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OF THE

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¹ Term expired January 2, 1905.

² Became Judge January 2, 1905.

³ Ceased to be President January 2, 1905.

⁴ Became President January 2, 1905.

⁵ Term expired December 31, 1904.

⁶ Became Judge January 2, 1905.

⁷ Succeeded Judge Dent January 2, 1905.

⁸ Succeeded Judge Miller January 2, 1905.



COURT RULES.

SUPREME COURT OF SOUTH CAROLINA.

The following rule was adopted by us on this court 8th day of December, 1904:

RULE XXVI.

Hereafter the clerk of this court shall not receive or file any pleading or papers on appeal where tendered by or on behalf of any

party to a cause unless the party or person tendering the same shall be an attorney authorized to practice as such in the courts of this state, or shall have received leave from one of the justices of this court in all appeal cases or in cases in the original jurisdiction to appear in and file papers and pleadings in the cause in which the same are tendered.

ORDER OF COURT.

SUPREME COURT OF APPEALS OF VIRGINIA.

For reasons appearing to the court, it is ordered that the bar examination at Wytheville be held this year on Friday, the twenty-third day of June, and thereafter on the third

Friday after the first Tuesday in June in each year until otherwise ordered.

Adopted March, 1905.

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(70 S. C. 68)

McCULLOUGH et al. v. GRAHAM et al.

(Supreme Court of South Carolina. Nov. 9, 1904.)

**COUNTIES—GENERAL STOCK—EXEMPTIONS—
CONSTITUTIONAL LAW.**

1. Acts Dec. 23, 1882, Dec. 24, 1883, Dec. 28, 1884 (18 St. at Large, pp. 238, 513, 867), exempting part of Williamsburg county from the operation of the general stock law, are not in conflict with Const. 1895, art. 10, § 6, prohibiting the General Assembly from authorizing counties or townships to levy taxes except for certain purposes, in that such acts provide for the levying of taxes for the maintenance of fences, which subjects are not within the exceptions of the Constitution, the provisions of the Constitution being prospective.

Appeal from Common Pleas Circuit Court of Williamsburg County; Watts, Judge.

Action by W. B. McCullough, R. J. Bryan, and others against J. J. Graham, supervisor, D. B. Blakely and S. J. Singletary, county commissioners, and G. W. Johnson, treasurer. From circuit decree overruling demurrer, defendants appeal. Reversed.

Le Roy Lee, for appellants. Stoll & Stoll, for respondents.

JONES, J. The plaintiffs, as taxpayers, sought to enjoin the supervisor, the county commissioners, and treasurer of Williamsburg county from levying and collecting taxes authorized by the acts of the General Assembly approved December 23, 1882, December 24, 1883, and December 28, 1884 (18 Stat. pp. 238, 513, 867), which purport to exempt, among others, certain townships in Williamsburg county from the operation of the general stock law, and provide for the erection and maintenance of a fence separating such townships from the section subject to the general stock law, and for levying and collecting taxes for this purpose upon the assessed value of all cattle, hogs, sheep, dogs, and goats embraced in the exempted sections.

From 1883 up to the commencement of this action, in November, 1903, taxes have been levied and collected under these statutes without question. The plaintiffs now assail the statutes as in conflict with article 10, § 6, of the Constitution, which provides

that "the General Assembly shall not have power to authorize any county or township to levy a tax for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, county officers, and for litigation, quarantine and court expenses, and for ordinary county purposes, to support paupers and pay past indebtedness"; and with article 17, § 11, par. 3, of the Constitution, which provides as follows: "The provisions of all laws which are inconsistent with this Constitution, shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in force until such legislation is had." Upon a demurrer to the complaint, the circuit judge, Watts, overruled same, and adjudged the said statute void, as in conflict with the said provisions of the Constitution, and granted the injunction. This appeal questions the correctness of this ruling.

We think the court erred. Article 10, § 6, above quoted, is not retrospective, but relates to future action by the General Assembly. Constitutions, like statutes, must be construed as acting prospectively, unless a contrary intent appears by express language or necessary implication. Ex parte Jeter, 64 S. C. 407, 42 S. E. 196. In the case of State v. Tucker, 54 S. C. 253, 32 S. E. 361, it was held that article 17, § 11, subd. 3, did not repeal local or special legislation in force at the time of the adoption of the Constitution, because the provisions of the Constitution against local or special legislation were prospective. Article 3, § 34. In article 17, § 11, subd. 1, of the Constitution, it is provided "that all laws in force in this state at the time of the adoption of this Constitution, not inconsistent therewith, and constitutional when enacted, shall remain in full force until altered or repealed by the General Assembly or expire of their own limitation." It is not suggested that the statutes in question were unconstitutional when enacted, and it is impossible for an act of the Legislature, having the force of law, to be declared repugnant to a constitutional provision subse-

quently adopted, and having prospective operation only.

The judgment of the circuit court is reversed.

(70 S. C. 95)

McDANIEL v. CHARLESTON & W. C. R. CO.

(Supreme Court of South Carolina. Nov. 9, 1904.)

INJURY TO EMPLOYÉ—FELLOW SERVANT.

1. A roadmaster who has control of the wrecking train while at work and attends all wrecks on his division is a fellow servant with the conductor of the train, and cannot recover of the railroad company, where, after the train was divided by an agreement between him and the conductor, the engineer of the wrecking train struck the detached car on which the roadmaster was standing in moving a part of the train under the direction of the conductor.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Laurens County; Townsend, Judge.

Action by S. G. McDaniel against the Charleston & Western Carolina Railroad Company. From order of nonsuit, plaintiff appeals. Affirmed.

N. B. Dial, for appellant. S. J. Simpson and Simpson & Cooper, for respondent.

WOODS, J. This action for damages rested on evidence to this effect: While plaintiff was engaged as roadmaster in clearing a wreck from defendant's roadway, the other portion of the work train ran against the detached flat car on which he was standing with such violence that he was thrown from the car and injured. The work train was operated by a conductor and engineer. Plaintiff, as roadmaster, worked under the direction of the engineer of the railroad, and the conductor of the work train ran his train under orders of the trainmaster; but the plaintiff was familiar with the rules of the railroad company, which required him "to attend in person all accidents" on his division, and provided that "conductors and engineers of work trains will receive instructions from the roadmaster in regard to work to be done by their train." On this occasion plaintiff was actually left by a superior officer in charge of the entire work of removing the wreck. Subsequently he and the conductor of the work train, of their own motion, agreed on a division of the work, and in pursuance of the agreement the work train was parted so that each should have some of the cars. The locomotive was attached to the cars the conductor was using. The accident occurred from these cars being moved violently without warning against the car which the plaintiff was using and on which he was standing. The circuit judge ordered a nonsuit on the ground that, if the injury was due to negligence, it was the negligence of a fellow servant.

The plaintiff's exceptions, as we understand, really involve three propositions which

he undertakes to sustain: First. The conductor operating the train was the superior of the roadmaster in the conduct of the work, and had a right to direct or control his services. There is no evidence to sustain this statement; on the contrary, the plaintiff positively confutes it. Second. The plaintiff and the conductor and engineer were engaged in different departments of labor. In the mere running of the work train from place to place, doubtless, to avoid interference with other trains, the conductor received orders from the trainmaster; but when actually at work the rules placed the conductor and crew under the direction of the roadmaster, and in his department of labor. Third. The plaintiff and the conductor and engineer were engaged about a different piece of work. Obviously, removing different pieces of the wreck did not constitute being engaged about different pieces of work, within the meaning of section 15, art. 9, of the Constitution. The common enterprise—the piece of work—was the removal of the wreck. The engine and cars were instrumentalities provided for the purpose, to be used by the conductor and engineer, under the plaintiff as their superior, just as jackscrews and shovels were to be used by others; and the negligent moving of the train stands on the same footing as would the negligent placing of a jack-screw. But aside from the rules of the company and the other evidence indicating that the plaintiff and conductor and engineer were engaged as fellow servants about the same piece of work, the plaintiff testified that he voluntarily agreed with the conductor as to what part of the wreckage each should remove, and the accident occurred while they were working about the common enterprise as fellow servants in conjunction with each other in pursuance of the agreement. Of the many cases on the subject it is only necessary to refer to *Wilson v. Railway Co.*, 51 S. C. 79, 28 S. E. 91, and *Koon v. Railway Co.*, 69 S. C. 101, 48 S. E. 86.

The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, A. J. (dissenting). This is an action for damages on account of injuries sustained by the plaintiff through the alleged negligence and recklessness of the defendant in the operation of its train of cars. The complaint alleges that while the plaintiff was in the discharge of his duties as roadmaster in assisting to load the debris which had been caused by a wreck on flat cars, and while standing on a flat car, without any warning whatever the defendant, its agents, servants, and employes, pushed its engine and cars violently, negligently, and recklessly against the car whereon the plaintiff was standing, and violently jerked or knocked the said car, and threw the plaintiff to the ground, inflicting upon him serious injuries. At the close of plaintiff's testimony the defendant made a motion for a nonsuit, which was granted, on

the ground that the injuries were caused by the act of a fellow servant. The appeal is from the order of nonsuit.

If the testimony was susceptible of more than one inference as to the relation in which the plaintiff stood to the person inflicting the injuries, then this question should have been submitted to the jury. In *Wilson v. Ry. Co.*, 51 S. C. 79, 28 S. E. 91, the court uses this language: "The second question raised by the exceptions is: Was there error on the part of the presiding judge in submitting to the jury the question whether the plaintiff and the employes of the defendant, through whose negligence the injury to the plaintiff is alleged to have been sustained, were fellow servants? Whether an engineer, brakeman, or switchman is, when exercising his ordinary duties, a fellow servant with the car cleaner, is a question of law. But whether, in a particular case, either of them was engaged in performing certain acts which the law requires of the master, and which would prevent them from being fellow servants, is a question of fact to be determined by the jury. The question as to who are fellow servants is a mixed question of law and fact. It is for the court to define the relation of fellow servants, but it is for the jury to determine whether the employes in a particular case come within the definition."

Section 15, art. 9, of the Constitution, contains the following provisions: "Every employee of any railroad corporation shall have the same rights and remedies for any personal injury suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work."

In order to determine whether the undisputed testimony showed that the plaintiff was a fellow servant with those operating the train of cars that caused the injury it will be necessary to review the testimony relating to this question. The plaintiff testified as follows: "Q. What is the duty of a roadmaster? A. To look after the general repair of the track, bridges, trestles, culverts, everything in the roadway department. Q. Ditches? A. Ditches; and distributing material, making requisitions for different kinds of material. Q. Looking after the physical part of the road? A. Looking after the road to see that material was distributed, and to keep a general supervision over the track and bridge force. Q. From whom do you get your orders? A. Engineer of roadway. Q. Who was he at the time? A. Mr. A. H. Porter. Q. He was engineer of what? A.

Roadway. Q. He was your next superior officer? A. Yes, sir. Q. What position does Mr. Reese occupy? A. He was conductor of the work train; and while at Greenwood we talked the matter over together as to the best way to get this work done and get him away from there so he could get to Augusta, and we agreed to divide up the force. He was to take a portion of it, as many as he needed, and put that coal car on the track. He had the trucks to lower on the wrecking car or flat car—I don't remember which now—and I was to take another portion of the force and finish loading this scrap iron next, lying scattered around from these burnt cars. Q. From whom did Mr. Reese get his orders? Whose jurisdiction was he under? A. Mr. Reese got his orders in regard to moving trains from the trainmaster. Q. What was Mr. Reese's business? A. So far as moving trains was concerned? Q. I mean generally what his business was? A. He carried out the instructions of his superior officer. Q. What position did he hold? A. Work train conductor. Q. Where did that work train work? A. It worked all over the whole system of the C. & W. C. Q. How much jurisdiction did you have? A. I had 112 miles. Q. That all of the system? A. No, sir; there is 345 miles of the system. Q. You mend other sections besides yours? A. There are three divisions, and I had the third division. Q. Mr. Reese got his instructions from the trainmaster? A. Yes, sir, the trainmaster. Q. His business was to operate the train? A. Yes, sir; he was in full charge of the train. Q. You have anything to do with the train? A. Not a thing. Q. Nothing to do with the train? A. No, sir. Q. Nothing to do with moving the train? A. No, sir. Q. At any time did you have anything to do with the moving of that train? A. No, sir. Q. Your duty was to look after the physical part of the road? A. Yes, sir. Q. Were you familiar with rule 824, which reads as follows: 'You will attend in person all accidents on your division, with ample force necessary to clear the track,' etc.? A. Yes, sir. Q. That was one of your rules? A. Yes, sir. Q. Do you know whether this was one of the rules with reference to work trains: 'Conductors and engineers of work trains will receive instructions from the roadmaster in regard to work to be done by their train'? A. Yes, sir. Q. After he [Porter] left, you were in charge? A. Yes, sir; I was in charge of the work—the direction of the work. Q. Didn't your charge of the direction of that work cover the general direction of all the instructions in reference to that work, including the work train? A. I had nothing to do with the moving of the train whatever. Q. Who had anything to do with the movement of the train? A. The conductor and engineer. Q. Who did the conductor report to? A. He reported, so far as the work went, to me, and so far as the movement of the train, all the train orders he

got from the trainmaster. Q. You mean this, do you not: that when you want to go to a spot from Laurens, or from Greenwood, or from any other distant point, he moves the train under a train dispatcher's order, but around the work was he not under your supervision or directions? A. About the movement of the train, he made his own signals, and whenever he wanted the train moved it was his duty to signal the engineer. That was the conductor's duty to make his train go back and forward. Q. How did Mr. Reese get his instructions about moving that train? A. From the trainmaster. Q. How, by mail? A. A train dispatch, a telegraph order; got them several times each day. As the work progressed, he may want to move back and forth over the road, and one order will not cover a day's work. Q. He was under the train dispatcher, you say? A. The trainmaster, when he comes in to lie up at night, the rules require that he report that his train is clear of the main line on a side track, and will move to-morrow between such and such a point—say, for instance, between Laurens and Ora. Then next morning, when he reports for the work, the trainmaster will wire him that engine so and so will work as an extra between Laurens and Ora. Q. You had nothing to do with that? A. Not a thing in the world. He was required to sign that order, and transfer it back by wire to the trainmaster." It will thus be seen that the facts were in dispute as to whether the plaintiff was a fellow servant with those in charge of the train of cars. There is testimony tending to show that the plaintiff and the conductor of the train received their instructions from different superior officers—the plaintiff working under the direction and control of the engineer of roadway, and the conductor receiving his orders from the trainmaster. This testimony tended to show that they were engaged in different departments of labor.

His honor the presiding judge therefore erred in granting the nonsuit.

(70 S. C. 75)

PEARLSTINE v. WESTCHESTER FIRE INS. CO.

(Supreme Court of South Carolina. Nov. 5, 1904.)

NONSUIT—NEW TRIAL—EXCEPTIONS—APPEAL—REVIEW—INSTRUCTIONS—INSURANCE—PROOFS OF LOSS—WAIVER.

1. A motion for nonsuit, in an action on an insurance policy, on the ground that insured had not complied with the conditions thereof, at the close of plaintiff's evidence, should not be granted, as plaintiff might show waiver in reply.

2. Exceptions to a refusal of a new trial on grounds not shown to have been urged below will not be considered.

3. Where the court properly submits the issues on request of appellant, stating an issuable fact affirmatively in the charge by inadvertence is not ground for reversal.

4. Where the question of actual knowledge is submitted to the jury by an instruction asked

by defendant, he cannot complain if the court modifies the request by instructing as to knowledge of facts by being put on inquiry, though there is no evidence on which to base it.

5. The court cannot, in its charge, on request, select isolated facts shown in the evidence, and state their effect.

6. Proofs of loss made and sworn to by an agent, where the facts are within his own knowledge and the principal is absent, is not a violation of a stipulation in the policy that the proofs of loss shall be made by insured.

7. It is no excuse for refusal of insured to submit himself to examination as to his loss at the demand of the insurer that he has fled the country to avoid arrest.

8. Where the insurance company retains unearned premiums after notice that the policy was void under its terms, it is some proof of waiver.

Appeal from Common Pleas Circuit Court of Bamberg County; Purdy, Judge.

Action by T. W. Pearlstine against the Westchester Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. C. Reed and Jno. R. Bellinger, for appellant. Izlar Bros. and H. F. Rice, for respondent.

WOODS, J. In this action on a fire insurance policy covering a stock of goods, the defendant sets up the failure of the plaintiff to comply with three stipulations of the policy: (1) "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership." (2) The provision that the proof of loss shall be rendered within 60 days, "signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property," etc. (3) "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company, and subscribe the same."

At the close of plaintiff's testimony, defendant asked for a nonsuit on the ground that the foregoing conditions to recovery had not been complied with. If we assume that the evidence established noncompliance, a nonsuit would have been improper, because, as has been frequently held, the plaintiff might show waiver by the defendant. *Sample v. Insurance Co.*, 42 S. C. 14, 19 S. E. 1020; *Copeland v. Assurance Co.*, 43 S. C. 26, 20 S. E. 754; *Carpenter v. Accident Co.*, 46 S. C. 546, 24 S. E. 500. The exceptions as to refusal or nonsuit cannot, therefore, be sustained. In such cases the motion for nonsuit or to direct a verdict should be made at the close of all the testimony.

The verdict being for the plaintiff for the amount of the policy, the defendant made a motion for a new trial, which was refused. If it appeared from the record that the mo-

tion was made on the ground that there was no testimony on which the verdict could stand, this court would be in a position to consider whether there was any real question of fact made by the evidence as to the violation of the policy on the part of the plaintiff, and any evidence of waiver, but the record is silent as to the grounds upon which the new trial was asked. The court can consider nothing outside of the record. We cannot infer from the exceptions or the general course of the trial that the motion for a new trial was made on the ground of a total lack of proof to support the claim. Without expressing any opinion whatever as to the evidence, therefore, the exceptions alleging error in refusing to grant a new trial must be overruled.

The defendant's first four exceptions to the charge relate to the stipulation in the policy as to exclusive ownership. It is true, the circuit judge did say in opening his charge that the defendant admitted the fire destroyed the property of the plaintiff; but the statement was a manifest inadvertence, to which it would have been well for defendant's counsel to call the court's attention. Subsequently the question of exclusive ownership was submitted as requested by defendant, and this should be held to remove any erroneous impression made on the jury by the first remarks as to ownership.

The defendant's first and second requests were as follows: "(1) That if the jury finds that the policy in question was issued to T. W. Pearlstine, and at that time the property insured belonged to S. W. Pearlstine, and not to T. W. Pearlstine, and that fact was not known to the defendant or its agent, plaintiff cannot recover. (2) That if the jury find that at the time of the fire the property insured belonged to S. W. Pearlstine, and not to T. W. Pearlstine, and that fact was not known to defendant or its agent, plaintiff cannot recover." The circuit judge charged these requests; adding, in substance, that knowledge of facts which should suggest inquiry and lead to the discovery of the real ownership would be equivalent to actual knowledge. The defendant, without challenging the correctness of the addition made to the requests as an abstract proposition, insists it was erroneous and prejudicial, because there was no testimony upon which to base it. Assuming, without deciding, that S. W. Pearlstine, and not the plaintiff, T. W. Pearlstine, was the owner; that the defendant had no knowledge of that fact, and that there was nothing to put him upon inquiry; and assuming, further, that it is reversible error to submit questions to the jury for which the testimony affords no basis—it does not follow that this exception can be sustained. The defendant itself requested the questions of ownership, and actual knowledge by the defendant of the true ownership, to be submitted to the jury as issues for them to decide, and therefore cannot

complain that the court, in the same connection, instructed the jury, in considering the issue of actual knowledge, to consider also the issue of knowledge of facts which would put defendant on inquiry as to the true ownership. The requests of defendant could not have been charged at all, except with the modification made by the court. *Gandy v. Insurance Co.*, 52 S. C. 224, 29 S. E. 655.

The defendant's third request was: "(3) That if the jury find that S. W. Pearlstine was in charge of the property, managing and controlling it under a power of attorney from T. W. Pearlstine, that fact was not sufficient to charge the agent of defendant with the knowledge or notice of any interest in S. W. Pearlstine in said property." It is obviously true that the single fact of the management of property under a power of attorney by the agent named in the paper does not charge those who deal with the reputed agent, acting in the name of the principal, with knowledge or notice that the agent, and not the principal, is the real owner; but it is not proper for the circuit judge to select isolated facts and state their effect. Whether the evidence would have justified a charge that T. W. Pearlstine was not the sole and unconditional owner of the property, and that there was nothing to show knowledge or information sufficient to put the defendant on inquiry, and that, under the terms of the policy, defendant was not liable unless there was a waiver of the stipulation as to ownership, we repeat, to avoid misunderstanding, is quite a different question, and one not before the court. Hence we decide nothing on the question of ownership and insurable interest.

The fourth request was manifestly covered by the charge made under the first and second requests.

The proof of loss was made out and sworn to by S. W. Pearlstine, the agent, who conducted the mercantile business under a power of attorney from T. W. Pearlstine, and not by T. W. Pearlstine himself, in whose name the policy was issued. The defendant next insists that the circuit judge erred in charging: "The authorities seem to hold that an agent for the insured can make the proofs of loss when the insured is absent at the time the fire occurred, and the agent is in a position to furnish the information necessary to complete the proofs of loss, or when the insured is in a position where, for any reason, it would be impossible for him to make the proofs, and the agent possesses the necessary information." "It is the province of courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function." *The Harriman v. Emerick*, 9 Wall. 161, 19 L. Ed. 633. This is as true of insurance contracts as any others, yet stipulations in them, as in other contracts, must be interpreted reasonably, having regard for the purpose

they were intended to serve. A proof of loss is an entirely *ex parte* statement of the facts concerning the property, the loss, and the insurance, intended only to afford information as a basis for settlement if satisfactory, and, if not, a basis for investigation. This statement, made in behalf of the insured by an agent fully conversant with all the facts and having charge of the property, serves these purposes as well as if made by the insured himself. Accordingly, it has been generally held, when the principal is absent, and the facts are within the knowledge of the agent, a proof so made is sufficient. *Firemen's Fund Ins. Co. v. Sims* (Ga.) 42 S. E. 270; 13 A. & E. Ency. Law, 332; 2 May on Insurance, § 465, and note 6; *Lumberman's Mutual Ins. Co. v. Bell* (Ill.) 45 N. E. 130, 57 Am. St. Rep. 140; *German Fire Ins. Co. v. Grunert* (Ill.) 1 N. E. 113; *Sims v. State Ins. Co.*, 4 Am. Rep. 311. The fifth and sixth exceptions are therefore overruled.

The agreement of the insured that he will "submit to examinations under oath by any person named by this company, and subscribe the same," stands upon an entirely different footing. The manifest purpose of inserting this stipulation is to afford a method of detecting imposition and fraud. In demanding examination, the insurer indicates dissatisfaction with the formal *ex parte* statement or proof. In such case the insured has agreed his conscience may be searched by questions put to him face to face, where there is no opportunity for studied concealment. He, and not his agent, has an interest in the claim for the insurance, and therefore a motive for fraud. To hold that the person to whom an insurance policy is issued could substitute an agent for himself to undergo such an examination would be to disregard not only the letter, but the spirit, of the actual contract, and make another for the parties. We know of no authority which holds that an agent may be substituted for such an examination.

It need hardly be said that, if circumstances arise without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused. In this case, however, the excuse offered in evidence on the part of the plaintiff for his failure to submit to the examination was that a few weeks before the fire he had killed a man, and was at the time of the demand and of the trial a fugitive from justice. The circuit judge refused to charge "that the fact that plaintiff is a fugitive from justice, if such be the fact, would not excuse him from appearing and submitting to an examination, if demanded by defendant." This was a manifest error. Mere unexplained absence would not be sufficient to excuse compliance with the contract. Certainly intentional and willful absence will not excuse. *Firemen's Fund Ins. Co. v. Sims* (Ga.) 42 S. E. 269; *Gross v. Ins. Co.* (C. C.) 22 Fed. 74; *Keener on Quasi Con-*

tracts, 215; 9 Cyc. 639, 649. The plaintiff in this case fled to escape the demand of the state's law that he stand his trial for homicide. It would be startling, indeed, for the law to excuse and sanction his flight and continued absence in defiance of its demand by holding he could have the benefit of a contract without performance of its obligations, because to perform his obligations would entail a submission to law, by undergoing a trial for the crime charged against him. By accepting such an excuse, the courts would not only sanction, but reward, flight from legal process.

The defendant next submits there was error in refusing to charge that a failure to return the premium after the fire does not amount to waiver of any of the conditions of the policy. Good faith would seem to require the insurer to cancel the policy and return the unearned premium, if, before the fire, while the policy was current, it had notice that the insured had so violated the policy that under its terms he would recover nothing in case of loss. In such case the insurer would allow the insured to hold the policy and rely upon its provisions, while at the same time it retained the consideration for the unexpired term, knowing the policy to be valueless. For this reason, the retention before the fire of the unearned premium for the unexpired term, with notice that the policy had become void under its terms, may be held evidence of waiver. It is held in *Schroeder v. Ins. Co.*, 51 S. C. 180, 23 S. E. 371, that if an insurance company actually received the premium after the fire, knowing that other insurance had been taken in violation of the policy, this would be evidence of its election to waive the violation. Where, however, the premium is paid, and in consideration of it the company contemporaneously issues its policy, which is a contract to insure on certain conditions therein mentioned, and the insured violates those conditions in a material particular without the knowledge of the insurer, in case of loss the insurer is not bound to return the consideration of the policy before standing upon its terms. The consideration has been paid, not for an absolute promise, but for a promise of the insurer to hold itself liable for loss on certain conditions. The company does not fail in its promise by insisting on its conditions. Not having broken its contract, it has a right to retain the consideration. The insured has received all he contracted and paid for—conditional insurance—and he has no right to demand a return of the price paid from the insurer, on pain of liability for unconditional insurance. After the loss occurs as to the property destroyed, the policy is no longer current, but has become matured by reason of the fire, and no question of good faith is involved in retaining the premium, because the rights of the parties are then fixed. Upon these considerations rest *Norris v. Ins. Co.*, 55 S. C. 450, 33 S. E.

586, 77 Am. St. Rep. 765, and *Young v. Ins. Co.*, 68 S. C. 387, 47 S. E. 681.

The circuit judge did not submit to the jury the construction of the letters introduced in evidence, as the defendant charges, unless a general submission to them of the question of waiver could be so regarded. There was no request for a specific charge as to the true construction of these letters, or any particular expressions used in them. Indeed, our attention has not been called to any letter or portion of a letter that seemed sufficiently doubtful in meaning to require judicial construction, and that would have been made plainer by any words the presiding judge could have used.

For the errors in the charge above mentioned, the judgment of the circuit court is reversed and a new trial ordered.

(70 S. C. 72)

PERCIVAL v. BAILEY et al.

(Supreme Court of South Carolina. Nov. 4, 1904.)

ARREST WITHOUT WARRANT—LEGALITY.

1. A policeman cannot legally arrest one charged with an offense less than a felony without a warrant, where the offense is not committed in his presence.

Appeal from Common Pleas Circuit Court of Richland County; Townsend, Judge.

Action by Martin Percival against W. J. Bailey and the Columbia Real Estate & Trust Company. From order overruling demurrer to complaint, defendants appeal. Affirmed.

Abney & Thomson, for appellants. J. Q. Marshall and J. S. Muller, for respondent.

JONES, J. The complaint in this case was for damages for false imprisonment. This appeal is from an order overruling a demurrer to the first cause of action for insufficiency. It was alleged that defendants "maliciously and without intent to injure the plaintiff, and without just or reasonable cause, gave the plaintiff into the custody of a policeman of the city of Columbia, and forced and compelled him to go to the police station of said city, and there caused him to be imprisoned on a false charge then made by the defendants as aforesaid—that the plaintiff had been guilty of interfering with laborers and of disorderly conduct, in violation of an ordinance of said city—and then and there caused him to be detained and restrained of his liberty for the space of two hours, without just or reasonable cause as aforesaid, and without right or authority so to do, and against the will of the plaintiff," etc. The specifications of the demurrer were: "(1) Because the charge made by the said defendant—that the plaintiff had been guilty of interfering with laborers and of disorderly conduct, in violation of an ordinance of said city, as set forth in the first cause of action—was for an offense at law, and was

disorderly conduct, of which the municipal court of the said city of Columbia had jurisdiction. (2) Because it appears from the allegations in said cause of action that the court had the right to determine what was disorderly conduct, and if it subsequently came to the conclusion that, on the testimony adduced, the plaintiff was not guilty, nevertheless the defendant is not liable for false imprisonment, and the same result would follow if it turned out that the municipal court had no jurisdiction over the acts complained of. (3) Because it appears from the allegations of the first cause of action set out in the complaint that the arrest and detention of the person of the plaintiff was made under legal process, and therefore there could be no false imprisonment."

In the order overruling the demurrer, Judge Townsend said: "In my opinion, the whole matter turns on whether or not a policeman can legally arrest one charged with an offense less than felony without a warrant, where the offense charged is not committed in the presence of the officer. Under the authorities cited, I do not think that such an arrest would be legal. The first cause of action contains the allegations, the defendants 'gave the plaintiff into the custody of a policeman of the city of Columbia,' etc. That was an illegal act, unless the offense charged is a felony, or was committed in the presence of the officer. The offense charged is only a misdemeanor, and there is no allegation that it was committed in the presence of the officer. The arrest was therefore illegal, and the giving over the plaintiff to the policeman was illegal. There is, then, this one illegal act, at least, charged in the first cause of action, and the demurrer cannot be sustained."

We do not think the court erred. Construing the complaint literally, as we must, we think it alleges an arrest without warrant or lawful process. A complaint in similar language was so construed in *Whaley v. Lawton*, 62 S. C. 98, 40 S. E. 123, 56 L. R. A. 649. Peace officers have at common law the right to arrest upon view, without warrant, all persons who are guilty of a breach of the peace or other violation of the criminal laws. *City Council v. Payne*, 2 Nott & McC. 475; *State v. Sims*, 16 S. C. 486; *State v. Bowen*, 17 S. C. 58; *State v. Williams*, 36 S. C. 493, 15 S. E. 554; *Loggins v. So. Ry. Co.*, 64 S. C. 321, 42 S. E. 163. It may be that an offense committed in the full hearing of an officer would be deemed as committed in his view. *State v. Williams*, supra. There may be also special circumstances of emergency which would justify a peace officer in arresting without warrant for a breach of the peace not committed in his view, if the officer arrived at the place of the disturbance very soon after the offense, and found the offender present. *State v. Sims*, supra; *State v. Lewis* (Ohio) 33 N. E. 405, 19 L. R. A. 451. The foregoing is the rule and its modifications, so far as announ-

ced in this state, with reference to arrest without warrant for offenses less than felony.

The alleged violation of the city ordinance was a mere misdemeanor, and, so far as the complaint shows, was an alleged past offense, not committed in the view of the officer making the arrest without warrant at the instance of defendant, and without any special circumstances showing an emergency which might justify arrest without warrant.

The judgment of the circuit court is affirmed.

(70 S. C. 56)

STATE v. MOODY.

SAME v. CHARLES.

(Supreme Court of South Carolina. Nov. 2, 1904.)

APPEAL—SPECIFICATION OF ERROR—DISPENSARY ACT—CONSTITUTIONAL LAW.

1. Where no specific grounds of error are alleged in the exception, it will not be considered.

2. Cr. Code, § 584, punishing the carriage and transportation of liquors under any other name than the proper name, is not in violation of the interstate commerce law as applied to the carriage and transportation of liquors, it not applying to liquor transported from another state into the state for private use.

Appeal from Common Pleas Circuit Court of Marlboro County; Gary, Judge.

J. G. Moody and Henry Charles were convicted of violations of the dispensary law, and appeal. Affirmed.

Townsend & Hamer, for appellants. J. M. Johnson, for the State.

POPE, C. J. The two above cases were, by consent of all parties, tried as one case, though the verdict of the jury was entered upon each separate indictment. The indictments were for violations of the dispensary law of this state. Verdict was in each case, "Guilty of the second count; not guilty as to the first and third counts." Thereupon the defendants appealed from said verdicts of guilty as to the second count.

The following is the indictment in the two cases, the indictment in the second case being identical with the first (except as to the name of the defendant and quantity of liquor), to wit: "At the court of general sessions begun and holden in and for the county of Marlboro, in this state, South Carolina, at Bennettsville, in the county and state aforesaid, on the third Monday of November, in the year of our Lord one thousand nine hundred and three. The jurors of and for the county aforesaid, in the state aforesaid, upon their oaths present that J. G. Moody, at Bennettsville, in the county of Marlboro and state aforesaid, on the 17th day of August, in the year of our Lord one thousand nine hundred and three, willfully and unlawfully did handle in the nighttime certain spirituous, malt, and other liquors containing alcohol and used as a beverage, to wit, three

kegs containing three and three-fifteenths gallons of contraband corn whisky; against the form of the statute in such case made and provided and against the peace and dignity of the state. And the jurors aforesaid, upon their oaths aforesaid, do further present that said J. G. Moody, at Bennettsville, in the county and state aforesaid, on the 17th day of August, in the year of our Lord one thousand nine hundred and three, did willfully and unlawfully carry, transport, have possession, accept, and remove three kegs then and there containing fifteen gallons of contraband corn whisky, having no proper or lawful mark, brand, label, or designation stamped or indorsed thereon or attached thereto; against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oath aforesaid, do further present that J. G. Moody, on the 17th day of April, in the year of our Lord one thousand nine hundred and three, at Bennettsville, in the county and state aforesaid, did willfully and unlawfully receive and accept for unlawful use certain spirituous, malt, vinous, fermented, brewed, and other liquors, to wit, three kegs containing then and there fifteen gallons of contraband corn whisky, which contain alcohol and are used as a beverage, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

Before the trial was entered upon, the defendants in each case demurred to the indictment. The demurrer was overruled. It is unnecessary to consider this point, because the verdict of the jury only held one count (the second) as good, and found the defendants not guilty on first and third.

We will proceed to pass upon the second count as affected by the grounds of appeal. These grounds are as follows: "(1) Because the presiding judge erred in refusing the motion in arrest of judgment, and also erred in refusing the motion for a new trial. (2) Because the verdict of the jury was based upon a count in the indictment founded upon a section of the dispensary law which is in conflict with the interstate commerce clause of the Constitution and act of Congress, and is void. (3) Because the jury acquitted the defendants of hauling liquor in the nighttime and in receiving and accepting contraband liquors, and this negatives any violation of the law in the transportation of liquors without proper mark, brand, or label. (4) Because there was no evidence to support the verdict of the jury. (5) Because section 584 of Criminal Code is in violation of the interstate commerce act of Congress, and void, for the reason that it is a burden upon such commerce. (6) Because the presiding judge erred in charging the jury that liquor brought from another state could be seized before it reached its destination, if being transported for an unlawful purpose. (7) Because the

judge erred in not quashing the second count in the indictment. The motion to be submitted to the Supreme Court is to arrest the judgment in each case, and, on failure of this motion, for a new trial."

1. We cannot view the first ground of appeal, in its present form, as showing any error. It simply declares error in the circuit judge in refusing to arrest judgment, and also error in refusing a new trial, but no ground of specific error in either matter is alleged. We are not called upon to lay down the specific ground of error, and we decline to do so. We therefore overrule this ground of appeal.

2. We cannot see but there is a difference in our dispensary law and the interstate commerce clause of the United States Constitution and the act of Congress. The jury were necessarily directed by the charge of the presiding judge, and in such charge the judge charged every proposition of law which was submitted by the defendants, and in his general charge to the jury was careful to lay down rules of law which must govern juries in their findings of fact. This being so, there is no error as here complained of.

3. The second count of the indictment does not include any reference to handling liquor in the nighttime or to the receiving and handling any contraband liquor, but charges that the defendant "did willfully and unlawfully carry, transport, have possession, accept, and remove three kegs then and there containing fifteen gallons of contraband corn whisky, having no proper or lawful mark, brand, label, or designation stamped or indorsed thereon or attached thereto, against the form of the statute," etc. We do not see how an acquittal of the defendant on the first and third counts negatives the charge contained in the second count.

4. The fourth ground of appeal cannot be sustained. There was some testimony in reference to defendants' handling the liquor. It was the legitimate duty of the jury to consider the force and effect of this testimony.

5. We cannot see where section 584 of the Criminal Code of 1902, conflicts with any of the provisions of the interstate commerce act of Congress, as pointed out by this ground of appeal.

6. In order to pass upon this ground of appeal, let us see what the circuit judge did charge in this matter: "Now, if a man prefers North Carolina corn to South Carolina rye, he has the right to send to North Carolina and get him a keg or a barrel, if it is for a legitimate purpose; but he has no right to send to North Carolina or South Carolina, or any other place, and buy it for the purpose of selling it, or for an illegal purpose. A party would have the right to send his agent to buy it for a proper purpose, but he has no right to authorize the agent to do an unlawful act. So, then, the question of fact for you to determine in this case is, was that liquor being transported to parties to be

used lawfully for their own personal use? There is no dispute that the defendants bought it. The defendant admitted that he bought thirty-one gallons of whisky. His contention is that he brought it to different parties in his county for their own private personal use. If you accept that view of the testimony, he would not have violated the law; but if he got it and was carrying it back there for parties to put it to illegal use, although he was an agent, they could not delegate him to do an unlawful act. A principal cannot authorize an agent to do an unlawful act or violate the law. So, if it would be wrong in his principal to have brought that amount of whisky into South Carolina to stock a blind tiger, and the principal delegated him to bring it, he could not be excused. So, after all, it is a question of fact, what was the liquor being brought here for—to Darlington county, through Marlboro county? You will take into consideration the facts and circumstances under which it was brought, the time at which it was brought, and the manner of transportation. All those are elements of fact proper to be brought out to enable you to come to a just conclusion as to why that liquor was brought into this state. If it was brought for an illegal purpose, it was contraband, and liable to seizure, and the party liable to arrest. If, on the other hand, it was brought for a lawful purpose, it would not be liable to seizure, and the party would not be violating the law of the land. So, the question is, for what purpose was that whisky brought? That is the question. I cannot aid you in the determination." When the charge, as a whole, is considered, the circuit judge did not err as claimed.

7. The seventh ground of appeal is too general to require any notice at our hands.

It is the judgment of this court that the judgments of the circuit court be and they are affirmed in each of the two cases here contained.

GARY, A. J., concurred in the result for the reasons stated in the opinion of Mr. Justice WOODS.

WOODS, J. (concurring in the result). The defendants were convicted under counts of separate indictments, which charged against them acts made criminal by section 584 of the Criminal Code of 1902. The circuit judge charged the jury at defendants' request "that section 584 of the Criminal Code as to carriage, transportation, etc., of liquors under any other than the proper name, etc., is in conflict with the interstate commerce clause of the United States Constitution, and does not apply to liquor transported from another state into this state for personal use." The presiding judge having put the construction upon this section which defendants requested, they cannot complain. The other portions of the charge upon the same subject to which exception is taken were substantially in accordance with

this request, and in elaboration of it. Aside from the objections to the indictment, the defense presented was that the liquor was for personal use. If the defendants intended to rely on the defense that the liquor was in transit from North Carolina to South Carolina, they should have indicated it by a request to charge. It is held in *Smith v. Lafar*, 67 S. C. 493, 46 S. E. 333, that "liquor purchased in another state and shipped to the purchaser in this state is not contraband, being protected as an article of interstate commerce until it is delivered to the purchaser." After it is received by the consignee, however, it may become contraband under the state law, and its subsequent "carriage, transportation," etc., then becomes a criminal offense, under section 584. In other words, section 584 is ineffective under the interstate commerce law only so far as it relates to "carriage, transportation," etc., into the state and to the consignee, not as to subsequent carriage from one point to another wholly within the state. The appellants' view that section 584, on which the second count was based, is absolutely null and void, is therefore erroneous.

(70 S. C. 33)

WICKER et al. v. WICKER.

(Supreme Court of South Carolina. Oct. 27, 1904.)

WILL—CONSTRUCTION—VESTED REMAINDER.

1. Testator devised all his real estate to his wife for life, and provided, as to the lands devised to his children in remainder, that, if any child died before testator or before his wife, his children should have in remainder; after the death of the wife, the share of land which the deceased parent of such children would have taken, had the parent survived testator and his wife. Held to vest in a son, at testator's death, a transmissible interest in remainder, and, where the son died during the life of his mother, the fee passed to his heirs at law.

Appeal from Common Pleas Circuit Court of Newberry County; Dantzler, Judge.

Action by Anne Elizabeth Wicker and others against Amella E. Wicker. From a decree for defendant, plaintiffs appeal. Affirmed.

Mower & Bynum, for appellants. Hunt, Hunt & Hunter, for respondent.

POPE, C. J. The question presented by this appeal is the construction of the will of one Jacob Wicker, who departed this life in the year 1890, having made his will in 1883, and added a codicil in 1884. The construction of the will and codicil sought is whether the children of the testator, having all been living at the death of the testator, took their shares of lands as vested, transmissible estates, or whether, on the death of Thomas L. Wicker during the lifetime of the testator's widow, his share of

lands of the testator passed to his (testator's) widow and his children other than Thomas L. Wicker. At the hearing before Judge Dantzler, on circuit, he construed the will and codicil as by its terms vesting the lands in fee simple in all testator's children living at testator's death, subject to having said estate divested in case any one of such children died during the life estate of testator's widow, with a child or children living, in which last contingency such child or children of the deceased child of testator would take the dead child's share. From this decree of Judge Dantzler the plaintiffs appealed on the following grounds: "(1) Because his honor erred in deciding that Thomas L. Wicker took a vested interest in remainder under the will of his father, Jacob Wicker, in the land in controversy, at the time of the testator's death. (2) Because his honor erred in deciding that at the death of the testator all the children then living took vested remainders, subject, however, to be divested, in case they died during the life tenancy of Anne Elizabeth Wicker, leaving issue, in favor of such issue. (3) Because his honor erred in holding that the second clause of the testator's will is not intended to postpone the vesting of the remainder in the children of the testator to the death of the life tenant. (4) Because his honor erred in not deciding that Thomas L. Wicker, having died before his mother, the life tenant, took no interest in the lands in controversy under the will of his father. (5) Because his honor erred in not deciding that the death of the life tenant, not that of the testator, is the period which must be looked to, in order to determine who must take under the will of Jacob Wicker. (6) Because his honor erred in deciding that the defendant was entitled to any interest in the lands in controversy." The six grounds of appeal will be considered together.

We will now reproduce the will and codicil:

"The State of South Carolina, County of Newberry.

"I, Jacob Wicker, of the said county and State, do make and declare the following to be my last will and testament, for the disposition of my property, both real and personal, to take effect at my death.

"I. I devise and bequeath all my property, both real and personal, except the personal property hereinafter otherwise disposed of to my wife Anne Elizabeth Wicker, to her sole use and enjoyment during her natural life.

"II. After the death of my said wife, I direct that all my personal estate hereinabove willed to her, and then remaining unconsumed by use or natural decay, be divided equally among my children then surviving and the child or children of any child or children of mine that shall die before me or before my said wife, so that the children or child of any deceased child shall have the share of such property to which his, her or their parent would have been entitled under this will had

¶ 1. See *Wills*, vol. 49, Cent. Dig. § 1477.

such parent survived me. And I will that the lands hereinafter devised to my children in remainder shall be governed by the same rule of transmission, that is to say, that if any child of mine shall die before me or before my said wife, his or her child or children shall have in remainder after the termination of the wife's estate for life, the share of land which the deceased parent of such child or children would have taken under this will had such parent survived me and my wife.

"III. I direct that after the death of my said wife, all of my real estate be divided among my children in the following parcels, to wit: my son, Henry Munro Wicker, shall have one tract, containing two hundred and $\frac{5}{100}$ acres, according to plat by Thomas M. Lake hereto attached, bounded by * * * and he shall also have in fee simple absolute that tract containing twenty-two acres, according to the plat of the same by Thomas M. Lake hereto attached, and bounded by * * *. My son, John P. Wicker, shall have the part of the Bates place containing fifty-eight acres, according to plat by Thomas M. Lake hereto attached, and bounded by * * * and the said John P. Wicker shall also have in fee simple absolute, the Hutchison place, containing one hundred and twenty-seven and one-half acres, according to plat by Thomas M. Lake hereto attached, and bounded by * * *. My son, Thomas L. Wicker, shall have that part of the Bates land, containing seventy-three and three-fourths acres, according to plat by Thomas M. Lake hereto attached, and consisting of two parcels, one containing sixty-nine and one-half acres, and bounded by * * * and the other containing four and one-fourth acres and bounded by * * *. These two parcels being connected by road which I hereby will to be used by the said Thomas L., his heirs and assigns, as a right and franchise belonging to the said two parcels of land just described; and the said Thomas L. Wicker shall also have in fee simple absolute one of the two Brooks places now owned by me, containing one hundred acres, and bounded by * * *. My daughter, Nancy P. Suber, shall have in fee simple absolute that parcel of land containing ninety-one and one-third acres, according to plat by Thomas M. Lake hereto attached, and bounded by * * *; and she shall also have that parcel, part of home place, containing eighteen and one-half acres, according to plat by Thomas M. Lake hereto attached, and bounded by * * *. My daughter, Sarah E. Felker, shall have in fee simple absolute, that parcel containing one hundred and five acres, according to the plat by Thomas M. Lake hereto attached, and bounded by * * *. My daughter, Margaret C. Harmon, shall have in fee simple absolute, that tract of one hundred acres of the Brooks land, bought by me at sale by the master for Newberry County, bounded by * * *.

"I bequeath to each one of my said sons, a bed, bedding and bedstead, to be given immediately after my death to such one or ones of them as shall not receive such property from me or my wife during my lifetime.

"V. My wife shall have the right after my death and so long as she lives to use and cultivate all my said real estate as she may see fit and to make use of any timber for firewood, fences or repairs of buildings and also to clear any lands she may desire for cultivation.

"VI. I hereby appoint my sons, Thomas L. Wicker and John P. Wicker, executors of this my last will and testament.

"VII. I hereby revoke all wills heretofore made by me.

"VIII. The foregoing disposition of my property embraces the lands this day conveyed to me by my said wife.

"IX. The devises of land in remainder to my said sons above set forth shall be subject in their hands and in the hands of their heirs or assigns to the following charges, to equalize as far as practicable my said daughters with my said sons, to wit: My son, Henry Munro, shall pay to my daughter, Margaret C. Harmon, three hundred dollars; my son, John P., shall pay to my daughter, Sarah E. Felker, two hundred and seventy-five dollars; and my son, Thomas L., shall pay to my daughter, Nancy P. Suber, two hundred and twenty dollars.

"In witness whereof I have hereunto set my hand and seal this 19th day of November, A. D. 1883.

his
[Signed] Jacob X Wicker. [L. S.]
mark.

"South Carolina.

"I, Jacob Wicker of Newberry County in said State having made my last will and testament bearing date the 19th day of November Anno Domini 1883 do now make this codicil to be taken as a part of the same.

"1. I hereby ratify and confirm said will in every respect save so far as any part of it is inconsistent with this codicil.

"2. It appearing to my satisfaction that the tract of land described to my son Thomas L. Wicker in third clause of my said will, known as one of my two Brooks tracts, does not contain one hundred acres as was supposed to be the case when said will was executed, but contains only about eighty-four acres, now I hereby will and devise to my said son Thomas L. Wicker nine acres of land absolutely and in fee to be taken and cut off from the remaining Brooks tract, which was devised under the said third clause of my said last will to my daughter Margaret C. Harmon, so that there shall be a more equal division of the said two Brooks tracts between my said son Thomas L. Wicker and my said daughter Margaret C. Harmon—the said nine acres to be cut off along the boundary line of the said two tracts of land.

"In witness whereof I, Jacob Wicker have to this codicil to my last will and testament subscribed my name and set my seal this 24th day of May Anno Domini 1884."

In order that there may not be any misconception of the different dates, we will repeat them: Jacob Wicker, the testator, died in 1890, survived by all of his children, to wit, Henry, John, and Thomas L. Wicker, Nancy P. Suber, Sarah E. Felker, Margaret C. Harmon, and also his widow, Mrs. Anne E. Wicker. Thomas L. Wicker and John P. Wicker caused the will to be admitted to probate in 1890. The widow, Mrs. Anne E. Wicker, took possession of the real and personal estate of her husband, Jacob Wicker, immediately after his death. All of the children of Jacob E. Wicker, the testator, had children, except Thomas L. Wicker. He was married in his father's lifetime, and died in the year 1899, leaving his wife, Amelia E. Wicker, his mother, and his brothers and sisters, as his only heirs at law. The question now is, was he vested with the lands laid out in his father's will for him. Judge Dantzler says in his decree that he was vested in remainder in said lands on the death of his father, Jacob Wicker. The circuit judge says he reaches this conclusion from a study of the whole will. He especially grounds his conclusions from a study of the third and second clauses of the will and codicil. He holds that the third clause is the devising clause. This view is supported, he thinks, not only by its own words, but also by the language of the codicil. The circuit judge holds that if Thomas L. Wicker had died before the life tenant, and had left child or children, such child or children would have divested the father, Thomas L. Wicker. It certainly was peculiar that the plats of land devised to each one of his children by Jacob Wicker were found attached to his last will and testament. So far as his son Thomas L. Wicker was concerned, the codicil, in its second clause, referring to the one-half of Brooks land set out in third clause of the will, speaks of it as "the tract of land devised to my son, Thomas L. Wicker, in third clause." It will be observed that no division of testator's lands is provided to testator's children as a class. In clause 3 of the will, each child is given his or her specific tract or tracts of land. It seems, therefore, that the testator, when he speaks of what is to take place after his wife's death, refers, and means to refer, to the death of the wife as the time when possession will be taken by testator's children. It is well known that, unless the language of the will requires the contrary, the law prefers a vesting of the remainder after and at the death of the testator.

When we have a case on all fours with the present, it will govern. It seems that the case of *Boykin v. Boykin*, 21 S. C. 513, is on all fours with the case at bar. In the case last cited, Mr. Boykin, by his will, provided:

"I direct that all the rest of my real estate shall be kept undivided until the death of my wife, to be worked by the slaves of my estate and those which I shall in this bequeath to my wife, under the control and management of my executors; and from and immediately after her death, I devise the said real estate to my sons, equally to be divided among them, share and share alike, to them and their heirs forever. And should any of my sons die before the time herein appointed for the division of my real estate, and should leave issue living at that time, then I direct that such issue shall take amongst them, share and share alike, the same portion of real estate to which their parent would have been entitled if he had survived my said wife, to them and their heirs forever. And if any of my said sons shall arrive at the age of twenty-one years before the death of my said wife, I direct that such son or sons shall be permitted to cultivate, each for himself, such a part of real estate as shall be allotted for that purpose by my wife and executors until the final division, when he or they shall receive his or their own share." The court held, in construing such provision of the will, that the devise created vested interests in the sons living at the death of the testator, and only division and possession were postponed to the death of the widow; therefore the interest of two sons who died intestate without issue after the testator, but before the widow, vested in their mother and other heirs at law. Thus, in the case at bar, Thomas L. Wicker, having lived after the death of the testator, but having died before his mother as life tenant, died intestate, and his share of lands received as devisee under his father's will remained for partition among his widow, Amelia E. Wicker, and his brothers and sisters; that is to say, one half hereof to his widow, Amelia, and the other half to his brothers and sisters, share and share alike. The decree of the circuit judge must be affirmed. It is the judgment of this court, that the judgment of the circuit court be affirmed.

(70 S. C. 83)

HELLAMS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina, Nov. 8, 1904.)

TELEGRAM—DELAY IN DELIVERY—EVIDENCE—NEGLIGENCE—DAMAGES.

1. Where a telegraph company receives a fee over the usual fee for delivery of a telegram beyond delivery limits, with notice of addressee's residence, it is some evidence of a contract to deliver the message with reasonable promptness.

2. A presumption of negligence arises from evidence of delay in delivering a telegram.

3. Punitive damages may be awarded against a telegraph company for willful breach of duty to deliver a telegram without delay.

¶ 2. See *Telegrams and Telephones*, vol. 45, Cent. Dig. § 71.

4. A telegraph company is not liable for failure to send a message by telephone, in absence of special contract for that purpose, because of a provision on the back of the telegraph blank that it is the agent of the sender for transmission over other lines.

Appeal from Common Pleas Circuit Court of Charleston County; Aldrich, Judge.

Action by J. E. Hellams against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Smythe, Lee & Frost and Geo. E. Fearons, for appellant. Mordecai & Gadsden, for respondent.

JONES, J. This action was brought to recover damages for the alleged wanton, willful, and grossly negligent conduct of the defendant in failing to seasonably deliver the following message: "Greenville, S. C., Feb. 11, '02. J. E. Hellams, Sullivan's Island, S. C., Charleston, S. C.: Come at once your mother low, not expected to live. D. F. Batson, Jr." The jury rendered a verdict for \$500, and from the judgment thereon the defendant company appeals upon exceptions raising the questions which we now consider.

1. There was no error in refusing the motion for nonsuit. The motion was made on the ground that there was no evidence that the particular contract set out in the complaint was made with defendant. The complaint, in the second paragraph, alleged that on the 11th day of February, 1902, one D. F. Batson, Jr., at Greenville, S. C., within the usual hours of business, in the office of said company, in person presented and filed with the defendant the message set out above; and in the third paragraph the complaint alleges "that the defendant at the said time and place received said message, and there and then promised promptly to transmit the same by telegraph and deliver the same to said J. E. Hellams, the plaintiff herein, the addressee of the said message, as aforesaid, at his said address on Sullivan's Island, Charleston, S. C., as the said address is so particularly set out in said telegraphic message, and that the said D. F. Batson, Jr., then and there, in consideration of said promise, did pay to the defendant's agent at said office the sum of twenty-five cents for the transmission and delivery of said message to Charleston, S. C., and the further sum of fifty cents then and there expressly agreed as the consideration for the further transmission thereof to Sullivan's Island, S. C., and delivery to the plaintiff." The answer admitted the second paragraph of the complaint, and, with respect to the third paragraph, admitted so much thereof as alleges the receipt of the said message by the defendant, and the prepayment by the plaintiff of the sums therein mentioned, but denied the remainder of the said paragraph. There was testimony that J. E. Hellams, the plaintiff, was at the time residing at Sulli-

van's Island, was working there as a carpenter under Mr. Pettyjohn, and kept a boarding house near Atlantic Beach Hotel. The message was received at the Charleston office at 6:05 p. m., February 11th, and the schedule offered in evidence showed that two boats were due to leave Charleston for Mt. Pleasant and Sullivan's Island at 6:30 and 8:40 p. m. The ferry wharf was not exceeding a five or six minutes' walk from defendant's telegraph office. The plaintiff testified that the message was delivered to him by Mr. Pettyjohn at 1 o'clock February 12th—too late for plaintiff to take an earlier train from Charleston to Greenville than 11 p. m. of that day; that, had the message been delivered by 8 o'clock on night of the 11th, he could have reached Charleston and taken the 11 p. m. train of that day, and could have reached his mother a day earlier. During Wednesday, February 12th, plaintiff's mother was conscious; but on Thursday evening, when plaintiff reached her bedside, she was unconscious, and died a few hours thereafter, without recognizing him. Plaintiff testified that he thereby suffered mental anguish. The receipt of the message of such tenor by the defendant, with notice that the addressee's residence was Sullivan's Island, and the receipt of 50 cents beyond the usual fee for transmission of said message to the Charleston office, and the actual delivery of the message to the plaintiff on Sullivan's Island, was surely some evidence of a contract to deliver the message with reasonable promptness at Sullivan's Island. At the time of the motion for nonsuit, no explanation had been made of the failure to deliver the message on the night of the 11th. Nonsuit was properly refused, as proof of delay in delivering a telegram raises a presumption of negligence on part of the telegraph company. *Poulnot v. Western Union Telegraph Company*, 69 S. C. 545, 48 S. E. 622.

2. The court committed no error in refusing to charge the jury "that the action arises ex contractu, and therefore the jury can find no punitive damages." This action was ex delicto, not ex contractu. The contract was referred to in order to show the relation between the plaintiff and defendant. The action was based upon the tortious breach of the general duty imposed by law because of the relation. It is further contended that the mental anguish act (23 St. at Large, p. 748) only gave an action for compensatory damages for mental anguish or suffering in the absence of bodily injury for negligence in receiving, transmitting, or delivering messages. Conceding this, there could still be a recovery for punitive damages for a willful breach of defendant's duty to plaintiff. *Lewis v. Telegraph Co.*, 57 S. C. 325, 35 S. E. 556; *Butler v. Telegraph Co.*, 62 S. C. 223, 40 S. E. 162, 89 Am. St. Rep. 893; *Marsh v. Telegraph Co.*, 65 S. C. 430, 43 S. E. 953.

3. It is excepted that the court erred in charging plaintiff's seventh request to charge,

as follows: "The jury are instructed that if the defendant agreed to become the agent of the sender, without liability to forward any message over the lines of any other company, where necessary to reach the destination, and if the defendant could have forwarded said message to the plaintiff by telephone on the evening of its receipt in Charleston, and failed to do so, they should find for the plaintiff. Well, gentlemen, that I charge you, with this modification: I cannot charge you upon the facts, and I cannot restrict you to saying that if they could have forwarded it by telephone or any other way, and failed to do it, it is liable, because I cannot go into the facts of the case. But I do charge you that it was the duty of the defendant to deliver the message by all reasonable means, and I have already charged you that, in connection, that it was the duty of the telegraph company, on the receipt of a message— The telegraph company ought to use due and reasonable diligence on the prompt transmission and delivery. Negligence is a want of ordinary care, and therefore 'ordinary care' is a relative term. What might be ordinary care to one person under certain circumstances might not be to another under different circumstances. Then, as I have explained to you, each one must use ordinary care and diligence in the conduct of the business, according to the business in which he is engaged." Appellant contends that this charge was erroneous and misleading: "(a) In that he thereby instructed the jury that it was the duty of the defendant to forward such message by telephone. (b) And in that the uncontradicted evidence was that the plaintiff had no telephone at his residence, but that some individuals in his vicinity had telephones in their residences; and the charge of his honor, when taken in connection with the testimony, meant that it was the duty of the defendant to have telephoned the contents of the message to one or more of such individuals, and requested them to convey the same to the plaintiff. This charge imposed upon the defendant a duty it did not owe to the plaintiff, and, in view of the testimony, was misleading, and did mislead the jury." The request to charge was evidently based upon respondent's construction of the contract indorsed on the back of the paper upon which the message was written, in these words: "And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination." We construe this as referring to other telegraph lines, and as not referring to telephone lines. We do not think that the law imposes upon telegraph companies the duty to telephone a message, as that would seriously impair the confidential relations assumed in the delivery, receipt, and transmission of telegraphic communications. Had the sender or addressee of the message

authorized its transmission by telephone to any one who would receive it and undertake to deliver it, that might have been a proper consideration for the jury in determining the question whether defendant used due diligence in delivery of the message. But in this case there was not a particle of evidence that defendant was authorized to telephone the message to some one on Sullivan's Island for communication to plaintiff, and the uncontradicted evidence was that plaintiff had no telephone in his residence, which fact the defendant ascertained on inquiry of the telephone company's office, in its effort to deliver the message by telephone directly to plaintiff. The request to charge should have been refused. Charging the request even with the modification stated was erroneous and misleading, in view of the undisputed facts in the case. This exception is therefore sustained. As this must result in granting a new trial, we do not deem it necessary to consider exceptions to the refusal to grant a new trial.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

(56 W. Va. 75)

GARTLAN et al. v. HICKMAN.

(Supreme Court of Appeals of West Virginia.
Oct. 25, 1904.)

FIXTURES—OIL LEASE—REMOVAL ON DEFAULT.

1. The owner of land executes a lease thereon for oil and gas purposes, by which it is agreed that the lessees shall have the privilege at any time to remove therefrom all machinery and fixtures placed on said premises. Under this lease, the lessees and their assignees, for the purpose of exploring for oil and gas, placed on the land an engine, wooden oil-well rig, wooden oil tanks, casing, pipes, rubber belt, and other appliances of like character, necessary for the prosecution of that work. Afterwards the lease was forfeited and terminated for the nonpayment of rental. *Held*, that said machinery and fixtures did not become parts of the freehold, and that said lessees, or the owners of the machinery and fixtures, had a reasonable time after the termination of said lease in which to remove said property from the land.

2. What is a reasonable time for the removal is to be determined from all the facts and circumstances of the case.

(Syllabus by the Court.)

Error to Circuit Court, Harrison County; John W. Mason, Judge.

Action by Thomas Gartlan and others against Willie Hickman. Judgment for plaintiffs, and defendant brings error. Affirmed.

Edward G. Smith, for plaintiff in error. Jackson & Patton and John Bassel, for defendants in error.

MILLER, J. Miranda A. Hickman and Willie Hickman, her husband, executed to John F. Phillips and J. Perry Thompson a lease bearing date on the 29th day of May, 1900, on a tract of 112½ acres of land in Harrison county, for oil and gas purposes. By

successive assignments of the lease, W. S. Mowris, Thomas Gartlan, and the Southern Oil Company acquired an interest therein. The lease stipulates, among other things, that the parties of the first part "do grant, demise, lease and let unto the parties of the second part, their heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of said products, all that certain tract of land," etc. (describing it). In another clause thereof "It is agreed that this lease shall remain in force for the term of five years from this date [the date of the lease], and as long thereafter as oil or gas, or either of them, is produced therefrom by the said parties of the second part, their successors and assigns. * * * Provided, however, that this lease shall become null and void, and all rights herein shall cease and determine unless a well shall be completed on the said premises within ninety days from the date hereof, or unless the lessees pay at the rate of \$125.00 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rentals under this provision during the remainder of the term of this lease. * * * It is agreed that the second parties shall have the privilege * * * at any time to remove all machinery and fixtures placed on the premises."

It is admitted by the parties to this action that Mowris, Gartlan, and said oil company went upon the land under the lease and drilled one well for oil and gas, which was completed about the middle of January, 1901, and shot by them on the 13th day of February of the same year; that the parties last mentioned paid the rental under the lease on the 29th day of August, 1901, for the quarter ending on the 29th day of November, 1901, which rental was accepted by Hickman and Mrs. Hickman, the then owners of the land, but no other rental provided for in the lease appears to have ever been paid.

On the 31st day of December, 1901, said Willie Hickman commenced his suit in chancery in the circuit court of Harrison county against Mowris, Gartlan, the Southern Oil Company, Phillips, and Thompson, and on the 7th day of January, 1902, presented his bill to the judge of said court, in which he sets up said lease and the several assignments thereof, and filed therewith copies of the same, and, in substance, alleges therein that Mowris and the oil company, claiming to be equal owners of the lease, had drilled one well on said land, marked on the plat filed as "No. 1," which was completed by them about the middle of January, 1901; that it was afterwards shot, and declared by them to be a dry hole, and not worth cleaning out;

that said lease had been abandoned by the said defendants, and active operations thereon for oil and gas continuously discontinued ever since the middle of January, 1901, until the 31st day of December, 1901; that the defendants have paid no rental on said land since the 29th day of August, 1901; that on the 31st day of December last aforesaid, they again entered upon said land with screw, circle, water barrels, bailer, stern, and cable, hauled the same to the well, and proceeded to lay pipe for the purpose of furnishing fuel to said well from another well on a neighboring farm. The bill then charges that the said lease and assignments thereof are null and void, and constitute and are a cloud upon plaintiff's title to said land, and prays that said lease, and the several assignments thereof, be declared forfeited and canceled as such cloud, and that defendants, and each of them, be restrained and enjoined from entering upon said land, and from doing any and all things under said lease, or any of the assignments thereof.

The injunction was granted as prayed for. The bill was filed at rules, and the cause regularly matured for hearing, and on the 22d day of May, 1902, the court made and entered its decree therein in the words and figures following, to wit: "This cause came on this day to be heard upon the plaintiff's bill and exhibits therewith filed, and was argued by counsel. Whereupon it appears to the court that this cause was regularly matured at rules, and the summons duly served on all the defendants, and the plaintiff's bill taken for confessed, and cause set for hearing at March rules, 1902; and it further appears to the court that the plaintiff is entitled to the relief prayed for in his bill. It is adjudged, ordered, and decreed that the lease therein described as the Phillips and Thompson lease, bearing date on the 29th day of May, 1902, and all assignments thereof and contracts thereunder, and a subsequent lease of the three acres around the buildings in said Phillips and Thompson lease reserved, are forfeited and constitute a cloud upon the plaintiff's title to the land therein described, and are hereby canceled, and the said defendants are ordered to surrender to the plaintiff the said lease and all assignments thereof."

Hickman on the 14th day of July, 1902, sent by registered mail to the several persons to whom it is addressed, copies of the following notice: "To Thomas Gartlan, The Southern Oil Company, a corporation, J. Perry Thompson, John F. Phillips and W. S. Mowris: You are hereby notified that the oil well rig, at well No. 1, casing and all fixtures and machinery of every kind or character, and all property now on my farm on Indian Run, in Harrison County, West Virginia, belong to me and are my property; and you are further notified not to remove the same or any part thereof; and you are still further notified not to trespass upon my said

farm or any part thereof for any purpose whatever"—which copies appear to have been received by them, respectively, from the 14th to the 28th days of July, 1902. It is also proved that this notice was the first claim of ownership that Hickman had made to the property in controversy, and was the first knowledge that the defendants, or any of them, had of the determination of the said chancery cause or of such claim.

On the 1st day of August, 1902, an action in detinue was commenced in the circuit court of Harrison county by said Gartian, Mowris, the Southern Oil Company, Phillips, and Thompson against Hickman for the recovery of sundry goods and chattels, to wit: 2,777 feet of 6 $\frac{1}{2}$ -inch casing (National Tubeworks manufacture), value, \$1,041.73; 200 feet 10-inch casing (National Tubeworks manufacture), of the value of \$192; 1 12x12 Eureka Engine (Boiler Works of Oil City manufacture), of the value of \$232.50; 1 wooden oil well rig, value \$200; 1 250-barrel wooden oil tank, of the value of \$30; 1 rubber belt, 6x12, 95 feet long, of the value of \$50; 1 6 $\frac{1}{2}$ -inch T, cast iron, of the value of \$3.32; 3 6 $\frac{1}{2}$ -inch L's, cast iron, of the value of \$6.98; all of said property being of the value of \$1,846.53; said property being in the possession of the said Willie Hickman—and \$1,000 damages for the detention of the same, and being the machinery and fixtures placed by them on the leased premises. Whereupon, the affidavit and bond as required by law having been filed by the plaintiffs in the case at the commencement of the action, the sheriff was directed to seize and take into his possession the property mentioned, which he did, and delivered the same to plaintiffs. A declaration having been filed, there was a trial of the action to a jury, a verdict in favor of plaintiffs for the property sued for, a motion by defendant to have said verdict set aside, which was by the court overruled, and a judgment that the plaintiffs should retain possession of the said property mentioned and described in the verdict of the jury, and that the plaintiffs should also recover their costs expended. Upon petition of Hickman, a writ of error to said judgment was allowed by a judge of this court. He complains that the court refused to set aside the verdict of the jury and grant to him a new trial of the action, that a certain instruction was given to the jury on motion of plaintiffs, and that certain other instructions were refused, all of which rulings of the court, he asserts, were and are erroneous and prejudicial to him.

In addition to the facts hereinbefore stated, the following agreed statement was read to the jury as evidence on the trial of said action: "It is admitted by the parties: That the plaintiffs placed the property in controversy upon the land of the defendant embraced in the lease of May 29, 1900, for the purpose of drilling and operating for oil and gas under the lease. That one well was

drilled in by the plaintiffs and completed about the middle of January, and shot by the plaintiffs on the 13th of February, 1901. The plaintiffs paid the rental under the lease on the 29th day of August, 1901, for the quarter ending November 28, 1901, which rental was accepted by the then owners of the property, the defendant and his wife, Mrs. Miranda Hickman. The well in question was drilled to a depth of thirty-two hundred and eight feet, and the casing inserted to the proper depth, to wit, about twenty-one hundred or twenty-two hundred feet. That a derrick was built over the well for the purpose of drilling, or running the drilling tools in the usual way, and constructed in the usual manner, to the usual height—about eighty-two feet—and that iron tubing or casing was inserted in the well, which is described in the declaration. That the engine sued for was set or placed in an engine house, and connected with the derrick with drilling tools in the usual way, and the tanks described in the declaration were set or placed about seventy-five feet from the derrick, or south of the well, for the purpose of receiving the oil. That the derrick is described in the declaration as one wooden oil-well rig. The T's and L's were used for the purpose of connecting the well with the tank—in other words, the piping leading from the tank to the well. That all the property sued for in the declaration was connected in the usual way and manner of connecting said property for the drilling and operating of the well, and was necessary for that purpose, and used for that purpose. That shortly after the 28th day of November, 1901, the defendant posted notices in writing upon all the outer gates of the land embraced in the lease, notifying the plaintiffs, or any one acting under them, to keep off the property, and that the defendant claimed that the lease had been forfeited for the failure to pay rent; neither the plaintiffs nor any of their agents at that time being on the property. That the same notice and claim were given verbally by the defendant to Clint Cothrop and other of the agents of the plaintiffs at the same time. That no rental was paid after the 28th of August, 1901, as before stated. That on the 31st day of December, 1901, the employes of the plaintiffs, and by authority of the plaintiffs, after the notice aforesaid had been given, went upon said property, and by warrant sued out on the first day of January, 1902, were arrested as trespassers, taken before a justice of the peace, and the cause continued at the instance of the defendants in the warrant, and before trial an injunction was granted in the chancery suit of Willie Hickman against Thomas Gartian and others, then pending in the circuit court of Harrison county. Thomas Gartian and others were then not prosecuted further under said warrants, but the same were dismissed. That on the 13th day of February, 1901, the

employees of the plaintiffs, by authority of the plaintiffs, went upon the land and shot the well, and on the 15th of January, 1902, by authority of the plaintiffs, again went upon the property and shot the well a second time. It is admitted that the property in question is of the value made in the declaration, that the property in controversy was taken by the plaintiffs at the time of the institution of this suit by giving bond, and that the same was not replevied by the defendant. It is admitted that a demand was made upon the defendant for the property in controversy shortly before the institution of this action, the exact date being July 26, 1902, which demand in writing is filed as a part of this statement, marked 'Demand.' That the lease under which the plaintiffs entered and placed the property upon the land of the defendant was in the following words and figures: * * * That all the property in controversy remained in place as it was at the time said well was drilled and operated until delivered to plaintiff by the sheriff in this suit. The record of the chancery cause of Willie Hickman against Thomas Gartlan, the Southern Oil Company, J. Perry Thompson, John F. Phillips, and W. S. Mowris, instituted in the circuit court of Harrison county on the 31st day of December, 1901, is filed as a part of this statement, marked 'Exhibit Record.' The amount of the defendant's damages in the event the verdict and judgment shall be for the defendant shall be one hundred dollars. It is further agreed that, of the twenty-two hundred feet of casing in the well originally, possession of only nine hundred and fifty feet was taken by the sheriff and delivered to the plaintiffs. Four hundred and twenty-five dollars being the value of that casing at the same rate averred here and agreed upon, the same is not involved in this suit."

The instruction given on motion of the plaintiffs is in the words and figures following: "The jury is instructed that the plaintiffs were not deprived of the right to remove the property demanded in the declaration, under the evidence offered to the jury, if, from such evidence, the jury shall believe said property was placed upon the leased premises for the purposes of drilling or operating for oil and gas, by reason of the fact that a decree was entered by the circuit court of Harrison county on or about the 27th day of May, 1902, in an equity suit brought by the defendant against the plaintiffs for such purpose, and that the plaintiffs would be entitled to a reasonable time after the termination of the suit in equity to remove said property from the leased premises."

The instructions asked for by the defendant and refused by the court are in the following words and figures: "(1) The court instructs the jury that if they believe from the evidence that the property sued for by the plaintiffs was placed by the plaintiffs

on the property of the defendant during the existence of an oil or gas lease, giving the plaintiffs the right to explore thereunder for oil and gas; and if the jury further believe that said property, or any part of it, was so placed upon the said Hickman's land as to give it the character of fixtures, or trade fixtures; and if the jury further believe from the evidence that the said oil and gas lease expired, or became forfeited, or was in any wise terminated, and the possession of said plaintiffs under said lease was lost, before said fixtures were removed from said land—then the jury should find for the defendant.

(2) The court instructs the jury that, after the expiration of an oil or gas lease by forfeiture or otherwise, the lessee cannot remove fixtures attached to the realty during the continuance of said lease. Such fixtures become a part of the realty, and go to the person entitled thereto after the expiration of the lease. (3) The court instructs the jury that, as between lessor and lessee, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term of the lease. After the expiration of the term of the lease, and the loss of possession thereunder, the tenant can neither remove said fixtures nor recover their value from the lessor. (4) The court instructs the jury that a lessee may remove fixtures which he has put on the leased premises at any time during the lease, or while he continues tenant, but after the expiration of the lease, and the surrender of the premises to the lessor, he cannot enter on the premises and remove any fixtures, for, when he quits the premises, leaving his fixtures behind him, it will be presumed he intended to abandon them. (5) The court instructs the jury that if they believe from the evidence that said Phillips and Thompson lease was on the 28th day of November, 1901, for the nonpayment of rent, or for any other reason, forfeited; and if the jury further believe from the evidence that the plaintiffs, Thomas Gartlan and others, were then, or at any subsequent time in the month of December, prior to the 31st day of December, 1901, out of possession of the premises described in said lease for oil and gas purposes, and that the plaintiff, Willie Hickman, was then in possession thereof; and if the jury further believe from the evidence that the property here sued for was at the time of the forfeiture of said lease not severed and removed therefrom for more than six months thereafter—then the jury should find for the defendant, Willie Hickman. (6) The court instructs the jury that if they believe from the evidence that the plaintiffs, Thomas Gartlan and others, after the completion of said well No. 1, paid on February 12, 1901, \$125, on May 28, 1901, \$125, on August 28, 1901, \$125, as rental, and that on the 28th day of November, 1901, annual rental fell due and was not paid; and if the jury further believe from the evidence that, for nonpayment of

rental or any other reason, said Phillips and Thompson lease has been judicially ascertained to be, and decreed to be, forfeited and canceled; and if the jury further believe that at the time of such forfeiture and cancellation, and thereafter, the plaintiffs, Thomas Gartian and others, were out of possession of the premises described in said lease, and that the said defendant, Willie Hickman, was in possession thereof; and if the jury further believe from the evidence that at the time of such ascertainment judicially of such forfeiture, and at the time of said cancellation, the property here sued for was attached to the real estate described in said lease, and was not severed therefrom until after the institution of this suit, by virtue of an order made in this suit, and without the consent of the said Hickman, and against his protest—the jury should find for the defendant, Willie Hickman. (7) The court instructs the jury that if they believe from the evidence that the property sued for was at the time of the institution of this suit so attached to the realty of Willie Hickman as to be trade fixtures, and if the jury further believe from the evidence that at the time of the institution of this suit the Phillips and Thompson lease had been canceled, then the jury should find for the defendant, Willie Hickman."

Hickman contends, first, that the things sued for were and are fixtures; second, that they remained attached to the realty after the termination of the lease; third, that, these fixtures being so attached at the time and after the lessee lost title to the lease, they cannot be removed from the land; and, fourth, that the lease ended on November 29, 1901, by forfeiture for the nonpayment of rental by the lessees, and did not terminate by reason of the decree of the court on the 22d day of May, 1902.

For the defendants in error it is urged, first, that the things sued for were and are chattels; second, that they retain their character as personalty, and are not fixtures; third, that they may be removed by the lessees within a reasonable time after the expiration of the lease; fourth, that the lessees are not precluded from the exercise of that right by the trial of the question of the forfeiture of the lease. By the express terms of the lease the second parties have the right to remove all machinery and fixtures placed on the premises in the prosecution of their exploration and search for oil and gas. There can be no question as to what property may be removed, unless the right of removal has been lost to the lessees or their assigns. The lease says that the second parties shall have the privilege of removal at any time.

The parties have agreed that the lease shall become null and void if the rental be not paid as stipulated. The authorities cited in the case of *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, seem to be full and clear that default

in the performance of the condition of the lease by the lessee ipso facto terminates and forfeits the lease, and all of his rights thereunder. In the chancery suit it was adjudicated that the causes of forfeiture existed as alleged, and therefore the lease was canceled. The said forfeiture, however, by the terms of the lease and the decree of the court, extends no further than to the lease, which "vested no present title in the lessees, except the mere right of exploration for oil and gas." *Steelsmith v. Gartian*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 505, 44 S. E. 433, 97 Am. St. Rep. 1027. The completion of a nonproductive well vested no title in the lessee. *Id.* Therefore the defendants in error forfeited only the right to further search for oil and gas on the land. There is nothing in this lease declaring that upon its termination the machinery and fixtures placed upon the land by the lessees shall be the property of the lessor. The lessor has written in the contract the considerations and conditions upon which the lessees may search for oil and gas upon the land. The lease is of uncertain duration. The right of the lessees thereunder is dependent upon the completion of a well by them within a specified time, the payment of rentals, or the production of oil or gas from the land in paying quantities. In order to complete the well, the lease allows the lessees 90 days from the date thereof. They are entitled to prosecute their search for the full 90 days with their machinery and fixtures, but at the end of 90 days, the well being unfinished, the lease would forfeit, unless the rental for the next quarter be paid in advance. It is untenable to contend that, default being made as aforesaid, the lessees would not be permitted to remove their machinery and fixtures. So, if the time of search should be extended by payment of rental, the lessees would be entitled to the whole period for the purpose of their exploration.

The object in placing the machinery and fixtures on the land was to enable the lessees to develop the leased premises. It was for the benefit of the lessees, and not to enhance the value of the land by permanent improvements thereon. Engines, derricks, oil tanks, casing, and pipes, of the character described above, are not placed on farms, as farming implements, or to be used in connection with agriculture. "The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold." *Edwards & Bradford Lumber Co. v. Rank* (Neb.) 77 N. W. 765, 73 Am. St. Rep. 514, 518, note; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166. In *Atchison, etc., R. Co. v. Morgan* (Kan.) 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471, it is held that "whether a chattel becomes a fixture depends upon the character of the act by which it is

put into its place, the uses to which it is put, the policy of the law connected with its purpose, and the intention of those concerned. * * * Before personal property can become a fixture by actual physical annexation to land, the intention of the parties, and the uses to which it is put, combine to change its nature from that of a chattel to that of a fixture." *Thomson v. Smith* (Iowa) 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541; *Donahue on Petroleum & Gas*, 72. In *Johnson's Ex'r v. Wiseman's Ex'x*, 4 Metc. (Ky.) 360, cited in 17 Am. Dec. 693, note, it is said: "The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used." *Cooper v. Johnson* (Mass.) 9 N. E. 33. *Thornton on Oil & Gas*, at section 567, says: "When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intentions of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation." The machinery and fixtures, as they are called, were placed on the land for the sole purpose of enabling the lessees to explore for and produce oil and gas thereon. Should the lessees fail in their search, or oil and gas, or either, be found and exhausted, this property would not be necessary for the use and enjoyment of the land by the owner as a farm. The land could be used for its former purpose—farming—without this machinery better than with it remaining thereon, an impediment, instead of an advantage. In the light of the authorities cited, we are of opinion that the machinery and fixtures placed on the leased premises did not become permanent fixtures, nor parts of the freehold, and that the plaintiffs' right and title thereto did not vest in Hickman by the forfeiture of said lease, as aforesaid.

The time for the removal of the property is not definitely fixed, by express terms, with reference to the termination of the lease. We have shown that the lessees could not be required to effect the removal before or at the moment the lease was terminated. Certainly they would not be required to make such removal during the pendency of the chancery suit, brought for the very purpose of determining whether or not the lease had been terminated. *Thornton on Oil & Gas*, at section 576, says: "Contingencies may arise that will not require the lessee to remove his fixtures at the expiration of the lease, or even within what would have otherwise been a reasonable time. Thus, where there arose a dispute between the lessor and lessee as to

when the lease expired, and the controversy was taken into the courts and was decided against the lessee, it was held that the lessee could remove the fixtures at the termination of the suit, although the lease had long before expired, and, if the lessor had refused to permit the lessee to so remove them, he was liable in damages." "Where anything is to be done, as goods to be delivered, or the like, and no time is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time." 2 *Pars. on Con.* §§ 535, 651; *Hammon on Con.* § 444; *Poling v. Condon-Lane B. & L. Co.* (W. Va.) 47 S. E. 279. In the case of *Shellar v. Shivers*, 171 Pa. 569, 572, 33 Atl. 95, 96, where the right of removal of machinery and fixtures was involved, the language of the lease was that the lessee should have the right to remove "at any time" any or all machinery. The court there denied the right of entry for the purpose of such removal four years after the lease had expired, and five years and six months after the well had been completed and found to be of no use as an oil or gas well. After construing the lease, the court says: "If this construction be correct, then the rule of law as to removal of fixtures would be as in cases where the tenancy is uncertain in duration, as when it depends upon a contingency, and that is that the removal must be made within a reasonable time, or, in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures." *Thornton*, at section 574, says: "Thus it was decided in New York that trade fixtures did not cease to be the tenant's property by reason of the mere fact that he did not remove them during his term, and that he could remove them after his term expired without subjecting himself to any damages for such removal, even though he be liable to an action for trespass for an entry on the premises demised.

* * * In Illinois it was held that the tenant had a reasonable time within which to remove trade fixtures, and what was a reasonable time was a proper question for the jury, under the instructions of the court." The author cites *Berger v. Hoerner*, 36 Ill. App. 360; *Nigro v. Hatch* (Ariz.) 11 Pac. 177. The same author says at the same section: "This is undoubtedly true where a forfeiture of the lease takes place; and, if the tenant is denied the right after the forfeiture to remove them, he may bring an action therefor, especially if the lease contain an agreement giving him the right to make such removal." *Sattler v. Opperman*, 30 Pittsb. Leg. J. (N. S.) 205; *Potter v. Gilbert*, 177 Pa. 159, 35 Atl. 597, 35 L. R. A. 580. What is a reasonable time for the removal of the chattels is a question to be determined from all the facts and circumstances of the case. *Kuhlmann v. Meier*, 7 Mo. App. 260. In this case plaintiffs evidently had not abandoned the lease. Hickman alleges in his bill

in the chancery cause that on the 31st day of December, 1901, the agents of Mowris, Gartlan, and others entered upon said land with certain machinery and appliances, and proceeded to work on and about said well No. 1. It is agreed that they shot the well on January 15, 1902. It is proved that the notice to plaintiffs by Hickman on or about July 14, 1902, was the first knowledge they or any of them had of the determination of said chancery cause, the cancellation of the lease, or the claim of Hickman to the property in controversy. On July 26, 1902, demand was made upon Hickman by defendants in error for the property, and on August 1st thereafter action was commenced therefor as aforesaid.

It seems to us that defendants in error proceeded within a reasonable time to assert their rights to the machinery and fixtures in controversy, and that the circuit court did not err in giving the one instruction and refusing the others. We therefore affirm the judgment.

(54 W. Va. 128)

STATE v. MCKAIN.

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1904.)

ASSAULT AND BATTERY—JURISDICTION—PUNISHMENT.

1. Assault and battery is an offense at common law, and cognizable as such by our circuit courts and other courts which exercise like jurisdiction in such cases. Upon conviction of the accused upon an indictment for assault and battery the court may impose upon him a fine or imprisonment, or both, at its discretion, limited only by the constitutional inhibition that excessive fines shall not be imposed nor cruel and unusual punishment inflicted.

(Syllabus by the Court.)

Error from Circuit Court, Marion County; John W. Mason, Judge.

Charles J. McKain was convicted of assault, and brings error. Affirmed.

O. H. Leeds, for plaintiff in error. O. Powell, Atty. Gen., and E. K. Reedy, for the State.

MILLER, J. C. J. McKain was indicted in the circuit court of Marion county for assault and battery upon Mrs. J. H. Downey. The indictment is in the usual form. It was certified by the circuit court to the "intermediate court" of that county, in pursuance of the act of the Legislature relating thereto, and was therein docketed for trial. Afterwards, in the last-mentioned court, the defendant asked leave to file his special plea in writing of autrefois acquit, which being objected to by the state, the objection was sustained, and leave to file the same was refused. Thereupon the defendant excepted to the ruling of the court. The defendant then entered his plea of not guilty, upon which issue was joined, and a jury, after hearing all of the evidence adduced by both the state and the defendant, found the de-

fendant guilty of an assault. A motion by the defendant to set aside the verdict and grant him a new trial was overruled by the court, and a judgment was then rendered that the state recover from the defendant a fine of \$25 and the costs of the prosecution, and that the defendant be also imprisoned in the county jail for the period of 60 days. A writ of error to this judgment was refused by the circuit court of said county, but on petition of defendant such writ, with supersedeas, was allowed by one of the judges of this court.

Plaintiff in error insists that the rejection of his special plea, the introduction of certain evidence objected to by him, the refusal to allow other evidence offered by him to go to the jury, and the refusal of the court to set aside the verdict and grant him a new trial on the ground that said verdict was and is contrary to the evidence, were and are prejudicial to him. All the evidence given to the jury is made part of the record. The paper offered by defendant as his plea of autrefois acquit is in the words and figures following:

"And the said Charles J. McKain, in his own proper person, here now comes into court, and, having heard the said indictment read to him, says: That the state ought not further to prosecute the said indictment against him, the said Charles J. McKain, because he says that heretofore, to wit, on the 26th day of May, 1902, before A. L. Lehman, mayor of the city of Fairmont, Marion county, W. Va., at the office of said mayor, in said city, county, and state, he, the said Charles J. McKain, was tried and acquitted for and of the said offense charged in the said indictment against him; that the said Henry Downey, one of the prosecuting witnesses named in the said indictment, was on the day and year aforesaid a special officer or policeman in the employ of the Baltimore and Ohio Railroad Company, a corporation; that he, the said Henry Downey, on the — day of May, 1902, arrested him, the said Charles J. McKain, while he, the said Charles J. McKain, was a passenger at the Baltimore and Ohio Passenger Depot, in the said city of Fairmont, and confined him, the said Charles J. McKain, in the jail of said city of Fairmont; that on the day and year first above mentioned, he, the said Henry Downey, appeared before the said A. L. Lehman, mayor, then and there mayor of said city of Fairmont, as aforesaid, and preferred charges and made information against him, the said Charles J. McKain, to wit, on the day and year last aforesaid was and had been guilty of drunkenness and disorderly conduct, on which said charge the said mayor on the day and year first above mentioned tried the said Charles J. McKain, and, after hearing all of the evidence adduced against him, the said Charles J. McKain, on the said trial, the said mayor promptly then and there, on said 26th day of May, 1902, discharged and fully acquitted him, the said

Charles J. McKain, of each and all of said offenses, as by the record thereof will appear, which judgment remains in full force and effect, and has not in the least been reversed or made void. And the said Charles J. McKain in fact says: That he is the said Charles J. McKain; that the said Charles J. McKain so tried and acquitted as aforesaid and the Charles J. McKain named in the said indictment are one and the same person, and not other and different persons; that the offense of which he, the said Charles J. McKain, was charged, tried, and acquitted, as aforesaid, and the offense of which he, the Charles J. McKain, is now indicted, are one and the same, and not other and different, offenses; and this he, the said Charles J. McKain, is ready to verify. Wherefore he prays judgment, and that by the court he may be dismissed and discharged from the said premises in the present indictment specified." This paper is plainly insufficient as a plea of autrefois acquit, and was properly rejected by the court. See Bishop's Directions and Forms, § 1043; 2 Whart. Prec. Indictments and Pleas, 693, and cases cited. The evidence certified is somewhat conflicting and contradictory. The jury is the judge of the weight and credit to be attached to the evidence. It is only in cases of manifest abuse, or plain departure from right and justice, that the court can interfere with the finding of a jury in such matters by granting a new trial. *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880; *Ross v. Gill*, 1 Wash. (Va.) 88; *McDowell v. Crawford*, 11 Grat. 877; *State v. Hurst*, 11 W. Va. 75; *Sheff v. City of Huntington*, 16 W. Va. 307. Where a motion for a new trial is made on the ground that the verdict is contrary to the evidence, and the motion is denied, the opinion of the court which tried the case is on such point entitled to great weight; and the appellate court in such case will not grant such new trial unless there has been a plain deviation from right and justice. *State v. Hunter*, 37 W. Va. 744, 17 S. E. 807; *Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S. E. 478; *Sigler v. Beebe*, 44 W. Va. 587, 30 S. E. 76. The judge of the trial court saw the witnesses, heard them testify, and passed upon their evidence. The circuit court reviewed the case upon the whole record. The two courts have held that the verdict is not erroneous. We are of the same opinion.

But defendant in error also contends that the judgment rendered against him is unauthorized by law, and cites Code 1899, c. 50, § 219, subd. 2, which provides that fines imposed by justices for assault and battery shall not be less than \$5 nor more than \$50. No power to imprison is thereby given. The jurisdiction of justices is conferred by statute. They can lawfully exercise none not so granted. They have no common-law powers. This statute does not apply to indictments for assault and battery prosecuted in the circuit or other courts which have like

jurisdiction in such cases. Assault and battery is an offense at common law, and is cognizable as such by our circuit courts. The said intermediate court exercises the same powers (subject to review) upon the trial of indictments certified to it by the circuit court which the circuit court could have exercised. Upon conviction of the accused the court may impose upon him a fine or imprisonment, or both, in its discretion, limited only by the constitutional inhibition that excessive fines shall not be imposed nor cruel and unusual punishment inflicted. *Ex parte Garrison*, 36 W. Va. 686, 689, 15 S. E. 417.

We find no error, and therefore affirm the judgment.

(56 W. Va. 141)

BRYANT et al. v. LOGAN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1904.)

INJUNCTION—SUIT BY TAXPAYERS—USE OF CITY
PARK—LEASE FOR RACING PURPOSES—VALIDITY.

1. Citizens and taxpayers, simply as such, stating no special harm to them different from others, cannot enjoin the use of a lease of a part of a city park, made by the city for a term of years, for the purpose of racing horses.

2. A lease for the term of one year, with right to extend it five years, by a city, of a part of a public park, to improve it, and use it at times for training and running race horses, for a rental to the city, reserving access at times to the public for riding and driving on the track, is not an unlawful diversion of such park from its legitimate use, and the lease is not void.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County;
L. N. Tavenner, Judge.

Bill by G. S. Bryant and others against Thomas Logan and others. Decree for defendants, and plaintiffs appeal. Affirmed.

W. N. Miller and C. A. Kreps, for appellants. Smith D. Turner and Reese Blizzard, for appellees.

BRANNON, J. Bryant and others, suing on behalf of themselves and all other citizens of Parkersburg similarly situated, filed a bill in equity against Logan and others, stating that the city of Parkersburg had purchased, with the proceeds of bonds issued by it, 42 acres of land, and converted it into a public park having driveways, walks, a bicycle track, trees, and other constituents of a park for public use and enjoyment, and the city had adopted rules for its regulation, and it was under the city's control and management; that by such rules and regulations this park was opened to the public during certain hours, and that for some years it was used by the public as a park for the benefit of all persons; that, contrary to law, the council had accepted a proposition from the Gentlemen's Driving Club to lease a portion of the park (about half) to said club for one year, with the right to extend the lease five

additional years, for training and racing horses; that this lease was detrimental to the public, because hindering and restricting its public use. Upon demurrer the bill was dismissed, and the plaintiffs appeal.

The first law question is as to the right of the plaintiffs to maintain the bill. They aver no special interest in themselves; they state no injury to their property, no interest peculiar to themselves. The only interest in them presented by the bill is that common to all the people of Parkersburg as citizens and taxpayers. In this respect the case is of practical importance, involving the right of anybody and everybody in a city to invoke equity to frustrate and avoid the action of the council in the management and control of city property. The case is not free from difficulty, both in itself and under diverse authority. A city is a branch, a subordinate agent, of the state government, vested with grave and important powers of state government delegated to it by the state. It is claimed that the use of this park for the purpose contemplated by the lease is misuse and diversion—I may say, a perversion—from the proper use, of property paid for by public taxation, and held in trust by the city for public use. Who can question it in the courts? Can a resident and taxpayer, without other interest, do so? On the one hand, it is of high import that the action of constituted authority of government should not be hampered and delayed by assailing by any and every individual from disappointment, whim, or caprice. The door would be open wide to multitudinous suits, filling the courts with litigation. They would arise constantly to carry out the individual idea of each person on good and bad grounds. Public policy argues against this. Though bad action of the city authorities would loudly call for redress, better that some instances of it go without redress, and that such redress be left to the public officials. On the other hand, municipal authorities do go wrong sometimes in the exercise of powers committed to them; but we must reflect that the people have intrusted them with discretion and power, and that it would produce infinite confusion if it should lie in everybody's will in every instance to act on his own impulse to question the public action of municipal authority. Unlawful action should be redressed; but who can call for it? The Attorney General, representing the state's abused confidence, at the relation of a resident, can call upon the courts to arrest or nullify such unwarranted action. 2 Dillon, Munc. Corp. § 912. "Where the injury which it is sought to enjoin is of a public nature, relief is sometimes sought by an action in the name of the Attorney General. And where under an act of Parliament lands are directed to be placed and kept in proper condition for the purposes of public recreation, the municipal authorities having charge of such lands may be enjoined from divert-

ing them to another and different use without authority of law, upon an information filed by the Attorney General." 2 High, Injunc. § 1303. If the lease is beyond the council power, the occupation of the park under it is a public nuisance, because it obstructs the public use, just as the obstruction of a highway is a public nuisance. So viewing it, the authorities are clear that no one interested only as all others are, not personally affected in property or otherwise, can have an injunction. 2 High on Inj. § 839; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311; *Talbot v. King*, 82 W. Va. 6, 9 S. E. 48.

In *State v. Matthews*, 44 W. Va. 372, 29 S. E. 994, we decided that where one usurped the office of sheriff, in which all are interested, his right must be contested by somebody interested further than as a citizen or taxpayer, unless the Attorney General intervened. I do not see why the case of *Smith v. Cornelius*, 41 W. Va. 59, 23 S. E. 599, 80 L. R. A. 747, is not pointed authority in this case. The Berkely Springs property was in the custody of a public corporation created by the state to hold it in trust for public health and pleasure, and this court held that a lease by such corporation, though ultra vires, could not be contested by a private person, but only by the state. In *Gall v. Cincinnati*, 18 Ohio St. 563, it was held that taxpayers, as such, could not oppose the removal of a market house. The court said that, whatever rights adjacent lot owners might have, taxpayers, as such, could not, by injunction, prevent it. When private persons sought to challenge the action of the county court in changing the location of a bridge, Judge Lucas said: "They stand here simply as private citizens and taxpayers, who undertake to represent the whole county in opposition to the judgment and action of the properly constituted authorities." He further said that they stood simply as citizens honestly believing that the decision and judgment of the tribunal appointed by law to determine such questions were at fault, and seeking to substitute their own judgment for that of the legal authorities, and coerce them to abandon their own views and accept the views of those citizens. *County Court v. Boreman*, 34 W. Va. 93, 11 S. E. 747. In the fully considered case of *Supervisors v. Gorrell*, 20 Grat. 484, where the supervisors were selling an old courthouse lot and acquiring a new one, certain citizens and taxpayers asked to be made parties. The opinions of the county judge and of the Supreme Court both deny their right as citizens or taxpayers to intervene, because without personal interest. In the county judge's opinion several cases are cited, one holding that "a plaintiff cannot sue as one of the public" to restrain a company from closing a railroad. The same principle is stated in *County Court v. Armstrong*, 34 W. Va. 329, 12 S. E. 488, the syllabus holding that "citizens

and taxpayers, merely as such, having no special property or interest to be affected save in common with all other citizens and taxpayers, cannot become parties to a proceeding by a county court to alter the location of and rebuild a county bridge." In 2 Dillon, Munic. Corp. c. 22, much is said in behalf of the right of taxpayers to enjoin illegal municipal action; but it will be found that the argument is in favor of such right in cases where a bonded debt is being incurred, or taxes illegally levied, or public money misapplied. I do not question the right in such cases, though many cases go so far as to deny it even there. In such cases taxpayers have a very perceptible, real interest—money is being taken from their pockets. But that does not apply in this case—the mere control and management of a city park where it is being leased for a short term for rental beneficial to the city. High on Inj. § 1301, says: "Although the general doctrine that taxpayers are proper parties to invoke equitable relief against misconduct on the part of municipal authorities is thus seen to be well established, it is not to be understood that they are entitled to maintain action in all cases of this nature, regardless of their personal interest or the degree of injury which they may sustain." The Ohio case of the market house above cited—*Gall v. Cincinnati*—is cited by High, as also the New York case of *Tift v. City of Buffalo*, 65 Barb. 460, holding that "a taxpayer at large of a municipality, having no private interest in the question more than other taxpayers, cannot maintain an action in equity, as against the public authorities, to set aside or prevent acts claimed to be illegal." The city was selling a park. The same doctrine is found in *Ayres v. Lawrence*, 63 Barb. 454. Blackstone is there quoted as stating: "It would be unreasonable to multiply suits by giving every man a separate right of action for what damns him in common only with the rest of his fellow citizens." In *Roosevelt v. Draper*, 23 N. Y. 318, right was denied to an inhabitant and taxpayer to contest a sale by the city of a piece of land in the city. The matter has been often considered and so held in New York. It has even been held that inhabitants and taxpayers cannot enjoin the vacation of a street unless peculiarly injured differently from others. *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379, 40 Am. Rep. 598; *Hesing v. Scott*, 107 Ill. 600. So we hold that the plaintiffs cannot sue. Suppose the board of public works to sell furniture in the capitol, or suppose the director of any state institution to do so, or misapply public property. Can we think that private individuals could have an injunction? I should say not without an act of Legislature to enable them to do so.

But, if the plaintiffs could sue, they cannot, on the merits, succeed. Chapter 32, p. 98, Acts 1893, amending the charter of Parkersburg, empowers the city to "purchase,

take, receive, hold and use goods and chattels, land and tenements, * * * either for the proper use of said city * * *; and the same may grant, sell, convey, transfer, let and assign, pledge, mortgage, charge or encumber in any case and in any manner in which it would be lawful for a private person so to do, subject to the limitation and provisions of the Constitution." Here is a very broad power given by the Legislature to the city. I do not see why it does not legitimate the lease made by the city from the imputation of excess of power and voidness. Again, even if the power to make the lease in question had not been given by the act of the Legislature, still we would not brand it as void and illegal, because the use contemplated by the lease is not an unlawful diversion of a part of the park from the use in view in its acquisition. The bill says the ground was acquired for park purposes "for the health, pleasure, and comfort of the people." Racing horses is enjoyed by thousands and thousands of people, high and low, rich and poor. The use of the park for this purpose would give people recreation and pleasure, and is not foreign to the object for which it was purchased. *New Orleans v. Louisiana Co.*, 140 U. S. 654, 11 Sup. Ct. 968, 35 L. Ed. 556. Note, too, that there was no sale depriving the city of title, but only a lease for one year, with right to extend the term five years. The lease covered only half of the 42 acres. There was already a grand stand and race track. The lease gave exclusive control to the club of the part leased, reserving to the public access to the track for riding or driving with horses or vehicles, except on racing days and one week previous, or when the track was in actual use by the club, or when its use would be improper by reason of bad weather. So it did not exclude the public wholly, but still allowed a partial use of it by the public. The lease gave the city \$300 annual rental, and fertilizers accumulated in the stables for the other ground. The city derived a benefit from the lease. A city may lease a part of a lot conveyed for courthouse purposes. It was held not a diversion from the legitimate use. *Bolling v. Petersburg*, 8 Leigh, 224. Parts of public buildings not needed may be leased. Note 8, 20 Am. & Eng. Ency. L. (2d Ed.) 1187.

Therefore we affirm the decree.

(56 W. Va. 146)

JENNINGS et al. v. BENNETT, Judge, et al.

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1904.)

PROHIBITION—EXECUTION OF DECREE—OTHER ADEQUATE REMEDY.

1. Where a personal decree for money is made on publication against nonresidents, without service of process or appearance, they must first apply to the circuit court by special appearance to vacate the decree and quash the execution be-

fore asking a writ of prohibition against an execution on the decree.

(Syllabus by the Court.)

Petition of Jennings & Bros. for writ of prohibition against W. G. Bennett, judge, and others. Writ denied.

Thos. P. Jacobs, for petitioners. L. M. Wade, for respondents.

BRANNON, J. See & Siers brought a chancery suit against Kane and E. H. Jennings & Bros. to cancel an oil lease; and a decree was made canceling the lease, and adjudging costs against E. H. Jennings & Bros. Jennings & Bros. were not served with process, and did not appear, but were proceeded against as nonresidents by publication. An execution for such costs issued against Jennings & Bros., and they petitioned this court for a writ of prohibition against the enforcement of said decree and execution. No attack is made on that part of the decree canceling the lease, but attack is made upon that part giving personal decree for costs, and it is claimed to be void. As there was no service of process or appearance, it is claimed that, upon elementary principles, the court had no jurisdiction of the person of Jennings & Bros. to render decree for costs. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520. We hold that, though the decree for costs be void, yet prohibition ought not to be awarded until the circuit court shall be allowed an opportunity to vacate that portion of the decree and quash the execution. We have not the case where the party appears and makes no objection or exception to jurisdiction. Many authorities say that he cannot in such case have a writ of prohibition. Our case is where the parties were not summoned and did not appear, and we are of opinion that the circuit court in such a case ought first to be asked for relief before prohibition can be had. Here is a case where the circuit court, likely by inadvertence, gave a decree that is, in a separable part of it, void. Ought the party to be allowed to bring a separate suit, and that the extraordinary remedy of prohibition, without asking the circuit court to correct its error? The decree being void in part, the court has power to vacate the void part at any time, though the term has ended. 17 Am. & Eng. Ency. L. (2d Ed.) 825. In *Board v. Holt*, 51 W. Va. 435, 41 S. E. 337, the rule is stated that generally prohibition will not issue against a preliminary rule or injunction until application has been made to the lower court to discharge the rule or dissolve the injunction. Judge Dent said, very properly, that it should be done out of deference to the judge below, on the theory that when the matter is called to his attention he will promptly dispose of the same in accordance with law. *Knight v. Zahnizer*, 53 W. Va. 470, 44 S. E. 778, so holds. Where it ap-

pears that the lower court in fact considered its jurisdiction, and held that it had jurisdiction, so that we may be sure that application to it would be vain, the rule may be different. *Havemeyer v. Superior Court (Cal.)* 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 245; *Board v. Holt*, 51 W. Va. 435, 41 S. E. 337. Of *Board v. Holt*, 54 W. Va. 167, 46 S. E. 124, we may also say it recognized this general rule, but dispensed with it from the fact that it was clear that the circuit judge had a fixed, sedate opinion in favor of his jurisdiction. Safely may we say that the great current of authority is that it is a part of the practice or procedure in prohibition that such application must first be made to the inferior tribunal. 12 Am. Dec. 609; *Callbreath v. District Court (Colo. Sup.)* 71 Pac. 387; 16 Ency. Pl. & Prac. 1128; *State v. District Court (Wyo.)* 76 Pac. 680.

Jennings & Bros. may appear specially before the circuit court only for the purpose of moving the vacation of that part of the decree giving costs and quashing the execution, or may make such appearance before the judge in vacation and move to quash the execution, without being bound by general appearance to the whole cause. *Groves v. County*, 42 W. Va. 587, 26 S. E. 460. Therefore we discharge the rule and refuse the prohibition, without prejudice to further application hereafter.

(56 W. Va. 123)

MARSH v. DESPARD et al.

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1904.)

VENDOR AND PURCHASER—RESCISSION OF CONTRACT—WHAT CONSTITUTES.

1. An executory contract for the sale of land can be rescinded or waived in equity by writing, or by word of mouth if possession of the land be given up or the writing be destroyed, but not without something done by way of rescission or waiver.

2. Any circumstance or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract will amount to a rescission of it.

3. A contract may be discharged by the parties thereto or the beneficiaries therein by an entirely new contract, entered into by them, with reference to the same subject-matter, the terms of which are coextensive with, but repugnant to, the original contract.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by James W. Marsh against Charles S. Despard and others. Decree for plaintiff. Defendants appeal. Reversed.

John Bassel, for appellants. Davis & Davis and Osman E. Swartz, for appellee.

MILLER, J. By contract in writing bearing date on the 10th day of February, 1872, Burton Despard, by James M. Lyon, his agent, sold to appellee, James W. Marsh, a

tract of 82 acres of land situate on the waters of Grass Run, in Harrison county (described in the contract by metes and bounds), at \$9 per acre, \$50 of which was paid in cash by Marsh at the date of the contract; \$50 thereof was to be paid when Despard and wife should convey the land to Marsh by deed with covenants of general warranty; the residue of the purchase money was to be paid in six equal annual installments, with interest from the date first aforesaid, and the entire interest was to be paid annually. On the 17th day of October, 1872, Marsh paid to Despard an additional \$50 on said purchase money, for which Despard gave to him a receipt, specifying therein that the payment was on account of purchase money for about 82 acres of land on Grass Run, sold to Marsh by James M. Lyon, as Despard's agent. Marsh went upon the land, built a house and barn thereon, cleared about 50 acres thereof, and put out an orchard of apple and peach trees, and has had actual and continuous possession thereof ever since, but Despard never executed to him a deed for the land. Despard died testate in October, 1874, leaving, him surviving, several children and heirs at law, who, by the provisions of his will, were to share equally in the partition and distribution of the testator's estate. Edwin Maxwell qualified as executor of the will. On the 6th day of December, 1881, Marsh paid to Maxwell, as executor, \$100 on his debt to B. Despard for land. The note of Marsh to Despard for purchase money of the land, as well as the title bond to Marsh for said land, were found among Despard's papers after his death, and came to Maxwell's hands as his executor. No other payment on said purchase money was ever made by Marsh. In 1883 the real estate of said Despard, deceased, was partitioned among and allotted to the persons entitled thereto by decree of the circuit court of Harrison county in a suit brought and prosecuted for that purpose. Appellant C. S. Despard, being a son and devisee, was entitled to participate in the partition and allotment. To him were assigned by said decree 318 acres of land on Grass Run, in said county, and two storerooms in the town of Clarksburg. The land does not appear to have any other description in the decree of partition. It is shown that Despard at the time of his death owned no tract of 318 acres on Grass Run; that the commissioners who made the partition and allotment did so without going upon the lands, from surveys and plats found among decedent's papers; that the decedent had also owned a tract of 124 acres on Grass Run, which had been sold to one Goodwin, and that the 124 acres and 82 acres were assessed and charged to Despard on the land-books with taxes; that said Marsh was never assessed with or paid any taxes on said 82 acres; that no lands on Grass Run were found, after said partition, in which decedent had any interest at the time of his

death, except said 124 and 82 acres, respectively, and that said tracts were not contiguous. On the 16th day of November, 1889, having been advised as to his rights in the premises by Judge Nathan Goff, of Clarksburg, who was a son-in-law of Burton Despard, Marsh executed to the Harrison County Oil & Gas Company a lease upon said 82 acres for oil and gas purposes. Marsh says in his testimony that he knew at the time that Judge Goff was a lawyer, and a son-in-law of Despard, and that Goff told him that it was his (Marsh's) land. In April, 1893, the appellant C. S. Despard went to Grass Run to locate the lands assigned to him as aforesaid. He found the 124-acre tract, and was told that Marsh lived on 82 acres that had formerly belonged to Burton Despard. He called upon Marsh at his home on the land, and informed him that this tract was a part of the land allotted to him in the suit for partition by the Despard heirs. The evidence does not agree as to what was then said by appellant. Marsh testifies that appellant said that the land which Marsh was then occupying was his (Despard's); that he (Despard) had a deed for it, and remarked that wherever he found any land unoccupied, which had originally belonged to his father, he intended to take it; and further stated that if he (Marsh) intended to stay on that land he would have to lease it. It further appears that Marsh then told appellant that he had bought the land of his father, and expected a deed therefor from the Despard heirs. This conversation is, in part, denied by appellant, who says that he told Marsh that the commissioners had set apart to him 325 acres of land; that the 82-acre tract was part of it; that Marsh did not mention anything about expecting a deed from the heirs; and that he told Marsh that he had a decree for the land, but did not tell him that he had a deed therefor. Hickman, who was present, says that appellant told Marsh that he had a deed for the land, and that Marsh would have to lease it or leave it. An understanding was then had between Marsh and appellant by which Marsh was afterwards to go to Clarksburg to make some arrangement with appellant about the land. Shortly afterwards Marsh did go to Clarksburg, and met appellant, who says that Marsh again told him that he had bought the land, and wanted to know what appellant was going to do about it. Appellant said to him that if he had bought the land it ought to be paid for; that appellant wanted the matter settled; that Marsh then spoke about renting the land, but said he would first consult his lawyer—a Mr. Scott—about it. He was afterwards seen with Mr. Scott, an attorney. This was in the forenoon. In the afternoon of the same day Marsh again met appellant at the law office of Edwin Maxwell, the executor, the said title bond being there in the possession of Despard. Thereupon Maxwell wrote for the parties, and Marsh signed, an

agreement, which is attested by Maxwell and B. M. Despard, in the following words and figures:

"I have this day rented from C. S. Despard the tract of 82 acres of land, on Grass Run in Harrison County, where I now reside for one year from the first day of April, 1893, for which I am to pay \$25.00 on November 1st, 1893, and \$25.00 before the 1st day of April, 1894.

"If I see proper to sow on said land a wheat crop the said Despard reserves the right to purchase said crop and pay me for the same, and if we can not agree I am to select a man & he a man and they if necessary a third man, who shall say what said Despard is to pay. If I shall sow any of the place in either oats or wheat I am to sow grass seed on same without any charge, the said Despard to furnish the seed for me to sow.

"Given under my hand this 19th day of April, 1893. J. W. Marsh.

"Witness:

"Edwin Maxwell.

"B. M. Despard."

On the 15th day of January, 1895, Marsh went to Parkersburg, to the home of appellant, and then and there signed another contract, which is in the words and figures following:

"This contract made this 15th day of January, 1895, between J. W. Marsh of Harrison County, W. Va., of the first part and C. S. Despard of Wood County, W. Va., of the second part that if the party of the second part has rented the party of the first part his eighty two acres of land on Grass Run where the party of the first part now resides upon the following terms. Commencing April 1st, 1895, that is the said Marsh, is to pay sixty-five Dollars a year and said amount is to be paid on or before the 1st day of December, 1895, and to give said Despard one half of the Fruit raised upon said place and the said Marsh agrees to feed all his stock upon said place and not to move off any manure and if the said Despard should sell said land the said Marsh is to give possession of said land but the said Despard is to pay said Marsh a fair compensation for his crop if he has to give possession of said land before this lease expires and the said Marsh further agrees to take as good care of said property as it was his own and to not plow any of the sod or grass land.

"Given under my hand and seal this the 15th day of Jany, 1895.

"J. W. Marsh. [Seal.]

"C. S. Despard."

It is shown that at the date of the first lease the land was not more valuable than it was when bought by Marsh, if worth so much. It appears that the amount of purchase money and interest thereon then due from Marsh on the land was about \$1,600. It is also shown that Marsh made no offer to pay the balance of purchase money, and

did not demand a deed for the land at any time. He admits that he did not have sufficient money at any time to pay the debt. He says in his testimony: "I leased said land of C. S. Despard after his having, as I thought, made a threat that I would be ejected from said land, thinking it was the only way that I could have a home for the family until I could see legal authority in regard to the matter. I never at any time said or intimated that I had no right or title to said land." Appellant says in his testimony: "I made no threat to him in any manner. He went out and consulted his lawyer as to whether he would take the land and pay for it, or turn it over to me in the place of taking it. It was optional with him to take the land under the contract or release it—either one." Marsh voluntarily went to Clarksburg, and, for aught that appears in the record, with full knowledge of his legal rights in the premises, and after taking legal advice thereon, of his own accord entered into said first lease. After occupying the land for nearly two years under this lease, he voluntarily went to the home of appellant at Parkersburg, entered into the second lease, and occupied the premises thereunder until the time of the institution of this suit by him, in October or November, 1897. He referred to the property, during that period, as the land of appellant. Maxwell swears as follows in reference to the possession of the said title bond by appellant: "I may have given him possession of the box containing the papers, or I may possibly have given him the paper, but my impression would be that I gave him the box containing the paper; and, if the land was assigned to him by the commissioners, there is no reason that occurs to me now why he might not have properly taken the paper." Thus it appears that appellant had the title bond with the assent of Maxwell, executor; that the whole arrangement was understood and acquiesced in by the executor, Marsh, and appellant when the first lease was made to Marsh, and accepted by him in Maxwell's office.

At the January rules, 1898, Marsh filed his bill in equity against said C. S. Despard and the other children and heirs at law of Burton Despard, deceased, Gertrude Despard, widow, and Edwin Maxwell, executor, setting up the facts connected with the purchase of said land, showing the said payments on the purchase money therefor, and praying a specific execution of said contract, and also that a deed for the land might be decreed to him from said heirs. Appellant C. S. Despard answered the bill, and relied, as a defense thereto, upon the facts hereinbefore recited. On the 21st day of January, 1899, the cause was heard, and a decree made and entered therein, by which it was and is adjudged that plaintiff is entitled to a specific execution of said contract upon the payment of the balance of the purchase money due

and unpaid upon said land on that day, amounting to \$1,798.48, the payment of which is ordered within 90 days thereafter; that upon its payment the said C. S. Despard and the other children and heirs at law of Burton Despard, deceased, are required to execute, acknowledge, and deliver to Marsh a deed for said land, with covenants of general warranty, but upon their failure so to do a special commissioner, who was appointed by the decree, is authorized to execute and deliver such deed for them. From this decree said C. S. Despard obtained an appeal and supersedeas.

Summarized, the case is thus presented: In February, 1872, Marsh bought the land, thereafter took possession thereof, and made permanent improvements thereon. Up to and including December 6, 1881, he had paid but \$200 on the purchase money. He was never charged with nor paid any of the taxes on the land. He was fully advised as to his legal rights in the premises. He knew that he was entitled to a deed therefor upon payment of the balance of purchase money, with its interest. C. S. Despard, under the said decree of partition, held the legal title to the land, and was entitled to this purchase money. On the 19th day of April, 1893, the amount of this purchase money and its interest amounted to about \$1,600. Marsh did not then have the money with which to pay it. That he might remain on the land with his family, he on that day voluntarily leased the land from appellant. On the 15th day of January, 1895, he again voluntarily leased it, having occupied it until the date last aforesaid—almost two years—under his first lease. He again held and occupied the premises as tenant of appellant until the institution of this suit. Just before that time he had refused to pay rents to appellant, and was notified to surrender possession of the premises.

Appellant insists that the said contract of February 10, 1872, was rescinded by mutual consent of himself and Marsh; that appellee became his tenant by said two written leases, and had thereby surrendered his possession of the land to appellant, and was therefore not entitled to specifically enforce the said contract. The ownership of the land by Despard having been acknowledged by Marsh in the leases, and admitted by him in accepting the tenancy thereof, the legal possession of the land by Despard necessarily followed. 1 Taylor, Landl. & Tenant, § 86. Appellee contends that he consented to become Despard's tenant in ignorance of his rights, and by reason of the fraud, misrepresentation, and intimidation by Despard. We think no fraud or intimidation is proved. There is some conflict in the evidence as to whether Despard said to Marsh that he had a deed or decree for the land; but, in the view we take of the case, this apparent contradiction is not material. After this interview with Despard, and after he had consulted an at-

torney at Clarksburg, where the records were accessible, and would have shown the facts about Despard's claim to the land, Marsh voluntarily leased the premises from Despard. But, admitting that Marsh was ignorant of his rights—which is not shown—he is in no better plight. "The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law acting on his title. Mr. Fonblanque has accordingly laid it down as a general proposition that in courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts. And he is fully borne out by authorities." 1 Story, Equity (13th Ed.) pp. 121, 122, and cases cited.

Appellee further contends that the agreements and leases between himself and C. S. Despard did not and do not amount to a rescission of the original contract, because the contractual obligations and rights of Burton Despard at his death passed to Maxwell, his executor, who alone could enforce them. We think the proposition is not applicable here. It is plainly evident that the decree of partition passed to C. S. Despard, the legal title to said 82 acres. He was not bound to part with his title until Marsh should pay to him the balance of the purchase money, with its interest, due on the land. It is true that Maxwell, as executor, was the personal representative of Burton Despard, and as such was charged with the collection and disbursement of that and other claims due the estate. But when the first lease was made to Marsh, Maxwell, presumably at the request of the parties, drafted it, and the title bond was present in the possession of Despard, who then and there agreed to release it. The debt of Marsh was thus canceled, and Maxwell thereby discharged from further duty in relation thereto. Hammon on Contracts, § 426, says: "The parties to a contract may discharge it by substituting in its place a new contract. This may occur in any one of three ways, each of which has the same effect: First, the parties may enter into an entirely new contract with reference to the same subject-matter, the terms of which are coextensive with and repugnant to the terms of the original agreement. * * *

The parties in interest did make such new agreement by the execution and acceptance of the leases; Maxwell, executor, being present and acquiescing therein. The language of the first lease, being the words of Marsh, after he signed the same, plainly show that he considered the land the property of appellant. The second lease again recognizes Despard as the owner and Marsh as the tenant. It says "the party of the second part (Despard) has rented to the party of the first part his (Despard's) eighty-two acres of land,

where the party of the first part now resides, upon the following terms: * * * And if the said Despard should sell said land the said Marsh is to give possession of said land, but the said Despard is to pay said Marsh a fair compensation for his crop if he has to give possession of said land before the lease expires." In *Cunningham v. Cunningham*, 46 W. Va. 1, 4, 32 S. E. 998, 999, the court says: "There is no doubt but that an executory contract for the sale of the land, whether written or oral, can be rescinded or waived, in equity, by word of mouth, if possession be given up or the writing be destroyed, but not without something done by way of rescission or waiver." *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245; *Straley v. Perdue*, 33 W. Va. 375, 10 S. E. 780; *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 511, 44 S. E. 433, 97 Am. St. Rep. 1027. "Any circumstance or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract will amount to a rescission of it." *Fry*, Spec. Per. § 877. "The rescission of a contract necessarily constitutes a bar to the performance of it by either party." *Fry*, supra, § 682. Having become the tenant of Despard, and accepted and held the possession of the 82 acres of land from 1893 to 1897 under said leases, Marsh will not be allowed now to dispute the title of his landlord, the appellant. 2 *Taylor, Landlord & Tenant*, 629, and cases cited. We are of opinion that the contract of February 10, 1872, was rescinded by the parties interested therein, and that Marsh, by the leases, surrendered the land to, and became the tenant of, Despard.

For the reasons stated, the decree of the circuit court is erroneous. We therefore reverse the same, and dismiss the plaintiff's bill.

(56 W. Va. 161)

TURNER v. McCORMICK.

(Supreme Court of Appeals of West Virginia. Nov. 1, 1904.)

VENDOR AND PURCHASER—OPTION—ACCEPTANCE—ALTERATION—RESCISSION.

1. An acceptance in writing of a formal and carefully prepared option of sale of land, within the time allowed by it for acceptance, using the formal words, "according to terms of the option given me," to which there is added, by the conjunction "and," a request for a departure from its terms as to the time and place of performance, is unconditional, and converts the option into an executory contract of sale.

2. A mere request by one of the parties therefor for an alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a binding contract, is not a breach thereof, giving right of rescission thereof or action thereon. Neither does it effect such alteration, unless assented to by the other party.

3. Such request relates to performance of the contract, and is not an element in the making thereof, although written and connected as aforesaid, with the acceptance, on a single sheet of paper, so as to make of the acceptance and request a compound sentence.

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County; John W. Mason, Judge.

Bill by Edgar D. Turner against William McCormick. Decree for defendant, and plaintiff appeals. Reversed.

Moreland & Glasscock and H. L. Robinson, for appellant. H. M. Russell and W. S. Meredith, for appellee.

POFFENBARGER, P. In this case the circuit court sustained a demurrer to a bill praying the specific performance of two alleged contracts for the sale of the Pittsburg vein of coal, underlying two separate tracts of land in Monongalia county. The owner of the land executed two options of sale to the plaintiff, each of which provided that it should be accepted within a certain time, and, if not so accepted, it should be void. The demurrer was sustained upon the theory that what is relied upon in the bill as constituting acceptance is insufficient, because it sought to introduce a new element into the proposed contract, and make not the contract originally proposed, but a new and different contract. The first option bears date December 31, 1901; was executed by William McCormick, as party of the first part, and E. D. Turner, as party of the second part; covers the coal in a tract of about 150 acres at the price of \$50 per acre, one-third to be paid in cash on delivery of deed, and the balance in two equal annual payments; and provides, as to acceptance, that "the party of the first part agrees that the party of the second part shall have until the first day of March, 1902, to accept the coal herein described as the same may be determined by the county surveyor. * * * And if the party of the second part does not give notice of such acceptance by said date, this contract shall be void, and of no further effect." The other option, executed by the same parties, is dated February 2, 1902; covers the Pittsburg vein of coal in and underlying a tract containing about 104 acres, at the price of \$41 per acre, one-third to be paid in cash on delivery of deed, and the balance in two equal annual payments; and provides, as to acceptance, that "if the second party, heirs or assigns, fails to notify said first party in writing, on or before the first day of March, 1902, that he or they elect to purchase said coal, then this agreement is to be considered as rescinded, null and void and neither party to be bound thereby or liable in any way." As to performance and the consummation of the proposed sale, the written option provided as follows: "The first party shall and will, within ninety days, after the notice in writing that the said second party, his heirs or assigns, elect to purchase said coal at his own proper cost and charge, make, execute and deliver to the said second party, his heirs or assigns a good and sufficient deed or deeds for said coal and mining rights, in fee simple, clear of all incumbrances, with clause of general warranty," etc. The first

option does not require acceptance in writing, nor performance within 90 days after notice of acceptance. The second does impose these conditions. Besides alleging a verbal acceptance of both of these options on the 21st day of February, 1902, the bill avers an acceptance and notice thereof in writing, and sets out a copy of the notice of acceptance, which reads as follows:

"Morgantown, W. Va., Feb. 21, 1902. Mr. William McCormick: I hereby notify you that your coal will be accepted according to terms of the option given to me on same and respectfully request you to make delivery of deed, with abstract of title, to me, in Morgantown, W. Va., on Saturday, June 28th, 1902, hour and place to be decided later. Yours truly, E. D. Turner."

Two objections to the written acceptance are urged. One of these relates to the first clause, and is that its language relates to the future, and imports a promise to accept, and not to notice of a completed acceptance. The other objection is that the request that deed be made on June 28, 1902, in Morgantown, at an hour and place thereafter to be decided, superadded to the alleged notice of acceptance, made it conditional, and not absolute, by attempting to introduce new terms into the proposed contract. Acceptance of the first option gave the right to have immediate performance, and allowed no time to the vendor in which to perform thereafter. Absolute acceptance of the second option would have included, as one of the terms thereof, an agreement that the vendor should have 90 days within which to tender the deed. As it required acceptance on or before the 1st day of March, 1902, and performance within 90 days thereafter, the request or condition in the notice that the deed be delivered on the 28th day of June, 1902, named a date more than 90 days after the first day of March, the limit for acceptance, and one more than 90 days after the notice of acceptance.

The first objection overlooks the substantial and legal meaning of the terms, and amounts to a mere criticism of the phraseology. By turning this weapon upon the appellees themselves, their contention is completely overthrown. The language is not that the option will be accepted, but that the coal will be accepted in the future; and the contract itself contemplates performance in future, and after acceptance of the option. It is in the very nature of a contract that it shall be first made, and then performed. Moreover, the language of the acceptance, in strictness, more nearly conforms to the language of the contract than that which it is said should have been used. The provision of the option as to notice of acceptance uses this language: "That he or they elect to purchase said coal." It requires notice of intention and election to do a thing in the future. Hence it may be said, without doing any violence to the language of the option, that notice

of an election to purchase according to the terms of the option should be understood and deemed to carry with it, by necessary implication, prior or contemporaneous acceptance of the terms of the option. Acceptance of the coal according to the terms of the option could not take place without a full accession to all the terms of the option. To this it may be added that it is not usual to refer to the instrument by its date or otherwise, and merely say it is accepted or its terms agreed to. Thus, in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249, the vendee had telegraphed as follows: "Will take the property. Meet me at Toronto first train. Answer." Another telegram responding to another proposal was: "Will accept your proposal." No substantial distinction between these forms of acceptance was discovered. In both instances the future tense was used. In *Barrett v. McAllister*, 35 W. Va. 738, 11 S. E. 220, there was a verbal notice in which the plaintiff told the defendant, after looking over the land, he was satisfied with it, and was ready to pay the money when the deed should be made. Then a day or two afterwards he wrote a letter in which he said: "I am here at your place of business ready to take the land and pay the money whenever the deed is made." In these instances the language, with one exception, related to performance, and it never occurred to anybody to question its sufficiency on that ground. In the same case, at page 745, 33 W. Va., and page 222, 11 S. E., Judge Brannon took this view. He said: "Why talk about the execution of a deed if the land was not satisfactory? Why talk about a deed if Barrett had not accepted the option? The fact that they so talked about a deed proves that Barrett had accepted the option and informed McAllister of it. Indeed, this conversation about a deed is of itself acceptance."

But it is further urged that the reference to the future in the first clause coupled with the request in the second clause, bears out the theory of a promise to accept in the future, and precludes the view that the writing conveys notice of a prior or contemporaneous acceptance. It has already been pointed out that the declaration of intent to take the coal in accordance with the terms of the option presupposes and necessarily implies present or past acceptance of the terms. The notice does not say, "I will take the coal according to the terms of the option on the 28th day of June," or "if you will deliver the deed on the 28th day of June." Its terms are positive. The notice is that the coal will be accepted according to the terms of the option given. This is followed by a request, not a condition, that the deed be delivered on the 28th day of June, instead of at an earlier date. To couple the two clauses in the manner suggested would be to depart from the plain, common-sense meaning of the notice. It would do violence also to the grammatical construction of the

notice. No reason is given why the latter clause limits and qualifies the former. It is not pointed out, nor even suggested, that the rules of grammatical construction require it, nor that the two clauses have such logical connection. The copulative conjunction used simply makes grammatical connection of the two clauses. It does not make them mutually dependent, nor the former conditional.

Yielding the first contention for the purpose of argument, counsel for appellee say that if the first clause, standing alone, would amount to unconditional acceptance, converting the option into a contract binding upon both parties, the addition of the request that delivery of the deed be made on the 28th day of June—a date more than 90 days after acceptance, and after the time in which acceptance could be made—renders the notice insufficient. They say this request does not relate to performance of the contract after the making thereof as proposed, and that the insertion thereof in the written notice was an attempt to ingraft upon the contract proposed conditions or terms not embodied in the original proposition; and, as the bill does not show any acceptance in writing of this new condition, the effort to change the original proposition has failed, and no contract has been made. If this last clause of the deed thus qualified the first, it would work a change as to the time of payment of the purchase money and delivery of the deed. It would also designate a place of payment as to which the options are silent. The bill avers, as the reason for requesting delivery on the 28th day of June, that the plaintiff had similar options upon the coal underlying several other tracts of land in the neighborhood of those owned by the defendant, and desired to close them all on the same day; it being his purpose to obtain an aggregate of 1,000 or 1,200 acres of coal in a body. While this averment is not important, it well illustrates the fact that such a request may be added to an acceptance for a good purpose, and it does not necessarily indicate an intention to change the terms of the proposed contract. The plaintiff desired the land, and was willing to take it and pay for it. He preferred to close all the options on the same day, and therefore added this request. Suppose he had on one day put the first part of the notice in writing, and sent it to the defendant. That would have closed the contract undoubtedly. Then suppose on the next day he had written a request that the performance be delayed until the 28th of June. That would not have been a repudiation of the contract. It would have been a mere request for an extension of time. The defendant could not have treated the contract as broken for that reason. He could have enforced it notwithstanding this request. The mere fact that the acceptance and the request are in juxtaposition, standing in the same sentence,

united by a conjunction, does not change their character or legal sense.

The contention of counsel for appellee is unsupported by authority. "If an offer is accepted as made, the acceptance is not conditional, and does not vary from the offer, because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope or suggestions, etc." 9 Cyc. 289. "Plaintiff answered a proposition to lease, 'I will accept your offer to lease to you at \$200 per year for three or five years as you choose.' Defendant answered, 'Make out lease for place for five years at \$200 per year.' He also said in this letter that he would like to build on a cookroom, with privilege to remove it. Plaintiff recognized that a lease for five years existed. Held, these letters made a lease and the request as to the cookroom did not attach a condition to defendant's acceptance." *Culton v. Gilchrist*, 92 Iowa, 718, 61 N. W. 384. In *Phillips v. Moor*, 71 Me. 78, the court held that an acceptance coupled with a request for a modification is an absolute and unconditional acceptance, and closes the contract. In that case the subject of the contract was a lot of hay. The defendant offered \$9.50 per ton for part of it, and \$5 for the balance. The plaintiff sent him a postal card in reply saying he had hoped the defendant would pay him \$10 for his hay of the best quality, and closed by saying, "But you can take the hay at your price, and when you get it hauled in, if you can pay the \$10.00 dollars, I would like to have you do it, if the hay proves good enough for the price." The defendant, having received this card on Friday morning, made no reply, and Sunday morning the hay was burned in the barn. The court held that there was a contract, and that, under the peculiar circumstances dispensing with actual delivery, which ordinarily is necessary to the passing of title, the defendant was liable for the price of the hay. In *Stephenson v. McClain*, 5 Q. B. D. 346, the principle is well illustrated. The defendant had certain warrants for iron. He wrote to plaintiffs, asking whether they could get him an offer for them. After some correspondence the defendant fixed a net cash price of 40 shillings per ton, the offer to hold good until the following Monday. On the morning of that day, at 9:42, plaintiff telegraphed this request: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." No answer having been received, the defendant, after receipt of this telegram and without having replied to it, sold the warrants, and at 1:25 p. m. telegraphed to the plaintiffs that he had done so. Before the sending of this telegram, the plaintiffs found a purchaser for the iron, and at 1:34 p. m. telegraphed the defendant, stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs

brought an action against him for non-delivery, and recovered. The court held that the inquiry as to whether the defendant would modify the terms of his offer was not a rejection of the offer, and, he not having withdrawn the offer before the sale was effected, a binding contract was effected by the acceptance of the plaintiffs upon finding the purchaser at 1:00 p. m., 25 minutes prior to the sending of defendant's telegram. The ruling in that case is a very strong adjudication against the contention of the appellee here. The request or suggestion for modification of the offer made before its acceptance might well have been regarded as an indication of a purpose not to accept. Here the acceptance precedes the request for a modification.

Among the cases relied upon as authority sustaining the action of the court in dismissing the bill is that of *Potts v. Whitehead*, 23 N. J. Eq. 512. The report of the case in that volume does not set out the fact fully. They are given at length in 20 N. J. Eq. (5 C. E. Green) 55. There it is shown that the offer was such that an unqualified acceptance of it would not have constituted a contract, for the offer and acceptance would have left open to further negotiation important elements of the contract. In that case the defendant signed a paper embodying an offer to sell certain land in consideration of \$20 per acre; \$500 of the price to be paid on the execution of a deed, and the balance to be secured by a mortgage on the land, with interest at 6 per cent. When the deferred payments of the purchase money should become due was not stated, and this paper and the alleged acceptance did not fix any time. If the latter had, it would not have been binding, unless assented to by the defendant. This was one ground of the decision of the chancellor, holding that there was no contract. The alleged acceptance said: "Have twice attempted the tender of the first payment of \$500.00 upon the agreement made between us on the 7th of December last. I will meet you," etc., " * * * when I shall be ready to make tender of the money and execute the proper agreements thereupon." This acceptance did not say, as does the one under consideration here, that the plaintiff would take the property in accordance with the terms of the agreement. He said he would pay \$500 upon the agreement and execute the proper agreements thereupon. There is scarcely a resemblance between the two papers. What was meant by "proper agreement," the court had no means of knowing. He might have meant such agreements as were just and fair, or such as the offer indicated. The paper was indefinite and ambiguous. Respecting it, the chancellor said: "It doubtless might fairly be inferred from this letter that the complainant intended to accept the offer in some way, and expected to enter into an agreement for the purchase

of this property, at the price fixed, but he did not bind himself so to do."

Another case relied upon is *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371. In that case the defendant, a resident of Los Angeles, Cal., offered for sale, by letter, two business rooms in Iowa City, saying to the plaintiff: "You can have that building for thirty-five hundred dollars, or the two for \$5,000. Let me hear from you at once." The alleged acceptance was by telegram from Iowa City, saying: "Accept your offer for two buildings at five thousand dollars. Money at your order at First National Bank here." The court held that the defendant "was entitled, under his offer, to have the money paid to him at his place of residence, and to deliver the deed there, and that, as the acceptance of plaintiff was not an acceptance of the offer as made, it did not bind B.," the plaintiff. It is to be noted here that the plaintiff did not request permission to pay the money into the bank to the defendant's credit at Iowa City, but said, in effect, that the money had been paid there to his credit. Therefore the payment into the bank at Iowa City was made a part of the acceptance. By such payment and notice, plaintiff attempted to add a new condition to the contract proposed, which was silent as to the place of payment, and therefore, in law, contemplated payment at Los Angeles. It was not an unqualified acceptance, coupled with a request for permission to pay at Iowa City. *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858, does not support the position taken by the appellee. The letter purporting to be an acceptance said the party would accept the offer, provided the title was perfect. It further said: "I will call at your office Monday at 10 o'clock, at which time I can get the abstract and have it examined." The common sense of this letter was that the writer had not accepted, and would not accept if he did not find the title perfect. In *Coffin v. Portland* (C. C.) 43 Fed. 411, relating to an attempted sale of bonds, the letter said: "We will take your * * * bonds * * * at par, you to furnish us written opinion of your city attorney as to legality of bonds, certified copy of council proceedings and ordinance, certified statement of your city debts, assessed value of your taxables, probable real value, the amount of your debt, and your present approximate population." After putting upon its minutes an acceptance of this proposition to purchase, the council passed a resolution rescinding what the resolution called a contract, and accepted the proposition of another person for the same bonds. The court says in its opinion: "It is more reasonable to regard the proposition of the plaintiffs in this respect as being conditional, and the acceptance of it as being upon the same condition. This being so, the plaintiffs, of course, have no right of action."

What is meant by this is that there had not been, in fact, any proposition to buy, or acceptance of such proposition. The plaintiffs were simply considering the advisability of purchasing, and, in the exercise of prudence, desired to examine all the proceedings relating to the issue before making an unqualified proposition to buy. There is nothing in that case that seems to have any bearing upon the question under consideration here.

Three cases referred to in one of the briefs for appellee are, in all material respects, alike. They are *Robinson v. Weller* (Ga.) 8 S. E. 449; *Northwestern Iron Co. v. Meade*, 94 Am. Dec. 557; and *Egger v. Nesbitt* (Mo.) 27 S. W. 385, 43 Am. St. Rep. 596. They enunciate the proposition that an acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the offerer, or the place named in the offer, is not an unconditional acceptance, so as to bind the seller. This is asserted by several cases. *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690. But they are all cases arising upon loose, informal correspondence, making it necessary to look to the whole of each paper to ascertain the true meaning and intent of the parties. None of the letters relied upon as acceptances said an offer was accepted in accordance with its terms, or that the property would be taken according to the terms of the letter of proposal. In none of them was the word "request" used, after language of unequivocal and definite acceptance, as in this case. In *Robinson v. Weller* the reply said: "Offer accepted. Money ready; send deeds at once." In *N. W. Iron Co. v. Meade*, the letter said: "If this is the very best offer you can make, you may properly execute the within deed," etc. In *Egger v. Nesbitt* the reply said: "I will accept your proposition, with the understanding that you will deliver to me all papers," etc. Owing to the distinctions pointed out, these precedents are not regarded as applicable or controlling in the present case.

Moreover, the reasoning in some of these cases is not entirely satisfactory. Nor does it seem to accord with principles announced in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. If a man says, "I accept your offer," that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete aggregatio mentium. The acceptance conforms to the offer in every particular. How can a mere request, relating not to the making of the contract, but to its performance, be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction

and sell to the other party. Property rights are sacred, and should be well guarded by the law; but, when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext, in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract—a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with or subsequent to the making of the contract, either party suggest, request, or propose a time, place, or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party. *Swiger v. Hayman et al.* (decided at this term) 48 S. E. 839. Either can compel the other to perform the contract as made. He may ignore the suggested, requested, or proposed alteration or deviation from the contract, as to the performance thereof. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. But if the suggested departure in performance is not accompanied by a declaration of unqualified and unconditional acceptance of the offer, it would be otherwise, of course. Some of the cases here referred to disclosed such acceptance, and others did not. The former do not harmonize with the principles enunciated by this court, and the latter do.

As much weight is accorded to the use of the word "request" here, and some of the books say that, if a request for a modification be made, it is deemed a rejection of the proposal, a case illustrating this rule will be noticed. It is *Burmester & Co. v. Phillips & Co.* (C. C.) 25 Fed. 805. *Burmester & Co.*, of Charleston, S. C., on the 14th day of March, 1885, wrote *Phillips & Co.*, of Fredericksburg, Va., as follows: "On receipt of letter [you] can ship us a cargo of 10 or 15,000 bushels choice dry Rappahannock white corn, at 51 cents, free on board, freight 7 cents a bushel." *Phillips & Co.* did not have the corn, but on the 16th of the same month they replied that they were endeavoring to get it. On the 20th they wrote that they could get it at the price, and were then endeavoring to secure a vessel to carry it at seven cents. On March 23d, *Burmester & Co.* wrote that they hoped *Phillips & Co.* would succeed in getting a vessel promptly, and gave some directions about ship's papers. On the 30th *Phillips & Co.* wrote that they hoped to succeed in getting a vessel, and, if so, would observe the direction about ship's papers. On April 4th *Phillips & Co.* notified *Burmester & Co.* by wire that they had succeeded in getting a vessel, and that as soon as she arrived at the landing they would advise, and that they would send a letter giving particulars. To this *Burmester & Co.* replied by letter of April 4th that they were awaiting letter's arrival as to

particulars. On April 9th Phillips & Co. reported that the vessel had arrived, and would be ready to receive the cargo on the following Saturday, and that they would draw for the cargo at sight, without grace, etc. To this Burmester & Co. made no reply. On April 11th Phillips & Co. telegraphed as follows: "Not hearing from you, we have resold the cargo of corn." Burmester & Co. telegraphed back that they had not canceled the order, and would expect cargo as ordered. Burmester & Co. afterwards sued, and the court held as follows: "The letter and telegram of the 4th of April were a new proposal, and that the failure of the Charleston house to answer before the 11th prevented the meeting of minds necessary to a contract, so that there was no contract, and defendants were at liberty to resell." In the opinion the court applied general principles, expressed as follows: "If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes, in law, a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer." In the light of the facts in that case as above stated, the proposition is sound and applicable. Instead of accepting Burmester & Co.'s proposition for an immediate shipment, Phillips & Co. announced their inability to do so, and made a counter proposition to obtain and ship the corn later. This was a request for a new contract, different from the one first proposed. The court held that to be a rejection of the first proposition. It being a new proposal on the part of Phillips & Co., not accepted by Burmester & Co., but treated with silence, there was no contract between the parties. There was no pretense of an acceptance of the original proposal of purchase.

This somewhat lengthy review of the authorities bearing upon the question seems to establish the following propositions: First, a request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it; second, a mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and, if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract; third, a request, suggestion, or proposal of alteration or modification, made after unconditional acceptance, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving right of rescission; fourth, acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and

place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance.

The bill alleges a verbal acceptance of both options at the time of delivery of the acceptance in writing, and a verbal agreement extending the time of performance until June 28th. These allegations have provoked a good deal of argument on the subject of extensions of time of performance and alterations of written contracts by parol agreement. The conclusion above indicated renders it unnecessary to go into these questions, or to examine the authorities cited as bearing upon them.

Our conclusion is that the acceptance in writing of the second proposal is unconditional, and converts the proposal into a binding contract. The other option does not require the acceptance to be in writing. It was verbally accepted, and that is sufficient, when the option does not require a written acceptance. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Barrett v. McAllister*, 33 W. Va. 745, 11 S. E. 220; *Creigh v. Boggs*, 19 W. Va. 240; *Capehart v. Hale*, 6 W. Va. 547.

For the foregoing reasons, the decree complained of is reversed, the demurrer overruled, and the cause is remanded for further proceedings.

(103 Va. 205)

VIRGINIA & S. W. RY. CO. v. BAILEY.

(Supreme Court of Appeals of Virginia. Nov. 23, 1904.)

MASTER AND SERVANT—RAILROADS—FIREMAN—INJURIES—COUPLING CARS—VICE PRINCIPAL—FELLOW SERVANT—ACTIONS—PLEADING—EVIDENCE—INSTRUCTIONS—MODIFICATION—VERDICT—APPEAL—PREJUDICIAL ERROR.

1. In an action for injuries, error in overruling an objection to an answer was not prejudicial where the witness was afterwards permitted to testify to the same fact without objection.

2. In an action for injuries to a railroad fireman, refusal to permit defendant to prove that it was not the duty of a conductor to give his brakeman any detailed instructions to go to the end of the cars to which a coupling was to be made was cured by an instruction that the conductor was entitled to presume that his brakeman was acquainted with the customary method of performing his duties, and that it was not the conductor's duty to give the brakeman special instructions with reference thereto.

3. Where, in an action for injuries to a railroad fireman, the negligence charged with reference to the conductor consisted in his permitting the engine to approach cars to which coupling was to be made at a dangerous speed, and that it was his duty to have such knowledge of their situation as would have enabled him to make the coupling with safety, a question asked of a witness as to whether it would not be the duty of the conductor "to know the exact spot at which the cars had been left to which he was going back to couple" was properly disallowed.

4. Where damages were claimed for permanent injuries sustained, mortality tables were admissible to show plaintiff's expectancy.

5. In an action for injuries to a fireman by being thrown from his engine by the impact in making a coupling, it was proper to modify an instruction that, if it was the duty of the brakeman to go with his lantern to the end of the car to which the engine was about to couple, and that he failed to go to the end of the car, and that the accident to plaintiff resulted "solely" from such failure of the brakeman, the jury should find for the defendant, was properly modified by the insertion of the word quoted, where it was also claimed, and the evidence tended to prove, negligence on the part of the conductor of the train as the proximate cause of the injury; the latter being a vice principal as to the fireman, and not his fellow servant, as was the brakeman.

6. Where the negligence of the conductor of a freight train, who stood in the relation of a vice principal to the fireman, in connection with the negligence of a brakeman, who was the fireman's fellow servant, caused the latter's injury, the railroad was liable therefor as though it alone was blamable.

7. In an action for injuries to a fireman by being thrown from his cab by an impact in coupling cars, an instruction that, if it was the conductor's duty to know the location of the cars he was about to couple to, and he did not know such location, yet if, under the circumstances, the conductor believed, and was entitled to believe, that the brakeman would be with his lantern at the end of the car to which it was expected to couple, and, if the brakeman had been there, the accident would not have happened, plaintiff could not recover, was properly refused, as predicated on the concurring negligence of the conductor, a vice principal, and of the brakeman, a fellow servant.

8. In an action for injuries to a fireman by being thrown from his car by the impact in coupling cars, evidence held to sustain a verdict for plaintiff.

9. An objection that the declaration in an action for injuries to a servant was insufficient to support a judgment for plaintiff on the ground that the allegations of negligence were not sufficiently specific cannot be made for the first time on appeal.

Error to Corporation Court of Bristol.

Action by D. H. Bailey against the Virginia & Southwestern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The instructions referred to in the opinion as given are as follows:

On the part of plaintiff: "(1) The court instructs the jury that when a person enters the employ of a railroad company as fireman he only assumes the ordinary and usual risks that are incident to such employment.

"(2) The court further instructs the jury that the conductor in charge of the train upon which plaintiff was at the time he was injured was a superior officer. Therefore all other employees on said train were subject to his orders.

"(3) The court instructs the jury that, if they should find for the plaintiff, they may, in estimating damages, take into consideration the following: The physical and mental suffering of plaintiff received from his

injury, his loss of wages for the time during which he was prevented by said injuries from working, proper compensation for his being unable because of said injuries to follow such a calling or business as he could otherwise have followed, and for moneys expended by plaintiff or for which he is obligated or indebted for medical and surgical attention, medicines, nursing, etc.

"(4) The court further instructs the jury that if they find for the plaintiff they may, in estimating his damages, if they believe his injuries permanent, also take into consideration the plaintiff's probable duration of life, and to show this they may take into consideration the standard mortality tables as showing the probable duration of plaintiff's life under all the proof in this case, and they may also consider the fact that plaintiff is engaged in railroad service, a more hazardous occupation than ordinary vocations of life.

"(5) The court instructs the jury that the plaintiff had a right to presume that the conductor of defendant company would discharge his duties in a careful manner, and in the usual and ordinary way."

On the part of defendant the court gave the following instructions:

"(1) The court instructs the jury that negligence on the part of the defendant cannot be presumed in this case; that it must be shown by the plaintiff by preponderance of testimony, otherwise the plaintiff cannot recover.

"(2) A servant entering the employment of a master assumes such risks as are ordinarily incident to the employment from causes open and obvious, the dangerous character of which he has had the opportunity to observe; and he must exercise reasonable care and caution for his own safety while engaged in the master's service.

"(3) The court instructs the jury that the burden of proving negligence is upon the plaintiff, and that negligence must be proved by affirmative evidence, which must show more than a probability of a negligent act; that a verdict cannot be found upon a mere conjecture; and that there must be affirmative and preponderating proof that the injury here sued for would not have occurred except for the negligent breach of some duty which the defendant owed to the plaintiff.

"(4) The court instructs the jury that if they should believe from the evidence that the injury complained of resulted to the plaintiff as a mere accident resulting from a misunderstanding of signal lights, and not resulting from negligence or fault on the part of the defendant or its conductor, they must find for the defendant, and this although they may believe the plaintiff also was free from fault.

"(5) (As modified.) The court instructs the jury that if they believe from the evidence

¶ 4. See Damages, vol. 15, Cent. Dig. § 439.

that it was the duty of W. B. Campbell, the brakeman, under the circumstances in this case, to have gone with his lantern to the end of the car to which the engine was going to couple, and that he failed to go to the end of said car, and that the accident to plaintiff resulted 'solely' from such failure of said brakeman to perform such duty, they will find for the defendant.

"And so, likewise, if they believe from the evidence that said brakeman could have prevented said accident by giving a signal to the approaching train to slow down or stop, and that, under the circumstances in this case, it was his duty to have given such signal, and that he failed to give such signal, and that the accident complained of was 'solely' the result of such failure, they will find for the defendant.

"(6) The jury are further instructed that the conductor in this case had the right to presume that his brakeman Campbell was acquainted with the usual and customary method of performing his duties, and it was not the duty of said conductor to give him special instructions with reference thereto.

"(7) The court further instructs the jury that, although they may believe from the evidence that the defendant was guilty of negligence, yet if they believe from the evidence that the plaintiff was also guilty of negligence, and that, but for the negligence of the latter, the accident would probably not have occurred, they will find for the defendant."

The court, on its own motion, charged:

"The court instructs the jury that if they believe from the evidence that in attempting to make the coupling at the time of the accident the engine approached and struck the cars at a greater rate of speed than reasonably safe and proper, and that by reason thereof the plaintiff, without fault on his part, was thrown from his place and injured, and they shall further believe the accident was caused by the negligence of Conductor Brown, or by the concurrent negligence of Conductor Brown and Brakeman Campbell, they shall find for the plaintiff; and, on the other hand, if they believe from the evidence that the accident was caused solely by the negligence of Brakeman Campbell, he is a fellow servant of the plaintiff, and there can be no recovery."

And the court also gave to the jury the instructions above set out and asked for by the defendant, numbered, respectively, 1, 2, 3, 4, 6, and 7, and refused to give instruction No. 8 asked for by defendant, and gave instruction No. 5 asked for by defendant, after having modified the same by inserting the word "solely" in the first paragraph thereof between the words "plaintiff resulted" and the words "from such failure," and by inserting the word "solely" in the second paragraph thereof after the words "complained of was" and before the words "the result of such failure."

Peters & Lavinder, A. H. Blanchard, and Wm. F. Rhea, for plaintiff in error. Bullitt & Kelly and D. D. Hull, for defendant in error.

KEITH, P. D. H. Bailey, the plaintiff in the court below, was a locomotive fireman in the freight train service of the Virginia & Southwestern Railway Company. On the 16th day of April, 1903, the crew to which he belonged started from Bristol to Big Stone Gap, and arrived at Clinchport, an intermediate point, some time during the night of that day. At Clinchport the crew received orders to shift some cars which were standing on a siding. The engine and tender were accordingly cut loose from the train at the depot, and all of the crew except the flagman went with the engine to do the shifting.

The switch is situated several hundred yards west of the depot, and at the point of the switch there is a railroad bridge, on the main line, over Stock creek. This bridge is 263 feet long. Its eastern end is about 777 feet from the depot, and its western end is 482 feet from the point of the switch. The total distance from the depot to the switch is 1,522 feet. The bridge is about 28 feet high at its highest point. Upon this switch there was a train of cars, about 20 in number. The purpose of the switching to be done by the crew was to change the position of these cars so as to place one of them, which stood near the west end of the cars, on the switch track, to the rear, or east, end, in position to be loaded. To accomplish this change of position, all the cars on the switch had to be moved and placed on the main line near the depot, and then replaced on the siding.

After placing the car which was to be set on the rear end of the switch next to the engine, the crew proceeded to remove the remaining cars from the switch, and put them down on the main line below the point of the switch. From the point of the switch on the main line to the other end of the switch was a downgrade, so that all of the cars could not be brought out at once, but several pulls had to be taken at them. At first about eight or ten cars were brought out and placed on the main line. Conductor Brown was actively engaged, taking the full part of a trainman, while this was being done, and it appears that he attended to opening and shutting the switch, while Brakeman Campbell rode on the cars and uncoupled them on the main line, cutting them off on this first pull between the car next to the engine and the balance of the cars. Then, holding on to the car next to the engine, they went back into the switch, and brought out another set of cars, which were pushed down on the main line below the switch, Campbell again cutting them off so as to leave the car next to the engine still coupled thereto. When they had cleared the

switch, they dropped the car which they had been holding on to down on the far end of the switch track, and then proceeded to replace the other cars back on the siding. After they had replaced all the cars except those first brought out, which would consequently be the last put in, just before starting back with the engine and tender from the switch track for this last pull from the main line, a conversation occurred between Brown and Campbell, as to the substance of which there is a difference between them, and which was not heard by the engineer or fireman. Brown says that he either told Campbell, or that Campbell suggested to him, that he (Campbell) would go across to the cars on the main line if Brown would take the engine around, and that the two reached this understanding. Campbell says that he told Brown he would go across the bridge-way (a foot bridge across Stock creek between the main line and the switch) to the main line, and see if all the cars standing there were coupled together, and that this understanding was reached between them. At any rate, Campbell did go across to the main line, and Brown did cut the engine and tender loose, go up to the switch, out on the main line, and back down on the main line with the engine and tender for the last draft of cars. Campbell, who had ridden the cars, had cut the engine and one car loose when the first draft had been placed on the main line. In cutting them off it so happened that they were left partly on and partly off of the bridge, two gondola cars and half of a box car projecting out on the bridge, and the balance of the draft coupled thereto standing east of the bridge. As Brown went back for the last draft of cars, he rode on the rear end of the tender, for the purpose of giving the engineer signals for the coupling, and, as he claims, expected to find Campbell at the end of the cars with his light. He saw Campbell's light at the end of the bridge, and did not signal the engineer to slow down until he got close enough to see the end of the gondola by the light which he himself carried in his hand; in other words, he reached the end of the cars in a shorter distance by the length of two gondolas and half a box car than he expected. The engineer, in moving the engine, was being guided by the signals given him from Brown's lamp, and was also being influenced in the speed at which he was running by the position of Campbell's light, although his statements and Brown's upon this subject do not entirely correspond. It seems, however, that the cars were closer to the engine and tender than either Brown or the engineer supposed, and, notwithstanding Brown's signal to the engineer immediately upon discovering them, the coupling was made at a greater rate of speed than would have been used had they known the exact location. The automatic coupling was made successfully, nothing was broken, and neither the brakeman, conductor, nor

engineer thought that anything very unusual had happened. The plaintiff testifies, however, that he was standing on his side of the engine, looking for signals, and getting ready to fire his engine, and not expecting the coupling to be made; and that when the engine and cars came together he was knocked out of the engine, and fell to the bottom of the bridge, landing in the creek, and sustaining severe injuries. The fact that he had fallen was not discovered by any of the crew until they had gone back over the switch with the last draft of cars.

From this statement of facts it will be seen that the real point in controversy is whether or not Brown, the conductor, knew, or ought to have known, the position of the cars to which he was to couple the engine, and whether or not the rate of speed at which the engine was moving under his direction was such as to constitute negligence.

The jury rendered a verdict for the plaintiff, which the court refused to set aside, and, the defendant in the court below (plaintiff in error here), the Virginia & Southwestern Railway Company, having obtained a writ of error, assigns the following grounds for the reversal of that judgment:

The plaintiff was asked, as a witness in his own behalf:

"Q. If the coupling had been made in the usual or ordinary way, would you or would you not have been thrown from the cab?"

"A. No, sir; if they had been coupled in the right manner, I would not have been thrown out."

To this question and answer there was a general objection, which the court overruled. It is claimed in the petition that, while the objections relied upon do not appear in the record, the question and answer were wholly inadmissible for any purpose.

It may be that the question is obnoxious to the objection that it is a leading one, and that the answer expresses the opinion of the witness, and not a fact. Without deciding whether or not either of these objections is well taken, or whether, in any event, it would constitute reversible error, we shall content ourselves with calling attention to the fact that at another point in the testimony of the plaintiff this question was asked him:

"Q. How did they throw you?"

"A. I went out head foremost. It was an unusual lick. If it had been hit by a lick that cars ought to be coupled, it wouldn't have thrown me. I had hold, and was looking out for it, and always did look out for anything like that when we was shifting."

This question and answer were not objected to, so that, if the error under consideration was sustained, there would still be evidence in the record covering the identical point to which no objection was made.

Objection is also made to the ruling of the court refusing to allow the plaintiff in error to prove by the witness Brown that it was

not his duty, as conductor, to give his brakeman, Campbell, any detailed instruction about going to the end of the cars to which the coupling in question was to be made; and a like offer of proof which occurs in the testimony of the witness McCue, which was also rejected by the court.

If the refusal to permit plaintiff in error to introduce the evidence referred to was erroneous, the error was cured by instruction 6 given at the instance of plaintiff in error, in which the court told the jury that the conductor had the right to presume that his brakeman, Campbell, was acquainted with the usual and customary method of performing his duties, and it was not the duty of the conductor to give him special instructions with reference thereto. The plaintiff in error could not have been prejudiced by the ruling of the court excluding evidence tending to show that it was not the duty of the conductor to do a particular act, when the point was covered by an instruction of the court which states that, as a matter of law, no such duty devolved upon him. We refrain from any expression of opinion upon either ruling of the court involved in this assignment of error, except to observe that in the result there was clearly no prejudice to the plaintiff in error.

Another objection taken to the exclusion of testimony is to the refusal of the court to permit McCue, "an experienced railroad man," to prove that it was not the duty of the conductor to know exactly where the cars were left that were being shifted.

There had been direct evidence that it was the duty of the conductor to know. It was proved that the company has no rule upon the subject; and McCue was expected to testify from his general information with respect to the operation of other roads. He was asked this question: "Where, as in this case, the conductor was attending to the shifting of the cars and also to the switching, would it or not be his duty to know the exact place where the cars had been left to which he was going back to couple?" To which question and any answer thereto the plaintiff, by counsel, objected, and the court sustained said objection, and refused to allow the witness to answer. Thereupon, without any distinct avowal by counsel for defendant, the court understood from the question and general drift of the examination that, if permitted to do so, the defendant would prove by the said witness McCue that in general railroad practice it would not be necessary or incumbent upon the conductor to give specific directions to the brakeman to go with his light to stand at the end of the train for the purpose of assisting in making the coupling, but that, according to general railroad rules and practice, it would be considered by the conductor that the brakeman would know that it was his duty to go to the end of the cars with his light, without being specifically told so to do; and that

where, as in this case, the conductor was attending to the shifting of the cars and also to the switching, it would not be his duty to know the exact spot where the cars had been left to which he was going back to couple. But the court, notwithstanding said statement of counsel, refused to allow the said witness to answer the above questions, and refused to allow the defendant to prove the facts set forth in the above statement of counsel."

So much of this exception No. 3 as refers to the duty of the conductor to give specific directions to the brakeman has already been sufficiently disposed of in discussing the assignment of error with reference to the question asked Conductor Brown; and as to so much of it as has reference to the duty of the conductor to know the exact place where the cars had been left, it is to be observed that the gravamen of the charge of negligence upon the part of the conductor is that he permitted the engine to approach at a dangerous speed the cars to which the coupling was to be made, and that it was his duty to know, not the exact position of those cars, but to have such a reasonable knowledge of their situation as would have enabled him to make the coupling with safety. The question in terms asks the witness, would it not be the duty of the conductor "to know the exact spot at which the cars had been left to which he was going back to couple?" To this question the witness would have made the categorical answer that "it was not his duty to know the exact spot"; an answer which would have been outright have been absolutely true as a response to the question in the precise terms in which it was propounded, and yet have been utterly misleading.

The action of the court in allowing the witness Skeen to testify as to the expectancy of life of a man of the age of defendant in error, and in allowing the introduction before the jury of certain mortality tables, is assigned as error.

The expectation of life of the defendant in error was one of the factors to be considered by the jury in ascertaining the compensation to be given him for a permanent injury. The expectation of life is, of course, incapable of exact ascertainment. All that can be done is to place before the jury the best evidence obtainable, to be considered by them under the direction of the court. Tables of mortality are usually esteemed the safest guides upon the subject, to be taken by the jury and weighed along with other facts and circumstances applicable to the expectation of the particular life under consideration. It is the best method of dealing with the subject of which the nature of the case admits.

The instructions asked for by the plaintiff and given by the court (see copy by Reporter) correctly state the law. Indeed, no objection is urged to any of them except No.

4, which relates to the measure of damages, and which has been sufficiently disposed of in dealing with the admissibility of the testimony of the witness Skeen.

The defendant asked for several instructions, all of which were given except No. 8. Nos. 5 and 6, however, were modified by the court. As originally asked, No. 5 was in the words following:

"The court instructs the jury that if they believe from the evidence that it was the duty of W. R. Campbell, the brakeman, under the circumstances in this case, to have gone with his lantern to the end of the car to which the engine was going to couple, and that he failed to go to the end of said car, and that the accident to plaintiff resulted from such failure of said brakeman to perform such duty, they will find for the defendant."

The modification consisted in inserting the word "solely" after the word "resulted," so as to make it read: If "the accident to plaintiff resulted solely from such failure of said brakeman to perform such duty, they will find for the defendant."

The purpose of the amendment is obvious. There was evidence tending to prove negligence upon the part of the conductor, who was not the fellow servant of the defendant in error, but was, as to him, the vice principal. There was evidence tending to prove negligence upon the part of Campbell, the brakeman, who was the fellow servant of defendant in error. If, therefore, the negligent act which caused the injury was due solely to the misconduct of the fellow servant, the railroad company was not responsible; but if the misconduct of the vice principal entered into and constituted a part of the negligent act which caused the injury, then the courts will not undertake to distribute the fault, but will hold the railroad company responsible as though it alone were guilty. *Norfolk & W. Ry. Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

The same principle controls the amendment introduced by the court in the second branch of this instruction, and we are of opinion that the amendments made by the court were proper, and this assignment of error is overruled.

The court also, of its own motion, gave an instruction which we think is, under the evidence in this case, plainly right, and the objection to which is, therefore, overruled.

This brings us to the consideration of instruction No. 8 asked for by the defendant, and refused by the court. It is as follows:

"The jury are further instructed that, although they may believe from the evidence that it was the duty of Conductor Brown to know the location of the cars that he was going back to couple to, and that he neglected this duty, and did not know the location thereof, yet if they believe from the evidence that said conductor believed, and, under all the circumstances of this case, had

the right to believe, that Campbell, the brakeman, would be, with his lantern, at the end of the car to which they expected to couple, and further believed that, if said Campbell had been at the end of said car with said lantern, the accident would not have occurred, they will find for the defendant."

This instruction is predicated upon the concession that it was the duty of Conductor Brown to know the location of the cars he was going to couple to, and that he neglected this duty, and rests the defense upon the ground that the fellow servant was guilty of negligence.

As we have already seen, if Brown, who was the vice principal, was guilty of a fault which entered into and constituted a part of the negligence which resulted in the injury of the plaintiff, then the railroad company is responsible, although Campbell, the brakeman, who was a fellow servant, was also in fault; the court in such cases holding that, where injury to a servant has been caused by the fault of a fellow servant concurring with the negligence of the master, the latter is liable as though he only was at fault. The fault of this instruction is that it is predicated upon the concurring negligence of the conductor, who was the vice principal of the master, and of a fellow servant.

There was a motion to set the verdict aside as contrary to the evidence, which was properly overruled. The testimony, considered as upon a demurrer to evidence, establishes the negligence of the plaintiff in error as being the proximate cause of defendant in error's injury.

The motion in arrest of judgment was also properly overruled.

There was no demurrer to the declaration, and we are not prepared to say that it could have been adjudged insufficient had a demurrer been interposed. If the declaration was less specific in its allegations of negligence than it should have been, we are still of opinion that a judgment upon it should not be arrested. Concede that the evidence went beyond the averments of the declaration, yet it is apparent that the plaintiff in error has suffered no prejudice upon this account, but that it presented its entire case to the jury. The objection should have been made by the defendant when the infirmity, if it exists, was disclosed. It should not have waited until a verdict had been rendered. If the objection had been made during the trial, the court, if it considered that substantial justice would have been promoted, and that the opposite party would not have been prejudiced thereby, would have allowed the pleadings to be amended on such terms as it deemed reasonable. Code 1887, § 3384 [2 Code 1904, p. 1792]. The observations of Judge Buchanan in the case of *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 801, 22 S. E. 869, are equally applicable here: "If there was such a variance as that com-

plained of, the objection ought to have been made in the trial court, either by objecting to the evidence when offered or by a motion to exclude after the evidence had been received. Section 3384 of the Code was enacted to obviate the difficulties which frequently arise after a trial has been commenced, when it appears that there is a variance between the evidence and allegations in the pleadings, by allowing the pleadings to be amended upon such terms as to continuance and costs as the court may deem reasonable, or by directing the jury to find the facts; and after such finding, if the court be of opinion that the variance was such as could not have prejudiced the opposite party, it gives judgment according to the right of the case.

"The objection now made for the first time should have been made in the court below, so that the plaintiff in that court might have had an opportunity to have moved the court to have adopted the one or the other of the courses provided by the statute. Having failed to do this, we do not think that the question can be raised here for the first time; and this assignment of error must be overruled."

In that case it appears that the objection was made for the first time in this court, while in the case before us it was made in arrest of judgment. The difference is one of degree, rather than of kind. The point is that it should have been made, in the language of Judge Buchanan, "when the evidence was offered, or by a motion to exclude after the evidence had been received." It is manifest that the plaintiff in error has suffered no prejudice in the trial court, that it made a full defense, and that the judgment has been rendered according to the very right of the case.

We are of opinion that there is no error in the record for which the judgment should be reversed.

(103 Va. 289)

NORFOLK & P. BELT LINE R. CO. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 1, 1904.)

RAILROADS—STATE CORPORATION COMMISSION—FIXING OF CHARGES—CHARGES FOR PLACING CARS ON SCALES—REVIEW—ORDER OF COMMISSION—AMOUNT OF THE RATE FIXED—PRIMA FACIE EVIDENCE.

1. Const. § 156, subsec. "b." declares that the State Corporation Commission shall have the power of regulating all transportation companies in relation to the performance of their public duties and charges therefor, and that the commission shall enforce such rates as may be reasonable. A transportation company, the business of which consisted of conducting a switch line and handling cars to and from industries with which it had established switching connections, observed the usual custom of placing cars in position to be weighed on consignees' or shippers' individual track scales, which scale service was necessary to the due

delivery of goods. *Held*, that the Corporation Commission had authority to fix the charges for placing the cars in position on such scales.

2. Under Const. § 156, subsec. "f," providing that the action of the State Corporation Commission shall be regarded as prima facie just and correct, on appeal from an order fixing the charge which a transportation corporation might make for placing cars to be weighed on consignees' or shippers' individual track scales the charges fixed were prima facie correct, and the finding entitled to peculiar weight.

Appeal from State Corporation Commission.

Appeal by the Norfolk & Portsmouth Belt Line Railroad Company from the order of the State Corporation Commission fixing the charge for placing cars in position to be weighed on consignees' or shippers' individual track scales. Order affirmed.

Thos. H. Willcox, for appellant. W. A. Anderson, Atty. Gen., and A. C. Braxton, for the Commonwealth.

WHITTLE, J. This is an appeal from an order of the State Corporation Commission fixing the charge for placing cars in position to be weighed on consignees' or shippers' individual track scales, located on sidings leading to industries along the line of appellant's railroad, at 25 cents per car for each car, loaded or empty, so placed in position and weighed.

Appellant is a public service corporation, duly incorporated by the Legislature of Virginia, and authorized to acquire land and construct, maintain, and operate a railroad with one or more tracks from any point on the line of the Norfolk & Carolina Railroad Company at or near Pinner's Point, to some point on the line of the Norfolk & Western Railway Company between the eastern and southern branches of Elizabeth river. The road is what is known as a "switching line," and its business consists of handling cars along its route from the terminus of one railroad to the terminus of another, and to and from the various industries with which it has established switching connections. For this service it receives the uniform compensation of \$1.50 for each loaded car hauled by it, without regard to the length of the haul, and nothing for empty cars.

The character of the service which is the subject of this investigation can be best illustrated by that rendered by the railroad company for the F. S. Royster Company, the owners of an extensive fertilizer manufacturing plant, whose property adjoins the belt line.

By agreement with the guano company, appellant, when its road was in course of construction, put in a number of sidings, with necessary switching facilities, connecting the company's buildings with the railroad. A track scale was installed on one of these sidings for the purpose of weighing such of the cars consigned to the company as might be necessary in the proper conduct of their

business. The railroad's part in the performance of that service is to switch the car to be weighed on the scale track, push it on the scale with its engine, and uncouple it. The sworn weighmaster of the guano company takes the weight of the car, which is then pushed off the scales by the next car to be weighed, and that process is repeated until all are weighed. When unloaded, the empty cars, by a reverse course, are in turn pulled on the scales and weighed, and the difference between the weights of the loaded and empty car gives the weight of its lading. The goods of the guano company are handled in car-load lots, and about 6,000 cars are annually delivered by the railroad company upon their sidings.

Until about one year before the institution of these proceedings, in delivering cars consigned to customers the railroad company imposed a charge of 15 cents for each car placed on the scales, whether loaded or empty, which charge was afterwards increased to 50 cents per car, whereupon complaints were made to the State Corporation Commission by shippers and consignees owning private sidings connected with the railroad that the increased charge was unreasonable and unjust. The proceedings instituted by the commission upon these complaints resulted in the order now under review, which, as remarked, reduced the rate from 50 cents to 25 cents per car.

To this ruling of the commission, appellant assigns two grounds of error:

First. It is insisted that placing cars on private track scales in position to be weighed is a matter of private contract, involving a nonpublic service, which the State Corporation Commission cannot require a railroad company to perform for customers having switching connections with the road; and therefore cannot fix the charges therefor; and

Second. That, even if the commission has jurisdiction over the subject, the rate of compensation fixed by it is unreasonable and unjust.

The principle upon which the state assumes authority to control and regulate the affairs of railroads and other public service corporations rests largely upon the doctrine of agency. Such corporations are founded by the Legislature for public purposes, and are clothed with authority, subject to state regulation and control, to exercise important governmental functions. By their charters they are granted privileges which may not be exercised by private persons, whether individuals or corporations, but always with the reservation, express or implied, that such privileges are subject to reasonable governmental control. *Cal. v. Pac. R. R. Co.*, 127 U. S. 40, 8 Sup. Ct. 1073, 32 L. Ed. 150. This right of control is part of the police power of the state.

As was said by this court in the *City of*

Petersburg v. Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848: "Bearing in mind the distinction between public and private corporations in the matter of public control—that the former are regarded as instrumentalities of the state, and liable to visitation and regulation, while the charters of the latter are contracts within the meaning of the contract clauses of the state and federal Constitutions, the obligation of which, in the sense of those clauses, cannot be impaired, * * * nevertheless the police power of the state is a governmental function, the exercise of which neither the Legislature nor any subordinate agency thereof upon which part of its authority may have been conferred can alienate or surrender by grant, contract, or other delegation. *Richmond, etc., Co. v. Richmond*, 28 Grat. 83; *s. c.* 96 U. S. 521, 24 L. Ed. 734; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253. * * * It follows, as a necessary consequence from the foregoing statement of the law, that there is an implied reservation of the police power of the state in every public charter granted by the Legislature."

Governmental powers are conferred upon the state primarily by the people, in trust for the benefit of all of its citizens; and whether exercised by the government directly through its own officials, or indirectly through the agency of corporations chartered by the state, must be exercised impartially, and without discrimination, for the benefit of all the people. This is the basic principle upon which our government is founded, and the philosophy of the constitutional provision securing to every one the "equal protection of the law."

"A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest." *Cal. v. Pac. R. R. Co.*, *supra*.

Railroads are public highways, and in this age of advanced civilization are as essential to the life of the state as ordinary roads and streets are to the existence of rural and urban communities. The very existence of public corporations, as well as their power to exact fares and freights, is derived from the state; and it cannot be deprived of its superintending power over them. *Cherokee Nation v. Kansas R. R. Co.*, 135 U. S. 657, 10 Sup. Ct. 965, 34 L. Ed. 295; *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 696, 16 Sup. Ct. 714, 40 L. Ed. 849; *Smyth v. Ames*, 169 U. S. 544,

18 Sup. Ct. 418, 42 L. Ed. 819; Wis., etc., Co. v. Jacobson, 179 U. S. 297, 21 Sup. Ct. 115, 45 L. Ed. 194.

In *Lake Shore, etc., R. R. Co. v. Ohio*, 173 U. S. 302, 19 Sup. Ct. 465, 43 L. Ed. 702, it was said: "In the recent case of *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677, it was adjudged that embraced within the police power of the state was the establishment, maintenance, and control of public highways there, and under such power reasonable regulations incident to the right to establish and maintain such highways could be established by the state."

In this commonwealth the State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial, and executive powers. Subsection "b" of section 156 of the Constitution declares that "the commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall from time to time prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements the commission may from time to time alter and amend."

It is quite clear that the foregoing provision affords ample authority for the action of the commission in this case, provided the service in question fairly falls within the category of a public service in the meaning of the Constitution.

It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of such carriers to perform them is as binding in the one case as in the other.

In the case in judgment the evidence shows that it is the custom of appellant and other railroad companies under similar conditions to render the service which is the subject of this controversy for their customers as an incident to the carriage and due delivery of their freight. In this connection it may be remarked that appellant does not deny that the service is necessary to the due delivery of goods consigned to its patrons, nor has it refused to render the service, but maintains that it is a nonpublic duty, neither compellable nor supervisable by the Corporation Commission. Nevertheless the rail-

road company assumes the absolute right to fix the amount of its compensation for the service, as in the case of rates for public service, without regard to the views or wishes of the party against whom the charge is made, and uncontrolled by the Corporation Commission.

With respect to the contention that the service is not enforceable by the Corporation Commission, the case of *Minneapolis, etc., Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, shows that, though a service may not be enforceable as a duty, yet, when voluntarily entered upon, it may be regulated, and the charges therefor prescribed, by the Railroad Commission.

The circus car cases and the express car cases and the like afford illustrations of services which a common carrier, as such, is not required to perform; and common carriers are held to be private carriers with respect to such duties and freight which it is not their business to carry. In that class of cases the parties furnish their own cars, or retain the possession and control of the goods shipped; and the authorities therefore hold that it is competent for the carrier to limit his liability, and that the amount of his compensation is the legitimate subject of compact.

Chief Justice Waite, after refusing to enforce an alleged duty in the "*Express Cases*," on the ground that it was not the common-law duty of the company to perform it, proceeds to show that it might, nevertheless, be imposed by statute, and that, if so imposed, the courts would then enforce it. He says: "The regulation of matters of this kind is legislative in its character, and not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions which we do not undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage, or by contract, or by statute, the courts cannot be called on to give it effect." *Memphis & L. R. R. Co. v. Southern Exp. Co.*, 117 U. S. 29, 6 Sup. Ct. 542, 628, 29 L. Ed. 791.

The distinction, however, between that class of cases and this case seems obvious. The service here is not an independent service, but is merely ancillary to the public duty of delivering freight to consignees with whom the railroad company has established switching connections—an incident to the public service, not severable, and essential to the due performance of that service. The establishment and operation of track scales, such as are used by the guano company in this case, are a necessity of modern commerce, of which the service of the railroad company in that connection is an indispensable feature. The case is analogous to that of a common carrier of live stock, whose

business of transporting the stock involves the incidental duty of furnishing suitable and safe facilities for loading and unloading the animals and for feeding and watering them while in transit. *N. & W. R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; *C. & O. Ry. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

If the power of the commission is limited merely to fixing the rate for carriage, and it is without authority so to regulate that service as to render it effective, it is obviously wholly inefficacious with respect to this large class of consignees and shippers.

Upon the first assignment of error, therefore, the court is of opinion that the service in question is cognate to, and so intimately connected with, the public service involved in the carriage and delivery of freight by the railroad company to patrons along its route as to constitute a part of such service, and, consequently, is subject to governmental control.

The court is further of opinion that the second assignment of error, that the rate fixed by the Corporation Commission for the service in question is too low, and the contention of appellee, on cross-appeal, that said rate is too high, are both without merit.

The Virginia Constitution (section 158, subsec. "f") provides "that the action of the commission appealed from shall be regarded as prima facie just, reasonable and correct." *N. N., etc., R. Co. v. Hampton, etc., R. Co.*, 102 Va. 847, 47 S. E. 858.

It has also been held that the commissioners are presumed to be experts in the matter of rates and charges, and that their findings are entitled to peculiar weight. *East Tenn., etc., Co. v. I. C. C.*, 99 Fed. 52, 39 C. C. A. 418.

But, aside from these considerations, the evidence fully sustains the judgment of the commission in that regard.

It follows that the order complained of is without error, and must be affirmed.

(103 Va. 276)

SPANGLER v. BOOZE.

(Supreme Court of Appeals of Virginia. Dec. 1, 1904.)

MALICIOUS ISSUANCE OF SEARCH WARRANT—PROBABLE CAUSE—DECLARATION—TERMINATION OF PROSECUTION.

1. An action will lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen.

2. Where the execution of a search warrant was ineffective in disclosing any of the property alleged to have been stolen, and the proceeding was thereupon discontinued, the declaration in an action for the malicious issuance and execution of such warrant without probable cause was not demurrable for failure to allege that plaintiff had been tried on the merits by a court of competent jurisdiction and acquitted.

Error to Circuit Court, Botetourt County. Action by Uriah Spangler against A. T. Booze. A judgment was rendered in favor of defendant, and plaintiff brings error. Reversed.

Benjamin Haden, for plaintiff in error. Glasgow & Woodson, for defendant in error.

HARRISON, J. This action of trespass on the case was brought by the plaintiff in error to recover of the defendant in error damages for having maliciously and without probable cause procured the issuance and execution of a search warrant, charging the plaintiff in error with the theft of certain apples.

A demurrer to the declaration was sustained by the circuit court, and from that judgment a writ of error was awarded, bringing the case here for review.

The declaration is in the usual form, its salient averments being that the defendant, A. T. Booze, contriving and maliciously intending to injure the plaintiff, Uriah Spangler, in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, had appeared before a justice of the peace, and without any reasonable or probable cause made complaint that the plaintiff did unlawfully steal, take, and carry away one lot of apples of the value of \$20, the property of the defendant, and that he had probable cause to believe, and did verily believe, that the property so carried away was concealed in the dwelling house of the plaintiff; that upon such complaint the defendant had, without any reasonable or probable cause whatever, procured the justice to make and grant his certain warrant, under his hand and seal, authorizing and empowering a constable forthwith in day or night time to enter the dwelling house of plaintiff, and there diligently search for the property alleged to have been stolen, and that, if the same or any part thereof should be found upon such search, the constable should bring such property and also the body of the plaintiff before some justice of the county, to be disposed of and dealt with according to law; that by virtue and under color of this warrant the constable to whom it was directed, and who was thereby charged with its execution, had, without any reasonable or probable cause whatsoever, and without the leave or license and against the will of the plaintiff, entered his dwelling house, and searched and ransacked the same and the rooms and apartments thereof, and had flung, tossed, and tumbled the furniture, wearing apparel, and other contents thereof, and had thereby greatly disturbed and disquieted the plaintiff and his family in the possession of said house. It is further averred that neither the apples of the defendant, alleged to have been stolen, nor any other goods or chattels of the defendant, feloniously stolen, were found in the plaintiff's house;

¶ 1. See *Malicious Prosecution*, vol. 23, Cent. Dig. §§ 6, 59; *Searches, and Seizures*, vol. 43, Cent. Dig. § 6.

nor were there any such goods and chattels therein before, at the time of the complaint, or, at any other time whatever; and that the defendant had no reasonable or probable cause for making the complaint or causing the warrant to be issued or executed; and that the defendant did not further prosecute his charge, but deserted and abandoned the same, and the complaint was wholly ended and determined.

The ground of demurrer to this declaration is that it fails to allege that the charges contained in the warrant therein referred to were, or any of them ever was, tried on their merits by a court having jurisdiction thereof, and that the plaintiff was adjudged innocent thereof, and that the same terminated favorably to him. The averments of the declaration show that these allegations were not in accordance with the facts, and therefore could not be made. This brings us to a consideration of the question whether it was necessary for the plaintiff to make the averments suggested by the demurrer in order to maintain his action.

It is well settled by authority, both in this country and in England, that an action for damages will lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen. Wharton on Crim. Law (7th Ed.) vol. 3, § 2942; *Elsee v. Smith*, 16 Eng. Com. L. Rep. 19; *Cooper v. Booth*, 3 Esp. Rep. 135; *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 698; *Carey v. Sheets*, 67 Ind. 375; 4 Minor, part 1, p. 393.

Mr. Minor says that "maliciously obtaining a search warrant to search one's house for goods alleged to be stolen, smuggled, etc., is such a prosecution that an action lies for it."

The contention of defendant in error that in a case like this the plaintiff must aver that he has been tried before a court of competent jurisdiction, and been fully acquitted on the merits, of the crime with which he is charged, is not tenable. When the stolen goods are not found upon the execution of a search warrant, that prosecution is ended. The warrant has served its purpose, and falls to the ground. It is, upon its face, conditioned upon the goods alleged to have been stolen being found. Not being found, as in the case at bar, the prosecution inaugurated by the defendant ended, and no further proceedings could be had thereunder.

Judge Cooley, upon this subject, says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such manner that it cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." Cooley on Torts, p. 216.

In the leading case of *Miller v. Brown*, supra—a very similar case to that at bar—it is said: "This action is to redress any damages the plaintiff may have sustained either

in his reputation by the scandal, in his person by imprisonment, or in his property by expense incurred; and it would have well lain upon the mere affidavit of the defendant, if made with malice and without probable cause; for assuredly an application for a search warrant upon the ground that goods have been stolen and are concealed within a person's inclosure, is a sufficient scandal to the reputation to sustain an action as to this ground. The cases of *Elsee v. Smith*, 16 Eng. Com. Law Rep. Cond. 212, and *Booth v. Cooper*, 3 Esp. 144, T. R. 535, and *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339, sustain fully this position."

In the case of *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914, where the goods were not found, the court held an action for damages would lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen; the court saying "that such a proceeding not only involves an imputation of criminal conduct on the part of the person whose premises are thus subjected to search, but it contemplates the arrest of the person if, upon search, the property is found in his possession. Such is the direction in the search warrant."

In the case of *Whitson v. May*, 71 Ind. 269, where no goods were found, it was contended that the issuance and service of a search warrant was not a "prosecution" in the sense in which that word was used by the text-writers and the authorities in treating upon actions for malicious prosecutions, and that, consequently, an action would not lie for causing a search warrant to be issued, conceding that the motive may have been malicious, and that no probable cause existed. But the court disregarded this contention, and overruled the demurrer to the complaint, holding that an action for malicious prosecution did lie against one who maliciously, and without probable cause, institutes and carries forward proceedings under a search warrant.

A learned author, speaking of search warrants, has remarked that "there is not a description of process known to the law the execution of which is more distressing to the citizen. Perhaps there is none which exerts such intense feeling in consequence of its humiliating and degrading effects." Archbold's Cr. Pr. & Pl. vol. 1, p. 131.

It would be a reproach to our jurisprudence if such a prosecution could be inaugurated and carried forward maliciously and without probable cause, and the innocent victim have no remedy. We are of opinion that the declaration in judgment states a good cause of action, and that the plaintiff was entitled to a trial on the merits of his case.

For these reasons the judgment complained of must be reversed, and the case remanded for further proceedings.

(108 Va. 281)

LANGHORNE v. MCGHEE et al.

(Supreme Court of Appeals of Virginia. Dec. 1, 1904.)

PARTNERSHIP — INDEBTEDNESS — COMPROMISE — EFFECT — OFFSETS — PAYMENT — PLEADING — ASSUMPSIT — MONEY RECEIVED.

1. A firm conveyed its assets to a trustee to secure notes due to plaintiff, the conveyance providing that one of the partners, G., should execute to plaintiff two notes secured by the deed of trust—one to secure G.'s share of the debt, and the other as a guaranty of a portion of the other partner's half of the firm's indebtedness to plaintiff—whereupon G. should be discharged from personal liability thereon, and that G.'s proportion of the proceeds of the firm assets should be credited on the notes so executed by him, and that he should be required to pay only the residue thereof. Thereafter a suit for settlement of the partnership affairs was compromised on the basis of an allowance to G. of \$3,000 by his partner. The judgment entered in G.'s favor for such amount was set aside on plaintiff's application on the ground of interest in the subject-matter of the suit, though he was not a party to the suit, but nothing further was done to establish plaintiff's claim. *Held*, that in the absence of fraud, or a showing that the sum of \$3,000 was not justly due to G., plaintiff was bound by such settlement with reference to G.'s liability on the firm's debt to plaintiff.

2. Code 1887, § 3298 (Va. Code 1904, p. 1737), provides that in a suit for debt the defendant may have allowed any payment or set-off which is so described in his plea, or in an account filed therewith, as to give plaintiff notice of its nature, but not otherwise. *Held*, that where defendants pleaded nil debit, and filed an account of set-offs, which were so described as to give plaintiff notice of their character, they were entitled to prove such items as payments.

3. Where a member of a firm executed notes in satisfaction of his liability on a firm debt to plaintiff, and reduced them from sources other than his interest in property of the firm conveyed to a trustee for the payment of the firm debt, and by the terms of the trust agreement the money received by plaintiff from the trustee to the extent of such partner's interest in the assets not exceeding the amount of the notes was to be credited thereon, payments having been made by the trustee which more than satisfied such partner's notes, he was entitled to recover the overplus from plaintiff in assumpsit, as money had and received.

Error to Circuit Court, Bedford County.

Action by John D. Langhorne against W. H. McGhee and others. A judgment was rendered in favor of defendants, and plaintiff brings error. Affirmed.

Horsley & Kemp and Caskie & Coleman, for plaintiff in error. J. L. Campbell, for defendant in error.

BUCHANAN, J. John D. Langhorne in April, 1902, instituted his action of debt against Wm. H. McGhee and J. W. Ballard on two negotiable notes, aggregating \$3,054.16, including costs of protest. The defendants pleaded nil debit, and with their plea filed an account of offsets which amounted, including interest, to \$4,125.39.

Upon the trial of the cause, neither party requiring a jury—the whole matter of law and fact being submitted to the court—a judgment was rendered against the plaintiff

for the difference between the amount of the offsets and the notes sued on. To that judgment this writ of error was awarded.

The errors assigned are that the court erred in admitting the evidence offered by the defendants, and in rendering judgment against the plaintiff.

The evidence offered by the defendants showed that T. D. Berry and Wm. H. McGhee were prior to January, 1896, engaged in business as partners under the firm name of Berry and McGhee; that they were indebted to the plaintiff in the sum of \$7,300, evidenced by two negotiable notes, one for \$4,800 and the other for \$2,500; that on the 7th day of May, 1896, they conveyed the assets of the concern to William Eubank, trustee, to secure the payment of the said indebtedness; that on the same day an agreement was entered into by Berry and McGhee and the plaintiff in which it is recited that the defendants had executed the said deed of trust, and the purposes for which it was executed; that the property conveyed by it was the joint property of the defendants, but the accounts between them had not been settled so as to show the relative rights of each therein, and that it was probable that they were not equally interested in the property; that McGhee, one of the defendants, had executed and delivered to the plaintiff two negotiable notes, one for the sum of \$3,650, and the other for \$350, each indorsed by James W. Ballard, of even date with the agreement, payable four months after date; that the \$3,650 note had been given as collateral and additional security for McGhee's one-half of the debt secured by the deed of trust; that the \$350 note had been given as a guaranty of that much of Berry's half of the \$7,300 debt; that the plaintiff had agreed that these notes (\$3,650 and \$350) might, at the option of the plaintiff, be renewed from time to time so as to cover a period of 12 months, upon paying the discount at 6 per cent. per annum. After making the foregoing recitals, it is declared that "this agreement witnesseth, that it hath been agreed between the parties hereto that a settlement shall be had between the said Thomas D. Berry and William H. McGhee of the transactions growing out of their partnership dealings, and that the proceeds of the sale and collections to be made by the said Wm. Eubank, trustee under the deed of trust aforesaid, shall be apportioned between the said Thomas D. Berry and William H. McGhee in proportion to their respective interests in said assets, as the same shall be developed upon the settlement of said partnership accounts, and that whatever would be the said McGhee's proportion of said assets shall be credited on the said note for \$3,650, and that he shall be required to pay only the residue of said note for \$3,650 after crediting thereon his due proportion of the amount derived under the deed first aforesaid; * * * and that upon the execution and delivery of the

two notes aforesaid, of \$3,650 and \$350, respectively, the said William H. McGhee shall be discharged from all personal liability upon the said notes of \$2,500 and \$4,800 first aforesaid, but such discharge shall not in any way affect the validity of the deed of trust aforesaid."

The \$3,650 note was renewed from time to time until May 17, 1897, when, in consequence of a demand made by the plaintiff, McGhee paid \$950 thereon, thus reducing the note to \$2,700, which, with the \$350 note, continued to be renewed from time to time until February 24, 1902.

In September, 1896, a few months after the agreement of May 7th was entered into, McGhee instituted a suit against Berry for a settlement of the partnership matters of Berry & McGhee; an order was entered directing one of the commissioners of the court to take and state their partnership account; the commissioner reported in May, 1899, that Berry was indebted to McGhee in the sum of \$4,334.13, as of April 15, 1896, upon a settlement of their partnership matters; and this report, upon exception by both parties, was recommitted, and in October, 1899, a second report was made, which showed that Berry's indebtedness to McGhee on that account was \$3,192.84, with some interest. Upon exceptions by Berry, that report was recommitted, but no new account was taken. In February, 1892, a compromise was made between Berry and McGhee, in which it was agreed that the former was indebted to the latter in the sum of \$3,000, as of September, 1896, and a decree confirming such compromise, and giving judgment against Berry for that sum, was entered by the court on May 20, 1902, in the suit for the settlement of their partnership affairs. That order was set aside at the instance of Langhorne, through his counsel, on the ground that he was interested in the matter, and desired to assert his rights in relation thereto. Nothing further was done in that case.

By the compromise agreement between Berry and McGhee, it appeared that the former had received out of the partnership business \$3,000 more than he was entitled to; thus showing that McGhee, as between himself and Berry, was entitled to the whole of the proceeds of the property conveyed to Eubank, trustee (that being less than the \$3,650 note), and that Berry would still be indebted to McGhee in a large sum. It thus appears, if the compromise agreement was binding upon the plaintiff, that McGhee had the right, under the agreement of May 7th, to have so much of the proceeds of the property received by the plaintiff from Eubank, trustee, applied to the satisfaction of the \$2,700 note sued on, as might be necessary for that purpose, and to have a judgment against the plaintiff for the residue thereof, after setting off or deducting therefrom an amount equal to the \$350 note and its interest.

The trial court did this, and there is no error in its action, unless, as the plaintiff insists, the compromise in question is not binding upon him, or the pleadings in the case did not authorize such judgment.

It is true the plaintiff was no party to the compromise, nor to the suit for a settlement of the partnership affairs of Berry and McGhee, in which the compromise was made. The agreement of May 7th did not provide that he should be a party to the settlement between Berry and McGhee, whether made with or without litigation. He knew that the compromise, settling their partnership accounts, had been made. At his instance the order of the court confirming their agreement of compromise was set aside, in order that he might look into it and assert his rights in relation thereto. Although more than a year elapsed after that order was set aside at his instance before this case was tried, nothing was done in that case. He made no effort to show that the sum of \$3,000 agreed upon by the compromise was not justly due from Berry to McGhee on their partnership accounts; and there is no suggestion here now that in making the compromise Berry and McGhee were guilty of any fraud or collusion, or that the sum agreed upon was in excess of what Berry owed McGhee on that account. Under all the facts and circumstances of the case, we are of opinion that the compromise is binding upon the plaintiff.

It is insisted that, under the pleadings in the cause, even if the compromise be binding upon the plaintiff, the defendants could not have any part of the moneys received by the plaintiff from Eubank, trustee, treated as payments on the \$3,650, or any renewal thereof, because there was no account of payments filed with the plea of nil debit.

It is true that the account filed by the defendants, showing what sums had been received by the plaintiff from the proceeds of the property conveyed to Eubank, trustee, was described as an account of set-offs. Our statute (Code 1887, § 3298; Va. Code 1904, p. 1737) treats payment and set-off together, and places them upon the same ground, in prescribing the mode of relying on them as matters of defense. *Allen v. Hart*, 18 Grat., at page 734.

Where the items of an account filed with a plea of payment, or with a plea under which payment may be proved, as nil debit, are so described as to give the plaintiff notice of their character, the defendants ought not to be deprived of the right to show that such items, or any of them, are payments, because they are described generally in the account filed as an account of offsets.

In the case of *Trimyer v. Pollard*, 5 Grat. 460, all the items in the account filed were described as offsets, yet the court held that an item in the account so described, which appeared to be a payment, and not a set-off, should be treated as a payment. In

so holding, Judge Allen (page 476) said: "The items are distinctly stated, and if from that statement it appears that any one of the items consisted of a payment, and not an offset, the general description of the account as an account of offsets ought not to affect the rights of the parties. The notice of the items is to be obtained from the face of the account, and, if the nature of it is there distinctly stated, the statute is complied with."

While the account filed in this case is described as a statement of offsets, the items are described as so much cash paid the plaintiff by Eubank, trustee, etc., at various times, and distinctly informed the plaintiff of the character of the defendants' claim, and entitled the defendants to prove such items to be payments.

A further objection is made that the defendants could not have allowed as offsets any part of the money received by the plaintiff from Eubank, trustee, because McGhee could not have maintained an independent action therefor against the plaintiff.

By the terms of the agreement of May 7th, the moneys received by the plaintiff from Eubank, trustee, to the extent of McGhee's interest therein, not exceeding the amount of the \$3,650 note, were to be credited thereon. McGhee, from sources other than his interest in the proceeds of the property conveyed to Eubank, trustee, paid the interest on that note and renewals thereof, and reduced the note from \$3,650 to \$2,700. These payments, together with the sums which the plaintiff received from Eubank, trustee, more than satisfied the \$3,650 note; and, to the extent of such overpayment, the plaintiff had moneys in his hands to which McGhee was entitled, and which could have been recovered by McGhee from Langhorne by an action of assumpsit. For wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. *Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *B. & O. R. Co. v. Burke & Herbert*, 102 Va. 643, 47 S. E. 824, and cases cited.

Without discussing further the objections urged by the plaintiff in error to the action of the circuit court, it is sufficient to say that we are of opinion that there is no error in its judgment, and that it must be affirmed.

(137 N. C. 68)

HUTCHINS v. SCHOOL COMMITTEE OF TOWN OF DURHAM.

(Supreme Court of North Carolina. Nov. 30, 1904.)

SCHOOLS—AUTHORITY OF BOARD—EPIDEMIC OF SMALLPOX—VACCINATION.

1. Under the charter of a city, giving the school board power to prescribe such rules as

¶ 1. See *Schools and School Districts*, vol. 42, Cent. Dig. §§ 321, 329.

may be just and lawful for the management of the school, the board had authority, at a time when an epidemic of smallpox prevailed, to make vaccination a prerequisite to a scholar's attendance; and it was applicable to a child, though, owing to her physical condition, vaccination would be dangerous.

Appeal from Superior Court, Durham County; Bryan, Judge.

Mandamus by J. W. Hutchins to compel the school committee of the town of Durham to admit plaintiff's daughter to the school. From a judgment for defendant, plaintiff appeals. Affirmed.

Manning & Foushee and Boone & Reade, for appellant. J. Crawford Biggs, for appellee.

CLARK, C. J. This is an application for a mandamus to the defendant public school committee to admit the daughter of the plaintiff to the public schools. The sole question presented is whether the following resolution is a reasonable exercise of the powers of the school committee of the city of Durham: "Whereas, from the report and recommendation of Dr. N. M. Johnson, Superintendent of Health of Durham county, in the judgment of this committee, general vaccination of teachers and children attending the schools is desired and required for the public safety: Now, therefore, be it resolved that no teacher or pupil be allowed to attend any school of the city of Durham after April 1, 1904, who does not present to the principal of such school a certificate of a physician of the city showing that such teacher or pupil has been successfully vaccinated within three years from that time, unless such person has been vaccinated within ten days preceding the date he or she presents himself or herself for such attendance, and this resolution shall be a permanent regulation of the schools." An epidemic of smallpox prevailed in the city of Durham and its suburbs last spring, not less than 1,000 persons being attacked; and the above resolution was passed as a protection to the 2,500 children in the schools of that city, the attendance in which had fallen off 40 per cent. by reason of the fear of contagion. These facts are averred in the answer and found to be true by the judge. In our judgment, the resolution was a proper and reasonable exercise of the powers of the defendant.

This is not a question of compulsory vaccination under legislative authority—that matter was before us and settled in *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691—but simply whether, if a child is not vaccinated, the school board can, as a precautionary measure, exclude all such from the school, by a resolution, under the power given in the charter to "have entire and exclusive control of the public school interest and property in the town of Durham, prescribe rules and regulations * * * and do all other acts that may be just and lawful to conduct and manage

the public school interests in said town." A similar resolution passed by the St. Louis board of public schools was held reasonable and valid in *Re Rebenack*, 62 Mo. App. 8; the court saying: "In the nature of things, it must rest with the boards to determine what regulations are needful for a safe and proper management of the schools, and for the physical and moral health of the pupils intrusted to their care. If said regulations are not oppressive or arbitrary, the court cannot or should not interfere." The same ruling was made as to a similar resolution in *Duffield v. School Dist.*, 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152; the court holding: "A school board has power to adopt reasonable health regulations for the benefit of pupils and the general public, and has the right to exclude from the schools those who do not comply with the regulations of the city authorities and the school board requiring a certificate of vaccination as a condition of attendance." To the same purport it is said in *State v. Zimmerman*, 86 Minn. 353, 90 N. W. 783, 58 L. R. A. 78, 91 Am. St. Rep. 351: "The welfare of the many is superior to that of the few, and, as regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the right of any pupil to attend the public schools." In *Blue v. Beach* (Ind. Sup.) 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195, it is pointed out that the constitutional guaranty that tuition shall be free and the schools equally open to all is necessarily subject to reasonable regulations to enforce discipline by expulsion of the disorderly, and protection of the morals and health of the pupils. The above cases are cited with approval in *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691. To same purport is *Sherman v. Charleston*, 8 Cush. 160, where Shaw, C. J., says: "The right to attend is not absolute, but one to be enjoyed by all on reasonable conditions."

The plaintiff relies upon *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, 59 Am. St. Rep. 262, that, in the absence of express legislative power, a resolution requiring vaccination as a prerequisite to attending schools is unreasonable, when smallpox does not exist in the community, and there is no reasonable ground to apprehend its appearance. We are not inclined to follow that authority. With the present rapid means of intercommunication, smallpox may make its appearance in any community at any moment without any notice given beforehand, and incalculable havoc be made, especially among the school children, which cannot be remedied by a subsequent order excluding the nonvaccinated. "An ounce of prevention is worth a pound of cure." Besides, that case is not in point here, where smallpox had been epidemic, and was still threatening. The language of the resolution making it "permanent" will not prevent its repeal if upon

the subsidence of the danger the school board of that day shall deem it proper to repeal. If the action of the board is not satisfactory to the public, a new board will be elected who will rescind the resolution.

The fact that it would be dangerous to vaccinate the plaintiff's daughter, owing to her physical condition, would be a defense for her to an order for general compulsory vaccination (*State v. Hay*, supra), but is no reason why she should be excepted from a resolution excluding from the school all children who have not been vaccinated. That she cannot safely be vaccinated may make it preferable that she herself should run the risk of taking the smallpox, but is no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children are vaccinated, there are always some whose vaccination is imperfect, and danger to them should not be increased by admitting those not vaccinated at all. Besides, a rule not enforced to all alike will soon cease to be a rule enforceable at all.

No error.

(137 N. C. 63)

**BOARD OF EDUCATION OF IREDELL
COUNTY v. BOARD OF COM'RS
OF IREDELL COUNTY et al.**

(Supreme Court of North Carolina. Nov. 30, 1904.)

**TAXATION—COLLECTION OF SCHOOL TAX—COM-
PENSATION.**

1. Under Code, § 2563, providing that the sheriff shall annually on or before December 31st pay to the county treasurer the whole amount levied for school purposes, construed in connection with section 723, providing that the sheriff shall be entitled to the same commissions on county taxes that he is given by Acts 1903, p. 403, c. 251, § 92, for the collection of state taxes, a sheriff is entitled to commission for collecting the school tax.

Appeal from Superior Court, Iredell County; Ferguson, Judge.

Action by the board of education of Iredell county against the board of commissioners of Iredell county and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Armfield & Turner and R. B. McLaughlin, for appellant. W. G. Lewis and J. B. Armfield, for appellees.

MONTGOMERY, J. This is a controversy without action, submitted under section 567 of the Code. The facts agreed upon present for our determination the question whether or not a sheriff is allowed to retain a commission out of the school taxes collected by him. The defendant Summers was sheriff of Iredell county, and paid to the treasurer of that county the whole amount of the school taxes levied for the county for the year 1903, less 5 per cent. commissions as compensation for himself for collecting the school taxes, and also less the amount of in-

solvents. The plaintiffs, the board of education of Iredell county, contend that under a proper construction of the law the sheriff should have paid the whole amount levied for school purposes, less the insolvents, and that he had no right to deduct therefrom any commissions for collecting the taxes. The sheriff contends that the settlement he made with the treasurer was a proper one, and that he had a right to deduct his commissions from the school taxes collected by him.

The plaintiffs base their contention on section 2563 of the Code, in which it is provided that the sheriff of each county shall pay annually, in money, on or before the 31st day of December of each year, the whole amount levied, less such sum or sums as may be allowed on account of insolvents for the current year, by both state and county, for school purposes. The insistence is that the language of that statute is clear, that the words used are unambiguous, and that, therefore, there is nothing left to be done by way of interpretation by the courts. They further contend that results that may flow from the statute, the motives of the legislators, and policies of the law cannot be considered, and that common sense and good faith should be chiefly used here, as in every instance, as the great canon of interpretation. In the briefs filed by counsel for both the appellant and appellees the fact that section 2563 of the Code is brought forward, word for word, in section 54, p. 61, c. 4, Acts 1901 (an act to revise and consolidate the public school law), except that the money is payable to the treasurer of the county school fund, instead of to the treasurer of the county board of education, was overlooked. There is no fault to be found with the principles of interpretation for which the plaintiffs contend, but it is nevertheless to be understood that the object of all interpretation of statutes is to carry out the intention of the lawmakers, and, when the intention is ascertained, that it must always govern. And it is also a well-known principle of construction that for the proper interpretation of a statute other statutes in *pari materia* may and ought to be considered in connection with the statute under review. Upon a reading of section 2563 it is seen that no commission is allowed the sheriff for collecting the school taxes of the counties, in so many words. Yet in the same section pains and penalties are put upon the sheriff, and his bondsmen subjected to civil actions, if he should fail to collect and pay over the taxes. If that section is to be literally construed, then we have the state requiring onerous and responsible duties to be performed by one of its citizens, no more interested in the cause of public education than others, without compensation, and with the dread of penalties and forfeitures hanging over him, and the fear of harassment to his bondsmen in a civil suit, if he should fail

to perform such service for the commonwealth. Such a construction of that statute would be a harsh one, and would work great injustice to the tax collectors of the state. Now, if there are other statutes or laws of our state in *pari materia*—that is, statutes concerning the revenues, the officers who collect them, and the compensation to which they are entitled for their services—fair dealing and common sense require that they be considered in connection with Code, § 2563 (section 54, p. 61, c. 4, Acts 1901). It is provided in section 723 of the Code that the county taxes shall be collected by the sheriff of the county, who shall be entitled to the same commissions, and subject to the same rules and regulations, in respect to his settlement of the said taxes with the county treasurer, as he is in his settlement of the public taxes with the treasurer of the state. Now, what are these rules and regulations which the law makes applicable to the settlement of state taxes? In chapter 251, p. 403, § 92, Acts 1903, among other deductions which the auditor is required to make in the settlement of the state taxes with the sheriff, is one of 5 per cent. commissions on the amount collected. If the three statutes—section 723 of the Code, section 54, p. 61, c. 4, Acts 1901 (section 2563, Code), and section 92, p. 403, c. 251, Acts 1903—be construed together, it seems to be clear that the defendant in this controversy is right in his contention—that is, that he is entitled to 5 per cent. commissions on the amount he collected of the school taxes—unless it be, as the plaintiffs contend, that the words “county taxes” in section 723 mean only taxes to be disbursed for general county purposes, and exclude the school taxes which are collected by the sheriff and paid to the treasurer of the county. We are of the opinion that, so far as this action is concerned, the words “county taxes” include all amounts levied by taxation, and which are to be used in the counties where they are collected, and where they are paid to the county treasurer. We are not inadvertent to the fact that all taxes levied for school purposes are known as “state taxes” because they are assessed and levied by the counties by the direct mandate of the General Assembly and the rate of taxation fixed by that body. But the ordinary taxes levied for school purposes under sections 2 and 3, p. 323, of chapter 247, Acts 1903, are collected by the sheriffs of each county, and paid to the treasurers thereof. Acts 1901, p. 61, c. 4, § 54. And the amount is apportioned by the county boards of education among the various townships of the county, and paid out by the county treasurer upon orders signed by at least two members of the school committee and by the county superintendent. The state board of education has no hand in the apportionment of that money. It is the work entirely of the county boards of education. There is a school fund, however, derived from the

sources mentioned in section 4, p. 45, c. 4, Acts 1901, which the state board of education does apportion annually among the several counties of the state, as an additional amount to that apportioned by the county boards of education, among the several townships. But, in addition to what we have said, if section 54, p. 61, c. 4, Acts 1901 (Code, § 2563), be carefully read, it will appear that the intention of the lawmakers was more to fix the time when the sheriff should pay over the school taxes than to prescribe a method of settlement. It is a matter of common information that those who conduct the public school system of our state, knowing that the spring and summer months of the year constitute the most favorable season for farm and outdoor work, and that most of our working people are engaged in such work, have recognized the fall and winter months as the most propitious time for the conducting of the public schools. Collection of the money for such purposes, therefore, must be made at an early date, after the beginning of the public school term, to meet the necessary expenses; and therefore it was enacted by section 2563 of the Code (Acts 1901, p. 61, c. 4, § 54) that the sheriffs of the several counties should collect and pay over the whole of the school taxes by the 31st of December of each year. At the time of the passage of the act (Laws 1881, p. 382, c. 200, § 35) which is brought forward in the Code as section 2563, the revenue law allowed, as does the law now in force, sheriffs until the first Monday in February of each year to make their final settlement of county taxes, and until the second Monday in January to settle their state tax accounts with the boards of commissioners, and to pay afterwards the amount to the State Treasurer in such manner or at such a place as he may direct. It is to be observed that there is no provision made in the machinery act (Laws 1903, p. 355, c. 251) by which sheriffs are allowed a commission for collection of county taxes. Section 97 of that act bears upon that subject, and commissions on amount collected of county taxes are left out. They can only be allowed under section 723 of the Code. His honor gave judgment upon the facts agreed in favor of the defendant, and we affirm the judgment.

Affirmed.

(127 N. C. 91)

EARNHARDT et ux. v. CLEMENT et al.

(Supreme Court of North Carolina. Nov. 30, 1904.)

CONTRACTS TO BEQUEATH PROPERTY—SPECIFIC ENFORCEMENT—PROOF — INSTRUCTIONS—ESTOPPEL—PLEADING—PARTIES—TRIAL.

1. Under Code, §§ 178, 183, providing that, when a married woman is a party, her husband must be joined, unless the action concerns her separate property, a married woman may sue alone for specific performance of a contract to bequeath her certain property in consideration of personal services.

2. Allowing the examination of a witness before the introduction of evidence to show the competency of his testimony is within the discretion of the court.

3. An exception to refusal to nonsuit at the close of plaintiff's case is waived by introduction of evidence by defendant without renewal of the motion at the close of all the evidence.

4. Instructions that, on a certain state of facts, "plaintiff cannot recover," are properly refused, under the system of procedure by which the jury does not render a general verdict, but responds to specific issues.

5. Where testator contracted to bequeath certain securities to plaintiff, but, instead, bequeathed them in trust for her, reception of the dividends for a number of years did not estop her from suing for specific performance of the contract.

6. A bequest of property in trust is not a substantial compliance with a contract to bequeath it absolutely.

7. The specific enforcement of a contract to bequeath certain personalty in return for personal services is not unjust, where the contract is for a valuable consideration, not procured by undue influence or any imposition, is faithfully performed, and the decree will not result in hardship.

8. Under Code, § 413, prohibiting the court from expressing an opinion upon the weight of the evidence, an instruction, in an action to specifically enforce a contract to bequeath certain property in return for personal services, that such a contract, when attempted to be established by parol, is regarded with suspicion, and not sustained unless founded upon a valuable consideration, and shown by strong, clear, and convincing proof, is sufficiently favorable to defendants.

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by A. E. Earnhardt and wife against L. H. Clement, as executor, and others. From a judgment for plaintiffs, defendants appeal. **Affirmed.**

Burton Craige and L. H. Clement, for appellants. Overman & Gregory, for appellees.

OLARK, C. J. This is an action for specific performance of a contract to bequeath the 50 shares of bank stock which the testator then owned to the feme plaintiff absolutely and in her own right, in consideration of services to be rendered by her to the testator. Her husband is joined as coplaintiff, but he has no interest in the action, and it was unnecessary. Code, § 178 (1), and section 183. Upon issues submitted, the jury found that the testator so contracted; that the feme plaintiff faithfully and fully performed the services stipulated for, but that the testator bequeathed the said bank stock, not absolutely to plaintiff in her own right, as agreed, but to a trustee for the benefit of plaintiff during her life, and after her death to her children, and, if she should die without issue, then to the grandchildren of the testator. The court having rendered judgment in favor of the plaintiffs, the defendants appealed, assigning as errors:

1. The permission to examine a medical witness out of his order upon assurance that

§ 7. See Specific Performance, vol. 44, Cent. Dig. §§ 223, 224.

the preliminary evidence to make it competent would be introduced later, which was done. This exception was properly abandoned here. It was a matter in the discretion of the trial court. *Ripley v. Arledge*, 94 N. C. 467.

2. The exception for refusal to nonsuit at the close of plaintiff's evidence was waived by the introduction of evidence by defendants, without renewing the motion at the close of all the evidence. *Jones v. Warren*, 134 N. C. 392, 46 S. E. 740.

3. Exceptions to refusal to grant prayers concluding "plaintiff is not entitled to recover" cannot be sustained under the present system, in which the jury does not render a general verdict, but responds to specific issues. *Witsell v. Railroad*, 120 N. C. 553, 27 S. E. 125; *Bottoms v. Railroad*, 109 N. C. 72, 13 S. E. 738, and cases cited. Besides, if in proper form, the instructions were properly refused. The first prayer asked an instruction that, if the jury believed the evidence, the plaintiff could not recover. The evidence was properly left to the jury. The second prayer, that the bequest in trust for life, etc., was a substantial compliance with the contract alleged by the plaintiff, was properly refused, and needs no discussion. The third prayer was that the feme plaintiff, having received the dividends on the stock for seven years, had elected to take under the will, and is estopped from claiming under the contract, and the fourth prayer is that the plaintiffs are estopped by accepting the dividends on the stock from claiming against the will. It is true, as the defendants claim, that a party cannot claim benefits under the will and against it (*Brown v. Ward*, 103 N. C. 173, 9 S. E. 300; *Sigmon v. Hawn*, 87 N. C. 450), and that the estoppel thereupon arising can be enforced against femes covert and infants (*McQueen v. McQueen*, 55 N. C. 16, 62 Am. Dec. 205; *Robertson v. Stevens*, 36 N. C. 247). But before the doctrine of election can arise, "two things are essential: (1) The testator must give property of his own; and (2) he must profess to dispose of property belonging to his donee." 11 Am. & Eng. Enc. Law, 65; *Adams, Eq. § 93*; *Price v. Price*, 133 N. C. 510, 45 S. E. 855. This is not the case here. There are no inconsistent benefits. By receiving the dividends on stock, the capital of which she was entitled to have absolutely, she only accepted part of what was her due, and nothing beyond her own. It put neither her nor the estate at a disadvantage. The statute of limitations was pleaded, and is a different matter from an estoppel. The statute of limitations runs against a married woman since the passage of chapter 78, p. 209, Pub. Laws 1899, but the feme plaintiff brought this action against the trustee within three years after becoming of age. The judge properly told the jury that the action was not barred, to which, indeed, the defendants did not except; and the mere receipt of the dividends on her own

stock does not, as we have said, bar her claiming the stock itself.

The defendants moved for judgment on the verdict upon the ground that the decree of specific performance would be inequitable and unjust. The motion was properly denied. The contract was (a) for a valuable and fair consideration; (b) fair, just, and mutual; (c) not procured by undue influence or any imposition; (d) plaintiff fully and faithfully performed her part; and (e) the decree is not oppressive, harsh, or inequitable, nor will it work hardship and injustice to any one. *Boles v. Caudle*, 133 N. C. 534, 45 S. E. 835. If, as the jury find, the contract was that the feme plaintiff should have this stock absolutely after the testator's death, and she rendered, as is found, the services agreed upon, there is no reason for requiring her to take merely the dividends thereon; nor is she estopped by having received only the dividends (less the trustee's commissions) for several years. There are dangers, in litigation of this kind, to set up alleged contracts with persons since deceased; but, aside from the protection of section 590 of the Code, the following instruction of the court, which is unexcepted to, was fully as careful of the defendants' interests as they could ask. His honor told the jury that "a person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained, except upon the strongest evidence that it was founded upon a valuable consideration, and except upon strong, clear, and convincing proof." He was prohibited by section 413 of the Code from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. That was a matter for the jury, subject to the corrective power of the judge to set aside the verdict. *Jones v. Warren*, supra; *Ray v. Long*, 132 N. C. 894, 44 S. E. 652; *Lehew v. Hewett*, 130 N. C. 22, 40 S. E. 769.

No error.

(137 N. C. 72)

CANNADY v. CITY OF DURHAM.

(Supreme Court of North Carolina. Nov. 30, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—POWERS OF STREET COMMISSIONER—QUESTIONS OF FACT—INSTRUCTIONS—HARMLESS ERROR.

1. In an action against a city for injuries resulting from a defective sidewalk, whether or not the city had established a sidewalk at the point where the accident occurred was a question of fact.

2. A street commissioner of a city has no power to appropriate and take charge of land for a sidewalk for the city.

3. In an action against a city for injuries from a defective sidewalk, a charge that, if plaintiff knew of the defect and its dangerous

character, he was bound to use ordinary care in protecting himself from what he knew to be a menacing danger, did not injure plaintiff in stating that he knew that the place was dangerous, as the degree of care imposed on him in view of that knowledge was the same as the court should have imposed upon him in view of his knowledge of the defect and the previous avoidance of it by himself and others.

4. An erroneous instruction on the issue of contributory negligence is harmless where the jury finds that plaintiff was not injured by defendant's negligence.

Douglas, J., dissenting.

Appeal from Superior Court, Durham County; Cooke, Judge.

Action by E. W. Cannady against the city of Durham. From a judgment for defendant, plaintiff appeals. Affirmed.

Winston & Bryant, for appellant. Manning & Foushee, for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover damages from the defendant, the city of Durham, on account of personal injuries sustained by himself through the alleged negligence of the defendant. In his complaint the plaintiff alleged that the defendant permitted for an unreasonable time a branch five or six feet wide and about three feet deep to run across and through the sidewalk on West Pine street, and to remain uncovered by a bridge or other device; and that on a dark night, there being no lamp or rail guard at the point, while going along the sidewalk, he fell in and hurt his knee. The defendant, in its answer, denied that the city had established a sidewalk or walkway at the point where the plaintiff was hurt, and also set up against the plaintiff's cause of action the plea of contributory negligence. There was no exception made to any part of the evidence. The plaintiff requested twelve instructions. His honor gave five as they were asked, refused to give three, and modified four of them. He gave six special instructions at the request of the defendant, and then submitted the charge in chief. The plaintiff excepted specifically to every sentence of his honor's charge. He excepted to the giving of the six special instructions requested by the defendant, and he excepted to the refusal of his honor to give the plaintiff's three special requests 1, 5, 12, and to the modification of his four requests numbered 2, 3, 4, and 6.

The exception by the plaintiff to everything the judge said on the trial has, of course, caused us to read all that he said to the jury with care, and, after having done so, we think none of his exceptions ought to be sustained; and we think it only necessary to consider two of the questions raised on the appeal—one concerning the instructions given in connection with the evidence bearing on whether or not the city had established a sidewalk at the point where plaintiff was hurt, and the other upon the question of the alleged contributory negli-

gence of the plaintiff. If the city had established a sidewalk on the west side of Pine street down to the branch a few feet below Hight's house, where plaintiff was hurt, then the plaintiff would have been entitled to instructions 1 and 5 asked by him. Whether or not the city had established a sidewalk at that point was a question of fact to be settled by admission in the answer or by evidence on the trial. In the answer it was denied by the defendant. Several witnesses testified that there had been no conveyance of the land to the city, no condemnation of the land, or any appropriation or control of the same by the city; and several testified that no work had ever been done on the street by the city. The only evidence relied on by the plaintiff to show either appropriation of the strip of land as a street, or that the city had ever had control of it, was the testimony of Elliott and of John B. Christian. Elliott said that in 1897-1899 he sold the property bordering on Pine street, where the plaintiff was hurt, after having divided it into lots, and that there were no sidewalks there when he sold it, and that the only work the town had ever done was to make a little water drain or ditch on the sides of the street, and to keep the ditch cleaned out. He said further that after he sold the land on Pine street "the purchasers built upon their lots, and that, of course, made the sidewalk." The witness Christian said that he had been a street commissioner of the city of Durham for many years; that the town never laid off any sidewalk on Pine street, and had never done any work there from Proctor street, and that the walkway was of the make of the travelers; that the city had built and worked the street at that point. He said he did not remember that either of the street committee had ever visited that part of the city, and that he took his orders from the chairman of the street committee. He said further that when Sam Hight was building his house he was there, and directed him to move it back from the sidewalk, because he was building it too near, and that Hight did move it back further from the sidewalk.

The fifth prayer of the plaintiff for special instructions (which his honor declined to give) was in these words: "If you believe the evidence in this case, you will answer the first issue [whether the plaintiff was injured by the negligence of the plaintiff] 'Yes.'" That instruction was based on the testimony of Christian that he ordered Hight, when he was building his house, to move it back from the sidewalk, and that Hight obeyed the order, and upon the plaintiff's testimony that while walking along the smooth, even walk just south of Hight's house, on his way home, he stepped into the branch, the bank of which was perpendicular on his side, and hurt his leg. The contention is that Christian, the street commissioner, was acting for the city of Durham,

and also that as street commissioner he had the power to appropriate and take charge of the land for a sidewalk for the city. We cannot admit that any such powers reside in a street commissioner.

The first prayer for instructions asked by the plaintiff (which was declined by his honor) was in these words: "It was the duty of the city of Durham to repair the streets and sidewalks of the city, and to make and keep them reasonably safe and convenient for persons traveling to and from on them." The plaintiff insisted that that instruction should have been given, for the reason that it was alleged in the complaint that the city had established a sidewalk on the west side of Pine street down to the point where he was hurt, and that that allegation was not denied in the answer. Upon a reading of the answer it must be admitted that the defendant was very cautious in the wording of its denial. In fact, it may be said that it was ingeniously done, but still effectively so. As we have said, the main question of fact in the case was whether or not the defendant had established and assumed control of the ground where the plaintiff was hurt as a street. It was denied in the answer, and there was evidence that it had not been so established or appropriated. His honor submitted that question fairly to the jury, with proper instructions on the law as to the effect of their finding, as the following parts of his charge will show. The plaintiff asked his honor to instruct the jury: "If you find from the evidence that the defendant permitted the sidewalk on the west side of Pine street, within the corporate limits of the city, to remain without any bridge or covering over a branch five or six feet wide and three feet deep, without a guard or rail, and that the north embankment of the branch was perpendicular, or about so, and that defendant failed to light the same, and permitted such conditions to exist for several years, this would be negligence; and, if this was the proximate cause of the injury to plaintiff, you will answer the first issue 'Yes.'" In line with that instruction he told the jury: "If you find from the evidence that defendant had established the sidewalk, or that it had been used as a walkway for a considerable time with the knowledge of defendant, and that defendant had assumed control over it on the west side of Pine street, within the corporate limits of the city, and defendant permitted the same to remain without a bridge or covering over a branch five or six feet wide and three feet deep, without a guard or rail, and that the north embankment of the branch was perpendicular, or about so, and that defendant failed to light the same, and permitted such conditions to exist for several years, this would be negligence; and, if this was the proximate cause of the injury to plaintiff, you will answer the first issue 'Yes.'" He fur-

ther instructed the jury that: "If you find from the evidence that there was a side or walk way used with the knowledge of the defendant for a considerable time, and that defendant had exercised any control over the sidewalk, and failed to place a bridge or other proper covering over the place where plaintiff alleges he was injured, that it was not lighted, and remained in this condition for an unreasonable length of time, this would be negligence, and, if it caused plaintiff's injury, you will answer the first issue 'Yes.'" On the question of the alleged contributory negligence of the plaintiff the court gave, at request of defendant, the following instruction: "If the jury believe the evidence of plaintiff, he well knew of the branch, of its location and dangerous character, of the passway over the bridge traveled by foot passengers; that he had for two months frequently, and almost daily, traveled Pine street, and was familiar with the location of the houses on the street, and where the sidewalk turned into the street and proceeded across the bridge; that he had seen and observed the danger of the branch for about two months almost daily—then the plaintiff was bound to act upon his information, and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it; and if the jury shall find that the plaintiff failed to exercise ordinary care the jury will answer the second issue 'Yes.'" The plaintiff had testified that whenever he had been near where he was hurt he had turned off the sidewalk about five feet from the branch, and just before reaching the branch had walked along the edge of the street, and crossed the branch on the bridge, just as other people did; and that before he was hurt he made one trip a day for a week, and two or three times a week for the balance of the time. He said further that he had never been along there in the night before, and that he did not remember ever noticing the place at the branch before he was hurt. The objection of the plaintiff to the instruction was that the court stated, in substance, that the point where the plaintiff was hurt was to the knowledge of the plaintiff a dangerous place, and that that was in direct contradiction of the plaintiff on this point, he having stated in his examination that he did not remember to have noticed the place where he was hurt before that occasion. We cannot see how the plaintiff's case was hurt by the instruction. The degree of care which his honor laid down as the rule of conduct to be observed by the plaintiff when he failed to turn off from the branch where he was hurt and to follow the path over the bridge on the street was exactly and precisely the same degree of care which his honor should have instructed the jury that the plaintiff was to observe on account of the plaintiff's knowledge of the

size and depth of the stream and the avoidance of it by himself and others in going along that way. It is to be observed that the plaintiff did not say that he mistook his way, and went to the branch, and that he intended to turn off where he usually did, but that the darkness of the night and the want of a light prevented him from doing so. He simply said that he followed the sidewalk. Bpt, even if the instruction had been a substantial error, it was harmless, because the jury had found that the plaintiff was not hurt by the defendant's negligence.

No error.

DOUGLAS, J., dissents.

(137 N. C. 48)

ERWIN v. MORRIS et al.

(Supreme Court of North Carolina. Nov. 30, 1904.)

INTEREST—USURY—VALIDITY OF CONTRACT—
CONTRACTS—CONSTRUCTION.

1. Under the statute prohibiting the charging of usury, a promise to pay usurious interest is void and unenforceable.

2. A vendee of mortgaged land agreed with his grantor, the mortgagor, to pay the mortgagee what was actually due on the debt. The mortgage note called for usurious interest, and the vendee sued to restrain a sale under the mortgage; he alleging a tender of the amount actually due. *Held*, that the injunction should have been continued to a final hearing, to determine whether the words "actually due" meant the face of the note, or the amount legally due.

Appeal from Superior Court, Cabarrus County; T. A. McNeill, Judge.

Suit by J. A. Erwin against Z. A. Morris and others. From an order vacating a restraining order and refusing an injunction, plaintiff appeals. Reversed.

Montgomery & Crowell, for appellant. Osborne, Maxwell & Keerans, for appellees.

CONNOR, J. This is an appeal from an interlocutory order dissolving a restraining order and refusing an injunction to the hearing. The complaint, considered as an affidavit, set forth: That, at a sale of the land described therein, Laura E. Moss, who afterwards intermarried with O. W. Swink, purchased same for the sum of \$3,884. That, not having the money to pay therefor, the defendants' intestate, P. M. Morris, agreed to furnish it, and take her note secured by mortgage on the land. That he did furnish the sum of \$3,884, and took from Laura E. a note dated December, 1894, for \$4,784, carrying interest at 8 per cent., payable semi-annually; \$900 being added to the amount furnished, as a bonus for the loan of the money. That no other consideration passed from Morris to Laura E. for the promise to pay said amount. That Laura E. executed a mortgage on the land to secure the note. Thereafter certain payments were made on

the note. Laura E. Moss on March 23, 1903, tendered the defendant Z. A. Morris, one of the executors of said P. M. Morris, the full amount due, less the sum of \$900 charged as a bonus, in full payment of the note, which he refused to accept. "That the said Laura E. Moss has sold and conveyed, for valuable consideration, by deed duly recorded April 1, 1904, the said tract of land to plaintiff, under a contract that plaintiff is to pay defendants whatever amount is actually due the defendants on account of the note and mortgage, together with all the rights, interests, and equities of the said Laura E. Moss in said land under said mortgage." That the plaintiff is ready, able, and willing to pay the defendants the amount actually due on the same, and tenders such amount. That defendants, pursuant to the power contained in the mortgage, have advertised the land for sale. His honor Judge Shaw granted a temporary restraining order, with notice to the defendants to show cause. His honor Judge McNeill, upon the return of the order, vacated the restraining order and refused the injunction. The plaintiff appealed.

The case is before us upon the plaintiff's affidavit, defendants not having filed any answer thereto. The question presented—whether the grantee of the mortgage may avail himself of the plea of usury included in the debt secured by the mortgage, or make the usury the basis for an action for equitable relief—has never before been presented to or decided by this court. It is well settled by our decisions that, under the statute prohibiting the charging of usury, the promise to pay the usurious interest is void and cannot be enforced. *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177; *s. c.* on rehearing, 112 N. C. 553, 17 S. E. 676. The question presented upon this appeal is whether the defense is confined to the debtor, or, when the land is sought to be subjected, may be set up by the grantee of a mortgage. The allegation is that the plaintiff took the title to the land upon a promise to pay what was "actually due" on the debt. It is not made clear what the real agreement was. If by the term "actually due" is meant due on the face of the note (that is, in consideration of the conveyance of the land for a fixed price, the face value of the note was reserved by the plaintiff, with a promise to pay it to the defendants), it would seem that such an agreement amounted to an application by the mortgagor of so much of the purchase money as was necessary to pay the note. If, however, the plaintiff simply assumed the position of the mortgagor, treating the word "actually" as meaning legally due, another and very different question would be presented. The authorities from other courts are not in harmony. In the present condition of the record, we prefer not to decide the question. The injunction should have been continued to the final hearing, when the contract between the plaintiff and mortgagor can be

ascertained. *McCorkle v. Brem*, 76 N. C. 407; *Marshall v. Commissioners*, 89 N. C. 103.

Error.

(137 N. C. 30)

BRITTAIN v. WESTALL.

(Supreme Court of North Carolina. Nov. 30, 1904.)

AUTHORITY OF AGENT—PURCHASE FOR CASH—PURCHASE ON CREDIT—WHEN BINDING ON PRINCIPAL—ACTION AGAINST PRINCIPAL—INSTRUCTIONS.

1. If express authority to buy on credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal.

2. In an action for goods sold defendant's agent on credit, the goods having been received by defendant, the defense was that the agent had been given cash to make the purchase, and that he had no express authority to buy on credit, and it appeared from the written contract of agency that the agent could buy only for cash. *Held* error to refuse an instruction that the contract did not authorize a purchase on credit.

3. It was error to refuse an instruction that, although the goods came into defendant's possession, and were appropriated by him, he would not be liable to plaintiff unless he had authorized the agent to buy on credit, or appropriated the goods knowing that he had.

4. It is only after a *prima facie* case of agency has been established that the acts and declarations of the agent become competent against his alleged principal.

Appeal from Superior Court, Catawba County; McNeill, Judge.

Action by D. M. Brittain against W. H. Westall. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Self & Whitener, for appellant. L. L. Witherspoon and M. H. Yount, for appellee.

WALKER, J. This case was before us at the last term upon an appeal by the plaintiff from a judgment of nonsuit, which the court rendered on motion of the defendant at the close of the testimony. 135 N. C. 492, 47 S. E. 616. We then held there was some evidence that Townsend was the agent of Westall to buy the lumber for him, and, although it was a restricted agency, and Townsend could only buy for cash, yet, if Townsend bought lumber from the plaintiff on Westall's credit, and the latter received and appropriated it to his own use, knowing at the time it had been so bought, he would be liable for its value. In order that this phase of the case might be submitted to the jury, the judgment was set aside, and a new trial awarded. A sufficient statement of the facts for an understanding of the point decided in this appeal will be found in the case as formerly reported. It may be added, though, that there was evidence at the last trial that the defendant had supplied Townsend with sufficient funds to buy the lumber. In *Patton v. Brittain*, 32 N. C. 8, it appeared that

an agent was given authority to purchase personal property for his principal, but only so far as he had cash of his principal with which he was to pay for it. The agent purchased on the credit of the principal without paying any money, and the property was delivered to the principal, who received and converted it to his own use. The court held that, when the agent violated his express instructions, and bought on credit instead of for cash, the principal had the right to repudiate the contract, and to refuse to receive the articles, but, having received and used them with knowledge that they had been purchased for him and upon his credit, the vendor could recover from him the price of the goods. It was said that the same result would follow whether the agent acted contrary to his authority, exceeded it, or had none at all; it being the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive and pay for them. A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account he cannot bind the latter by a purchase on credit, unless, perhaps, such is the well-known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. This is substantially the principle which is involved in this case, and it is sanctioned by the best authorities. See 1 Am. & Eng. Enc. of Law (2d Ed.) pp. 1020, 1021, where the cases on the subject are collated. This court has said that when the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. *Ruffin v. Mebane*, 41 N. C. 507. It may be taken, then, as a settled principle in the law of agency, that, if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. *Sprague v. Gillett*, 50 Mass. (9 Metc.) 91. The case of *Komorowski v. Krumdick*, 56 Wis. 23, 13 N. W. 881, is much like ours. The court there held that an agent to purchase property must, in order to bind his principal, who furnishes in advance the funds to make the purchase, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of such express authority or of such

a custom the agent cannot bind his principal by a purchase, upon a credit, from a person who is ignorant of his real authority as between himself and his principal, unless the property so bought is delivered to the latter, and he receives it knowing that his agent actually bought on credit, or that he had no funds in his hands at the time with which to buy the same. See, also, *Jaques v. Todd*, 3 Wend. 83; *Willard v. Buckingham*, 36 Conn. 395; *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569; *Paine v. Tillinghast*, 52 Conn. 532; *Mechem on Agency*, § 864. While these principles seem not to have been seriously questioned by the defendant, he contended that Townsend was not his agent, and that, even if he was, he had been supplied by him with more than sufficient cash with which to buy the lumber afterwards received by the defendant, and that Townsend had no express authority to buy on credit.

In order to present these questions, and have the jury pass upon them, the defendant's counsel requested the court to give certain instructions to the jury; and among others the following one, which was the subject of the defendant's second prayer: "The written contract introduced in evidence constituted Townsend the agent of Westall, with limited authority only. As such agent, Townsend had authority to buy lumber for cash, with money furnished him by Westall, but he did not have authority under said written contract to buy lumber on Westall's credit." We do not see why defendant was not entitled to this instruction. On the face of the contract it appeared that Townsend was directed to buy only for cash, and, this being so, he could not, of course, buy on credit, contrary to the instructions of his principal. Whether the defendant subsequently ratified what he did, and is therefore liable to the plaintiff, is quite another and different question.

The instruction requested in the defendant's sixth prayer was a proper one, and should have been given. It was as follows: "Although the identical lumber in controversy came into possession of defendant, and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or accepted and appropriated the lumber with notice of the fact that Townsend had bought it on his [defendant's] credit." The contract expressly required Townsend to buy for cash, and the only possible ground of defendant's liability is that he received and appropriated the lumber to his own use, knowing that his agent had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case the latter had implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 Am. & Eng. Enc. of Law, 1021, and notes.

The first and fourth prayers were properly

refused, as none of them embraced all of the facts which it was necessary for the jury to find in order to defeat the plaintiff's recovery. They were not complete, but confined only to a single aspect of the case. The instruction asked to be given in the third prayer was not warranted by the state of the evidence. The fifth prayer was substantially given. Indeed, the modification made by the court was virtually but a repetition of the language in the first part of the prayer. The seventh prayer, which was modified, and then given by the court, might well have been refused, as it is subject to the same objection as that already stated to the first and fourth prayers. It restricted the right to recover to only one view of the case, when there were others which should have been considered by the jury. Like the first and fourth prayers, it was too narrow, and therefore misleading. But the amendment of the court wrought no material change in the instruction as it was asked to be given.

With reference to the objections to testimony, we may say generally that the declarations of an agent are not competent to prove the agency. It is only after a prima facie case of agency has once been established that the acts and declarations of the agent can become competent against his alleged principal. *Francis v. Edwards*, 77 N. C. 271; *Gilbert v. James*, 86 N. C. 244; *Daniel v. Railroad* (at this term) 48 S. E. 816. When he is shown to be an agent, his acts and declarations in the course of his employment and within the scope of his agency and while he is engaged in the business (*dum fervet opus*) are competent, as in that case they are, as it were, the acts and declarations of the principal himself. What he says and does, even while engaged in transacting the business of the agency, is not competent to establish the agency, which is a preliminary fact to be shown before his acts and declarations can be admissible at all. We need not discuss the exceptions to the charge, as they may not be presented again. There was error in the refusal to give the instructions contained in the second and sixth prayers of defendant, for which there must be another trial.

New trial.

(137 N. C. 35)

STATON v. WEBB.

(Supreme Court of North Carolina. Nov. 30, 1904.)

PLEADING—FORMS OF ACTION—PRAYER FOR RELIEF—MORTGAGES—FORECLOSURE—RIGHTS OF MORTGAGEE—JUDGMENT CREDITORS OF MORTGAGOR.

1. Under Const. 1868, art. 4, § 1, and Code, § 133, abolishing distinctions between actions at law and suits in equity, and Code, § 233, providing that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, and a demand for the relief to which plaintiff supposes himself entitled, and section 260, providing that the allegations

of a pleading shall be liberally construed, an exception to a complaint, that by its form it is "for money had and received," and, as such, cannot be maintained unless the money has been actually received by defendant, is untenable.

2. As between a judgment creditor and the mortgagee, the former is entitled to the proceeds of a sale of the mortgaged property after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage, or are necessarily incident thereto; and the mortgagor cannot make a subsequent agreement with the mortgagee, giving him the entire proceeds of the sale of the land, to the exclusion of judgment creditors, under the guise of exorbitant commissions.

3. A mortgagee cannot claim an attorney's fee out of the proceeds of the sale of the mortgaged property, as against a judgment creditor of the mortgagor, in the absence of proof of authority therefor in the mortgage.

4. Although Code, § 233, provides that the complaint shall contain a demand for the relief to which plaintiff supposes himself entitled, a complaint filed by a judgment creditor of a mortgagor, stating that defendant mortgagee had sold the mortgaged premises for more than enough to pay his debt, and refused to pay the surplus to plaintiff in satisfaction of his docketed judgments, and in which the evident relief, though not stated, was to require defendant to pay over the surplus to plaintiff, was sufficient.

Appeal from Superior Court, Edgecombe County; Moore, Judge.

Action by H. L. Staton against W. G. Webb. From a judgment for plaintiff, defendant appeals. Affirmed.

The following statement of facts, taken from the defendant's brief, substantially states the case: "On February 1, 1896, Joseph Cobb executed to the defendant, Webb, a mortgage deed conveying a tract of land to secure the payment of a note for \$1,000, due January 1, 1897, with authority to sell for cash on default in the payment of said note, and apply the proceeds of sale to the payment of the note and interest, and the surplus, if any, to the said Joseph Cobb, or to his heirs.' On June 5, 1896, the plaintiff recovered four several judgments against the said Joseph Cobb in a justice's court of said county, and on the same day caused them to be duly docketed in the office of the clerk of the superior court of said county. That the amount due the said Webb on the aforesaid mortgage indebtedness on December 2, 1900, date of sale under said mortgage, was \$1,290.16, and the amount due plaintiff on said judgments on that day was \$558.57. That the said Webb was unable to secure a cash purchaser for said land. So it was finally agreed between him and the said Cobb that the land should be sold on a credit of three years. That at the same time it was further agreed between said parties that, in consideration of the labor and efforts of the said Webb to find a credit purchaser at a price in excess of the mortgage debt, such excess bid should be applied to an unsecured indebtedness of \$800 of the said Cobb to the said Webb. That said land was sold in accordance with said agreement on December 2, 1900, on these terms:

\$250 cash; \$500 payable December 2, 1901; \$500 payable December 2, 1903; and \$500 payable December 2, 1904. Deed was made to the purchaser on his making the cash payment, and executing a mortgage on the land to secure the deferred payments. At the time of the mortgage sale and the making of the aforesaid agreement with Cobb, the said Webb had no knowledge of the judgments in favor of the plaintiff. That, of the cash payment of \$250, the said Webb disbursed \$2.25 for stamps and recording deed to the purchaser, and paid attorneys \$20 for preparing the papers between Webb and the purchaser. That Webb has received on said purchase mortgage and notes only the following amounts: \$50 October 21, 1901; \$50 December 2, 1901; \$100 October 6, 1902; and \$200 January 6, 1904."

The plaintiff contends that he is entitled to the payment of his judgment debt after satisfaction of the mortgage. The defendant contends that he is also entitled to the payment of his unsecured debt in accordance with his agreement with the mortgagor. The court below adjudged that the defendant was entitled to the balance of the principal and interest of his mortgage debt, together with the necessary expenses of the sale, exclusive of attorney's fees, and that the plaintiff was then entitled to the payment of his judgment debt which exhausted the fund. The court also appointed a receiver, and directed the defendant to turn over to him the unpaid note given for the purchase of the land. The defendant appealed.

Gilliam & Gilliam, for appellant. G. M. T. Fountain, for appellee.

DOUGLAS, J. (after stating the case). The defendant filed three exceptions. The first is that, by the form of the complaint, this is an action for money had and received, and, as such, cannot be maintained unless the money has been actually received by the defendant. This exception cannot be maintained, whatever might have been its merit under the old common-law practice, before the adoption of the Constitution of 1868. Section 1 of article 4 provides that "the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the state as a party, against a person charged with a public offense, for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the fact at issue tried by order of court before a jury." Section 133 of the Code is as follows: "The distinctions between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished, and there shall be hereafter

but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." Section 233 provides that "the complaint shall contain (1) the title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant; (2) a plain and concise statement of the facts constituting a cause of action without unnecessary repetition, and each material allegation shall be distinctly numbered; (3) a demand of the relief to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof must be stated." Section 260 is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties." It is evident from these provisions that the new Code of Civil Procedure was neither a modification nor a simplification of any of the common-law modes of procedure. It practically abolished all the common-law forms of action, and adopted the old equity practice, with some slight modifications; the principal one being that in the code practice the summons precedes the complaint, while in equity the subpoena follows the bill. *Wilson v. Moore*, 72 N. C. 558. A brief glance at the methods of procedure in actions at law before the adoption of the Code of Civil Procedure will show how complete is the change. In this state the courts followed the practice of the Court of King's Bench in England. Much space and learning were expended upon the nature and requisites of the different pleadings, but in actual practice the method was of the simplest kind. The action was begun by an "original writ" commanding the sheriff to "take the body of C. D. (if to be found in your county) and him safely keep so that you have him before the Justices of our Court of Pleas & Quarter Sessions to be held —, then and there to answer A. B. of a plea of trespass on the case to his damage — dollars." If the action lay in debt or covenant, or any other form of action, the only change made was to insert in lieu of the words "trespass on the case" the words "that he render unto him the sum of — dollars, which he owes to, and unjustly detains from, him," or a "breach of covenant," as the case might be. *Eaton's Forms*, 44. Under this writ the sheriff took the defendant into custody, unless belonging to some exempted class, such as a woman or an administrator, and held him to bail, or himself became special bail. The plaintiff was supposed to file a declaration, which in fact was rarely if ever done; the mere indorsement of the nature of the action on the back of the writ being deemed a sufficient compliance with the rule in the absence of a specific demand. The defendant was also expected to

plead, which was usually done by his counsel merely marking upon the docket the nature of his pleas, in a contracted form. Whatever it may have been in theory, the usual entry was about as follows: "Genl. Issue, Payt. & set-off, Stat. Lim. with leave." The last two words mean leave to plead any other defense that may chance to occur to the pleader, such as *nil debit*, accord and satisfaction, non est factum, or the like. In ejectment—a form of trespass wherein the general issue was, "Not guilty"—the procedure was more complicated, but even in that action Mr. Eaton feels called on to say: "The practice which prevails in North Carolina of trying actions of ejectment with no declaration on file but that against the casual ejector is very irregular." The force of this remark is apparent when we recall that the casual ejector had no actual existence, being purely a fictitious personage—the airy phantom of judicial imagination. In the old system the principal difficulties lay in deciding upon the proper form of action, and the danger of encountering during the trial some equitable right that could not be adjusted in that court. The fact that the courts of law and equity were held by the same judge at the same place and during the same week did not prevent them from being separate and distinct courts, with subjects of jurisdiction and methods of procedure entirely different. It was to remedy these evils that the new system was adopted. Whether it comes up to the full measure of simplicity claimed for it by its most enthusiastic advocates, we are not entirely prepared to say. We certainly do not desire to make any further complications, and, in furtherance of its essential principles, must overrule the exception.

The second exception is as follows: "That on the issues found by the jury the plaintiff was not entitled to the judgment rendered, for that it is found as facts (Issues 5 and 6) that Cobb was indebted to Webb in the sum of \$800, and contracted with him that, in consideration of his finding a purchaser for said land at a price in excess of the mortgage debt, such excess should be applied to said unsecured debt." This exception is based exclusively upon the case of *Norman v. Hallsey*, 132 N. C. 6, 43 S. E. 473, but does not come within its essential principle. In that case it was held that a mortgagee who sells under a mortgage is not liable to a subsequent mortgagee or judgment creditor for the surplus paid by him to the mortgagor, unless he has actual notice thereof before such payment. It does not decide that he can retain any surplus in payment of a further and unsecured indebtedness of his own, which is the case at bar. As between him and the mortgagee, the judgment creditor is entitled to all the surplus proceeds of the sale after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage, or are necessarily incident thereto. We are not aware of any principle that would

permit the mortgagor to make a subsequent agreement with the mortgagee by which he could give him the entire proceeds of the sale of the land, to the exclusion of judgment creditors, under the guise of exorbitant commissions.

The third exception was to the refusal of the court below to allow an attorney's fee of \$20. The exception cannot be sustained. *Turner v. Boger*, 128 N. C. 300, 35 S. E. 592, 49 L. R. A. 590. If an attorney's fee cannot be allowed to a disinterested trustee when specially provided for in the deed of trust, we see no reason upon which it can be allowed to a mortgagee without proof of necessity or authority in the mortgage.

In the case at bar the complaint has no prayer for relief, but we think that it sets out the plaintiff's cause of action with sufficient clearness to indicate the proper relief. The complaint alleges that the defendant mortgagee has sold the mortgaged premises for more than enough to pay his debt, and, upon demand, refuses to pay the surplus to the plaintiff in satisfaction of his docketed judgments. As there is no question as to legal exemptions, the evident relief is to require the defendant to pay over the surplus. The fact that the purchase price is in notes, and not in money, compels the intervention of a receiver to carry out the judgment. This is fully as much for the benefit of the defendant as for the plaintiff, as a resale of the land may be necessary, and the defendant would be entitled to the full payment of the principal and interest of his mortgage debt before anything is paid to the plaintiff—if necessary, even to his entire exclusion. It has been repeatedly held by this court that no prayer is necessary where the appropriate relief sufficiently appears from the allegations of the complaint. In *Knight v. Hough-talling*, 85 N. C. 17, *Ruffin, J.*, speaking for the court, says: "We have not failed to observe that the answer of the defendants contains but a single prayer for relief, and that for a rescission of the contract. But we understand that under the code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered; the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied." In *Dempsey v. Rhodes*, 93 N. C. 120, *Merrimon, J.*, speaking for the court, says: "Indeed, in the absence of any formal demand for judgment, the court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs." See, also, *Harris v. Sneed*, 104 N. C. 369, 10 S. E. 477; *Gattis v. Kilgo*, 125 N. C. 133, 34 S. E. 248; *Clark's Code*, § 233

(3). While a formal prayer for relief may not be necessary, we would, however, advise our brethren of the bar to comply with the express requirements of section 233 of the Code, as there is always a certain element of danger attending experimental pleading.

The judgment of the court below is affirmed.

(127 N. C. 51)

TROXLER v. NEW ERA BLDG. CO. et al.
(Supreme Court of North Carolina. Nov. 30, 1904.)

VENDOR AND PURCHASER—FRAUD—EVIDENCE—BREACH OF CONTRACT—JUDGMENT.

1. As tending to show that defendants induced plaintiff to sell a part of a tract of land for less than its value by fraudulent representations that a building would be erected on the land sold, making the remainder more valuable, evidence that two corporations organized by defendants to take title to the property were not organized in accordance with statute, and that fraud was practiced on the state in obtaining their charters, was admissible.

2. Where defendants induced plaintiff to convey property to them for less than its value by representations that they would organize a corporation, and erect a building on the land which would enhance the value of the adjacent land still owned by plaintiff, and at the time defendants had no intention to erect, or means for erecting, the building, or reasonable ground to suppose it would be erected, plaintiff was entitled to have the conveyance set aside.

3. Where defendants induced plaintiff to convey to them land for less than its value by agreeing in good faith to erect a building which would make more valuable adjacent land owned by plaintiff, he was not entitled to have the conveyance set aside on defendants' inability to perform their contract, but was only entitled to recover the damages sustained.

4. Where plaintiff sued to rescind a sale of land for fraud, he was not entitled to have the property sold if he should fail to comply with the condition of a decree setting aside the sale on repayment by plaintiff of a part of the price received by him.

Appeal from Superior Court, Alamance County; Cooke, Judge.

Action by G. H. Troxler against the New Era Building Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff alleged: That prior to July 31, 1903, he was the owner of a lot in the city of Burlington, on the southeast corner of Main and Davis streets, and on said day he was the owner of other adjoining real estate, and had caused to be erected several small wooden buildings on said lot, which were rented to tenants at a monthly rental; also a livery stable and a dwelling, both of which were rented. That early in the year 1903 he was contemplating the erection, upon the lot first described, of such a building as would be desirable for business firms and corporations of said city, and had partly agreed with a contractor for the erection of such building; his purpose being to render more valuable the property adjacent thereto, owned by him as aforesaid. That, at the suggestion of said contractor, plaintiff

saw defendant Murray, who broached the matter of the purchase of the property (being the first described lot) by a corporation known as the New Era Building Company; and the said Murray, acting as agent of said company, requested plaintiff to sell the lot to the company; representing to plaintiff that, if he would do so, the company would at once proceed to have erected a building upon the property. That Murray described said building, and stated that it would be of pressed brick, with solid glass fronts on both Main and Davis streets; that upon the corner was to be a room or rooms which were to be occupied by the Alamance Loan & Trust Company, the leading bank in Burlington, and that upon the first floor, in addition to the bank, were to be three up to date and well-appointed storerooms; that the second floor was to be for lodgerooms and offices; and that the building was to cost from \$12,000 to \$15,000. Murray represented that the company was able to, and would, have the building erected, and by his statements led the plaintiff to believe that the only thing needed was the procuring of plaintiff's said real property at a low price. That in said conversations Murray's attention was called to the fact that the lot which was owned by plaintiff would be greatly enhanced in value by the erection thereon, and the moving into the vicinity of said bank of merchants, of business men, and the like. That the charter of the corporation of the company showed that it had a subscribed capital stock of \$6,000, \$1,000 of which was subscribed for by the defendant Murray, \$2,000 by defendant Anderson, a man of character and means, and \$3,000 by defendant Hay, a man reputed to be worth a considerable sum. By reason of these representations of Murray, acting as agent of defendant company, after much persuasion, plaintiff agreed to sell the property to the building company for \$2,000 in cash, \$500 in stock in the company, and for the further consideration of the erection upon the lot of the building described by Murray. That, at the time of signing the contract, Murray, representing the company, paid plaintiff the sum of \$500 cash, in part of the purchase money; said amount being paid by the check of W. E. Hay, who was consulted by Murray before he closed the trade. Thereafter plaintiff had several conversations with Murray, who said that the company was certainly going to erect a building, and on one occasion he exhibited drawings showing how it would look when completed. That, at the time plaintiff was to convey the property under the contract, Murray stated that the company did not have money in hand to make the cash payment, and defendant Hay asked the plaintiff to take a check payable in 20 days for the balance of the money. Plaintiff asked for his \$500 in stock, and was told that it was ready for delivery, but plaintiff never saw or had possession of said

stock. Plaintiff asked Murray if the stock was legal and all right, whereupon Hay expressed doubt as to its legality. That, by reason of the representations and inducements as to the financial ability of the company by Hay and Murray, plaintiff was induced to execute a deed for the property to the company for a recited consideration of \$2,500, of which he had received \$500 in cash; taking the check of Hay, payable in 20 days, for the balance. Between the date of the deed and the time the check became due, the company, without consulting plaintiff and without his knowledge, conveyed the property to a company known as the Piedmont Building Company, organized and promoted by the defendants Murray and Hay, and in which the defendants Holt, Rose, and Mayfield were the charter members, and the consideration of the deed was \$3,500. That, at the expiration of 20 days, plaintiff demanded of Murray his stock in defendant company, and was informed by him that there was no such company as the New Era Building Company, but tendered him stock in the Piedmont Building Company, which he refused to take. Murray informed him that he must take this stock, or take the \$500, or nothing. Defendant Hay, president of said company, has announced its intention of going out of business, and has had the property advertised for sale. That the New Era Building Company was never legally organized, and did not have three bona fide subscribers to its capital stock. That Anderson did not agree to take \$2,000 worth of stock therein, but signed a subscription list agreeing to take \$100 stock if, after investigation, he thought it was going to be a valuable investment. That Anderson was told by Murray at the time that it was merely a formal matter, and did not bind him to take stock. That he never had any money. That there was never one cent paid to said company. That all the money it ever had was the amount advanced by the defendant Hay to pay for plaintiff's land. That said company never had any prospect of being able to erect said building. That, by and through the representations of Murray, the deed was procured by fraud and misrepresentation at about one-half the real value of the land. That at the time the conveyance was made the company had no idea of erecting such building as that described by defendant Murray, and was financially unable to erect a building of any kind, and that at that very time it intended to convey the property to the Piedmont Building Company, whose organization had been procured only a few days before by Murray, acting for himself and Hay. That all of these facts were concealed from plaintiff. That the Piedmont Company is in reality the successor of the New Era Company, and was organized to take this property from the latter company to make difficult the procuring of justice by this plaintiff. That those who signed themselves

as charter members of the Piedmont Company acted under the same misapprehension and representations as the said Anderson in the New Era Company, and that none of them have ever paid one cent into said company. That W. K. Holt, one of the signers, upon finding out what the company was up to, immediately withdrew from it and refused to have anything more to do with it, and that he was never such a bona fide subscriber to its capital stock as is required by law for the legal procuring of a charter. That the whole matter was a scheme on the part of Murray and Hay to procure the property of plaintiff for a consideration vastly less than its actual value, and, as plaintiff is informed and believes, the true facts were known only to these two of the personal defendants, and the other personal defendants had nothing to do with it, but their names and signatures were sought to give to the transaction the stamp of approval which their names would give, and the use of their names was procured through misapprehension, and by concealing from them the true nature and real purpose of the organization of the said corporations. That the entire interest in said real property is now owned by Hay, and that this was the end which was sought by him and Murray from the beginning. That neither of said companies was properly or legally organized, or capable of taking or holding any real property. That the conveyance of the property by plaintiff was obtained by fraud and misrepresentation, and for a totally inadequate consideration. That since the execution of the conveyance the property has been greatly damaged by the removal therefrom of all the buildings formerly located thereon, and by the cutting of the trees situate thereon, and plaintiff has been further damaged by failure to receive any rent therefrom. Plaintiff is ready, willing, and able to pay defendant Hay the whole amount of \$2,500, and hereby tenders the same, and prays that the deed may be cancelled.

Defendants denied all charges of fraud and misrepresentation, either in respect to the organization of the several corporations, or procuring the conveyance of the plaintiff's property. They deny that it was not the purpose of the New Era Company to erect the building, or that the building thereof entered into the consideration of the conveyance. They say that the city refused to grant a permit to the company to erect the building. They further say that the property was not at the time of the conveyance worth more than the amount paid therefor. They deny that they refused to issue to the plaintiff the shares of stock in accordance with the contract, but, on the contrary, plaintiff refused to accept the stock.

By leave of court, plaintiff amended his complaint so as to allege "that at and before the time of the execution of the contract to convey, and of the deed conveying, the prop-

erty hereinbefore described, defendants W. E. Hay and J. W. Murray represented and agreed that they would have erected upon said lot the building hereinbefore described, and that said representation and agreement was held out as and did act as an inducement to said plaintiff to execute said deed and contract, and that said building has never been erected, and that such failure to erect said building has endangered plaintiff in the sum of fifteen hundred dollars," which defendants denied.

The defendants tendered issues which the court declined to submit. Defendants excepted. The court thereupon submitted the following issues: "(1) Was the execution of the contract to sell the land in controversy from Troxler to W. E. Hay and associates, and the deed from Troxler to the New Era Building Company, procured by fraudulent and false representations on the part of said Hay and J. W. Murray? Answer. Yes. (2) Is the Piedmont Building Company a purchaser, for value and without notice, of said property? Ans. No. (3) What damage, if any, has Troxler sustained by the removal of buildings, cutting of trees, and the loss of rent from the property? Ans. \$216. (4) Was it agreed by Murray, acting for himself and as agent of Hay, at the time of the execution of the contract, and up to and at the time of the execution of the deed, and as a part of the consideration therefor, that a brick building containing rooms for stores, bank, opera house, and offices should be erected upon said lot? Ans. Yes. (5) Has the building been erected? Ans. No. (6) What damage, if any, has Troxler sustained by reason of the failure to erect the building? Ans. \$250. (7) Did Troxler accept \$500 in cash in place of the stock in the New Era Building Company? Ans. Yes. (8) What damage, if any, has Troxler sustained by his failure to get said stock? Ans. \$200." Defendants excepted, and from a judgment upon the verdict appealed.

J. T. Morehead and G. S. Ferguson, Jr., for appellants. Parker & Parker and W. H. Carroll, for appellee.

CONNOR, J. (after stating the facts). This record contains 91 pages, with 22 exceptions, directed to every phase of the case from the amendment of the complaint to the form of the judgment. The case involves not only property rights, but the conduct and character of the parties. It was contested at every point by learned and able counsel. We have given to the exceptions a careful examination and consideration, and will endeavor, as briefly as is consistent with clearness, to give our reasons for the conclusion reached. Both parties submitted a large number of prayers for special instructions, a portion of which were given, and others refused. His honor set aside the verdict on the eighth issue, and an examination of the judgment shows that it is based

upon the findings upon the first and second issues. The issues numbered 4 to 7, inclusive, were submitted by his honor to enable him to render a proper judgment if the jury had found for the defendants upon the issue in regard to the alleged fraud, and found that the defendants had broken their contract in regard to the erection of the building. His honor's action in this respect was in accordance with the theory of the code system of practice, by which, upon special findings, the court is enabled to give such judgment, either of a legal or equitable character, as the parties may be entitled to. Under the former system the plaintiff would have been compelled to bring an action at law to recover damages for breach of contract, or, if he wished to avoid the deed for fraud entering into the consideration, file a bill in equity. That legal and equitable causes of action may be joined, and that such judgment may be rendered as will protect the legal and equitable rights of the parties, is well settled. *Lee v. Pearce*, 68 N. C. 76; *Hutchison v. Smith*, Id. 354; *Bank v. Harris*, 84 N. C. 206; *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122. It is true that the plaintiff does not, as good pleading would suggest, state separately his several causes of action; but if, upon the facts stated, the court can see that more than one cause of action is stated, it will submit such issues as are raised by the pleadings. In this case, the jury having found the first issue for the plaintiff, the other findings, except the second, become immaterial. It therefore becomes unnecessary to discuss the exceptions pointed to rulings of the court which apply only to the other issues. The exceptions in regard to the issues and the amendments of the complaint cannot be sustained. The exceptions to the evidence tending to show that the New Era and the Piedmont companies were not organized in accordance with the statute, and that a fraud was practiced upon the state in procuring the charters, cannot be sustained. It was not offered for the purpose of attacking or invalidating the charters. This could not be done collaterally. *Railroad v. Newton*, 133 N. C. 132, 45 S. E. 549. It was competent upon the first issue, as tending to sustain the charge of fraud and misrepresentation.

The contention of the plaintiff is that, by a series of acts and declarations, the defendants Murray and Hay procured the title to his property; that the formation of the corporation constituted a part of what is called a scheme to accomplish their purpose. It is elementary learning that, in the trial of an issue of fraud, much latitude is allowed, and any fact which tends to show the intent of the parties is relevant and competent. *Ruffin, J.*, in *Knight v. Houghtalling*, 85 N. C. 17, says: "Fraud rarely lurks in the written agreement of the parties entered into at the end of their negotiations with each other, but almost universally precedes it; and, con-

sisting, as it must necessarily do in such a case, of acts and declarations merely, it can only be exposed by allowing the conduct of the parties, their words and deeds, throughout the entire treaty, to be shown to the jury." The declarations of Murray were clearly competent. The defendant Hay cannot take advantage of his negotiations leading up to the conveyance without assuming the burden incident thereto. There is evidence for the consideration of the jury that Hay knew of and ratified Murray's promise to have the building erected. *Lee v. Pearce*, *supra*. There was evidence fit to be submitted to the jury upon the first issue. The only question, therefore, for our consideration, is whether there was error in the instructions given, or in refusing to give those requested.

His honor, at the request of the defendants, instructed the jury as follows: "The jury are instructed that on the first issue the burden of proof is upon the plaintiff, and he must satisfy you by the preponderance of the evidence that the execution of the deed and contract was procured by false and fraudulent representations of Hay and Murray; and unless the jury find from the evidence that, at the time the representations were made, there was no intention or purpose on the part of the New Era Building Company to erect the building described in the complaint on the lot mentioned therein, then the representations were not false and fraudulent, and the jury will answer the first issue 'No.'" And at the request of the plaintiff as follows: "If you find from the evidence that at the time of the execution of the contract to Hay and associates, and up to and at the time of the execution of the deed to the New Era Building Company, Murray and Hay represented and agreed that they would erect a building of the kind referred to in the written contract on said property, and that the erection of the building was held out to and accepted by Troxler as a part of the consideration moving and inducing him to execute the contract and deed, then I charge you to answer the fourth issue 'Yes.' If you should find from the evidence that, at the time of the execution of the contract to convey the property, Murray represented that a company could and would be formed which could and would erect said building, when it was not in fact intended to form a company for that purpose, but that the whole matter was a scheme to get the title to this property out of the hands of Troxler, and if you should further find that such representation moved Troxler to execute the contract, then I charge you to answer the first issue 'Yes.' If you should find from the evidence that, at the time of the execution of the contract, Murray represented that a company could and would be formed which could and would erect said building, when in fact he did not know, and had no reasonable ground to believe, such to be the fact, and

that this whole matter was being worked to get the title to the property out of the hands of Troxler, and if you should further find that such representations moved and induced Troxler to execute the contract, then I charge you to answer the first issue 'Yes.' If you should find from the evidence that, at the time of the execution of the contract to convey the property, it was represented that a company could and would be formed which could and would erect the building thereon, when in fact it was never intended to organize such a company, but that the whole matter was a scheme to get the title to this property into the hands of W. E. Hay, and if you should further find that such representations moved Troxler to execute the contract, then I charge you to answer the first issue 'Yes.' The instructions given are amply sustained by the text-writers and opinions of this and other courts. If, as the jury find, the plaintiff was induced by the representation and promise of Murray, representing the proposed corporation, that a building was to be erected thereon which would enhance the value of his other property, and at the time of making the representation and of accepting the deed the parties did not intend to erect, and had no means for erecting, such a building, or if Murray made the representation, having no reasonable ground to believe that such was the intention, and the purpose of Murray and Hay was by this means to get the title to the property, he is entitled to relief in a court of equity. If, having an honest purpose to carry out their contract, the defendants obtained title to the lot, and were thereafter unable to do so, the extent of the plaintiff's remedy would have been such damages as he sustained by the breach of the contract. It must be conceded that it would be difficult to fix the measure of such damages. Mere speculative damages could not have been recovered. The fraud consists in the fact found by the jury that the defendants, at the time of making the representation and promise which constituted the inducement to make the deed, did not intend to make good such representation and promise. It has been frequently held that, when personal property has been obtained by such means, the vendor may recover his goods. *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446; *Hill v. Gettys*, 135 N. C. 373, 47 S. E. 449. It is equally well settled that a court of equity will cancel a deed obtained by such means. The charge fully and clearly presents the case in all of its aspects. His honor properly told the jury to answer the second issue in the negative if they answered the first for the plaintiff.

The judgment directs the reconveyance of the property upon the payment by the plaintiff to the defendants of the amount received by him, less the sum of \$216 assessed by the jury as damages, etc., in response to the third issue. This we think correct, and is

what the plaintiff expresses his readiness to do. The judgment further directs the sale of the property if the amount is not paid by a day fixed. The equity invoked by the plaintiff is rescission. He is entitled to be put back in his original position in respect to his property, as near as may be. We do not think that he is entitled to have a sale. In this respect the judgment should be modified.

Affirmed.

(137 N. C. 43)

SMITH et al. v. JOHNSON et al.

(Supreme Court of North Carolina. Nov. 30, 1904.)

BOUNDARIES—ESTABLISHMENT UNDER SPECIAL PROCEEDINGS—EVIDENCE—SUFFICIENCY—NONSUIT—TRIAL.

1. Acts 1893, p. 44, c. 22, provides that the owner of land may have boundary in dispute established by filing a petition, etc.; that the clerk of the superior court shall issue an order according to the contention of both parties, and make report of the same, with a map; and that occupancy by petitioner shall be sufficient evidence of ownership. *Held* that, plaintiff having testified that he was in possession of the land "described on the map," it would be presumed on appeal to the Supreme Court, in the absence of any map that plaintiff referred to the same land referred to in the judgment of the clerk, and hence it was error to have granted defendant a nonsuit on the ground that plaintiff had not shown ownership.

2. Acts 1893, p. 44, c. 22, provides that the owner of land may have any boundary in dispute established by filing a petition, etc., that the cause shall be heard by the clerk of the superior court; that occupancy of land by the petitioner shall be sufficient evidence of ownership, and an appeal is given to the superior court. *Held*, that where defendants denied the allegation of the complaint, setting forth the lines as claimed by them, and denied plaintiff's ownership, and on the filing of the answer the clerk directed a survey and adjudged the true line, and defendants appealed to the superior court, the question as to the location and as to ownership was for the jury.

3. On appeal from a judgment of nonsuit the testimony must be taken most favorably to plaintiff.

Appeal from Superior Court, Alexander County; Neal, Judge.

Special proceedings by W. P. Smith and others against Taylor Johnson and others under Acts 1893, p. 44, c. 22, to establish a boundary line. From a judgment of nonsuit, plaintiffs appeal. Reversed.

This is a special proceeding under chapter 22, p. 44, Acts 1893, to establish a boundary line, begun before the clerk of the superior court of Alexander county. The plaintiffs alleged that they were the owners of certain land, fully described, and that the defendants were the owners of adjoining land, and that the dividing line between the land of the plaintiffs and defendants was in dispute; the plaintiffs setting out their contention, and asking that a survey be ordered, and the true line established, in accordance with the provisions of the statute. The de-

fendants deny the material allegations of the complaint, and set forth the lines of the land claimed by them. They deny that plaintiffs own any land adjoining them. They also allege that they and their ancestors have been in possession of the land claimed by them under known and visible boundaries for more than 50 years. Upon the filing of the answer the clerk directed a survey to be made showing the contentions of both parties. Pursuant to the order, the surveyor duly filed his report, setting forth that he had surveyed the lines in controversy. He sets out in detail the several lines showing by a map the contention of each party. The report is clearly and intelligently made. The clerk thereupon heard the cause upon the report, hearing the evidence and argument of counsel, and adjudged that the plaintiffs are entitled to the line in controversy established as asked for in their petition, and on the report of the surveyor he adjudged the true line to be from the points set out in his judgment as indicated on the map, and ordered that the county surveyor go upon the lands, and mark and establish the line as located by him. From this judgment the defendants appealed. The case came on for trial in the superior court upon said appeal. The "case" on appeal states that, "After reading the pleadings as set forth in the record upon issues submitted as shown by the record, the plaintiffs introduced the following evidence." Following this statement the evidence is set out in full, whereupon the following judgment was rendered: "At the conclusion of the plaintiffs' evidence, the defendants moved for a nonsuit against the plaintiffs, for that in no aspect of the case on the plaintiffs' evidence, when the plaintiffs rested, were plaintiffs entitled to the relief demanded. After argument on both sides upon this motion to nonsuit the plaintiffs and the whole record, it is considered and adjudged by the court that the motion of the defendants to nonsuit the plaintiffs is sustained." From this judgment the plaintiffs appealed.

McIntosh & Burke, for appellants.

CONNOR, J. (after stating the case). Neither the record nor the case on appeal states upon what ground the motion for judgment of nonsuit was based, and we are not favored with any argument or brief on the part of the defendants. The plaintiffs' brief states that the following issue was submitted to the jury: "What is the true boundary line between plaintiffs and defendants?" Chapter 22, p. 44, Acts 1893, provides: "That the owner of land, any of whose boundary lines are in dispute, may establish said line or lines by special proceedings. * * * The owner shall file his petition stating facts sufficient to constitute the location of said line or lines and making defendants all adjoining owners whose interest may be affected by the location of said line. If the an-

swer deny the location set out in the petition, the clerk shall issue an order according to the contention of both parties and make report of the same with a map. * * * The cause shall then be heard by the clerk and judgment given determining the location thereof." Provision is made for an appeal. This court said in *Williams v. Hughes*, 124 N. C. 3, 32 S. E. 325: "We do not think it was intended to try title to land under this statute, but to procession, locate, and establish the lines between adjacent land-owners. It gives the right to the owners of the land, and provides that the occupancy of land by the petitioner shall be sufficient evidence of ownership to entitle the petitioner to relief under this act." In that case the issues were confined to the ownership of the land by the plaintiff, and the inquiry whether the true boundary lines between the plaintiff and defendant were those set out in the complaint. The court, referring to the issue, said: "And for this purpose it seems to us that it would be better to broaden the second issue by allowing the jury to locate the boundary line, whether it was where the petitioner alleged it to be or not." The two questions presented by the record in this case, both of which should have been submitted to the jury, are, first, whether the plaintiffs were the owners of the land described in the complaint; and, second, what was the true dividing line between them and the defendants? There was certainly some evidence to go to the jury upon the first question. The plaintiffs testified that they were in possession of the land described on the map. In the absence of any map, we must assume that they referred to the same land which is referred to in the judgment of the clerk. If the jury found that the plaintiffs were the owners, and for that purpose it was sufficient to show that they were in the occupancy of the land, the only question for them to determine was the location of the true boundary line between the plaintiffs and defendants. In *Williams v. Hughes*, supra, the court charged the jury "that upon all the evidence they could say where the line was." This instruction was approved by this court. The purpose of this special proceeding, as set forth in the statute, and frequently held by this court, is not to try the title to the land, but only to ascertain the boundary lines. *Midgett v. Midgett*, 129 N. C. 21, 39 S. E. 722; *Van Dyke v. Farris*, 126 N. C. 744, 36 S. E. 171—in which it is expressly held that the title was not in issue, the court saying that by pursuing the provisions of the act the lines between the parties may be established, but this did not prohibit either party from asserting his rights to the title of the same land; the chief justice saying, "What benefit the act confers to the citizen it is not our province to say." In *Parker v. Taylor*, 133 N. C. 104, 45 S. E. 473, it is held that the judgment of the clerk determining the location of the line is con-

clusive upon parties and privies to the action. It would seem that from what is said by the present chief justice in that case that upon the issue raised by the answer upon the plaintiffs' first allegation the cause should have been transferred to the superior court for trial as in other cases of special proceeding. If the jury had found that the plaintiffs were the owners of the land described in their complaint, the case would have been remanded, with direction to the clerk to proceed to have the line in dispute settled; if they were not the owners, the proceeding should have been dismissed. As the clerk proceeded to direct the survey before trying the issue, and the whole cause, without objection, went to the superior court upon appeal, the two questions should have been tried there before the jury. We presume that this was his honor's view, and that in his opinion the plaintiffs failed to show ownership or occupancy of the land claimed by them. Without the benefit of a map, it is impossible for us to see exactly how the matter was; but, as the judgment is of nonsuit, the testimony must be taken most favorably for the plaintiffs. We assume that in saying, "I am in possession of the land on plat, blue 1-2-3-4-to 1," he referred to the land described in his complaint. While in many cases the judgment of nonsuit, where it clearly appears that in no aspect of the testimony the plaintiff is entitled to recover, is proper, it is the better practice to submit the questions raised by the pleadings to the jury under proper instructions, so that a verdict may be rendered settling the matters in controversy.

We think, upon examination of the entire record, that there was error in the judgment of nonsuit. There was some evidence to go to the jury upon the question of ownership evidenced by occupancy. Let it be so certified.

Error.

(137 N. C. 79)

SMITH v. BRUTON et al.

(Supreme Court of North Carolina. Nov. 30, 1904.)

MARRIED WOMEN—CONVEYANCES OF REAL ESTATE—MODE—SUBMISSION TO ARBITRATION—PLEADING—DENIALS IN REPLY.

1. In an action to recover possession of a tract of land, defendants alleged that plaintiff, a married woman, had been abandoned by her husband, and had agreed to arbitrate the title to the land; that the arbitration was had; and that the award, by which title was adjudged to be in others than plaintiff, was made a judgment of the court. Plaintiff, in her reply, said that she had not been abandoned by her husband, "as alleged in the answer." *Held* that, conceding that plaintiff's reply was not sufficient to amount to a denial of the charge of abandonment, the question was nevertheless in issue, as defendants' answer did not constitute a counterclaim, and a reply thereto was unnecessary under Code, § 268, providing that an allegation of new matter in the answer, not relating to a

counterclaim, is to be deemed controverted as upon a direct denial or avoidance as the case may require.

2. The fact that a married woman admitted in an agreement to arbitrate the title to land owned by her that she was a citizen of this state, and in a declaration made by her to become a free trader stated that her husband was a citizen of Arizona, did not show that she had a right to convey her land by deed under Code, § 1832, authorizing women abandoned or turned out of doors by their husbands to convey their real estate without their husbands' consent.

3. A married woman can be bound, as to her land, only by her deed duly executed, with the written assent of her husband, and with her privy examination, or by the judgment or decree of a court of competent jurisdiction.

4. While, under Code, § 178, a married woman may, without the joinder of her husband, sue to settle the title to her separate real estate, and would be estopped by a judgment rendered against her, yet she cannot, in view of Const. art. 10, § 8, authorizing a married woman to convey real estate "with the written assent of her husband," submit the question of title to lands owned by her to arbitration.

Clark, C. J., dissenting.

Appeal from Superior Court, Montgomery County; O. H. Allen, Judge.

Action by Melissa A. Smith against J. O. Bruton and others. From a judgment for defendants, plaintiff appeals. Reversed.

Shepherd & Shepherd, for appellant. Adams, Jerome & Armfield and H. M. Robins, for appellees.

MONTGOMERY, J. This action was brought by the plaintiff to recover possession of a tract of land of which she claims to be the owner. The defendants contest her claim on the grounds, first, that they and those under whom they claim have been in possession of the same for 50 years; and, second, that the plaintiff, before this suit was brought, had entered into an agreement with Adelaide Kron and Elizabeth Kron, who claimed title to the land, to enter into an arbitration to have settled the title thereto; that the arbitration was had, and an award made and returned to court, in which the title to the property was adjudged to be in Adelaide and Elizabeth Kron; that the award was made a judgment of the court, and that the plaintiff is estopped by that award and judgment from claiming the land. In their answer the defendants further averred that, although the plaintiff was a married woman at the time of the submission of her case for arbitration, and has since that time been continuously a married woman, yet that she had been abandoned by her husband at the time she entered into the agreement, and had not been living with him for more than 10 years, and has not since lived with him; that she was at that time, and has ever since been, a free trader. In her reply the plaintiff said that she had not been abandoned by her husband, "as alleged in the answer."

The main question in the case, then, is,

can a married woman, without joinder of her husband, consent to have the title to her real estate determined by the award of arbitrators? The defendants contend, however, that it will not be necessary to decide that question in this case. Their counsel insist that that statement in her reply wherein she says that her husband has not abandoned her, "as alleged in the answer," is not such denial of the defendants' averment as is required by the Code, and that, therefore, it is to be taken as true that her husband had abandoned her, by her own admission; and that, that being so, she had a right not only to consent to the arbitration, but even to convey the land by deed without the written assent of her husband, if she wished to do so. If it should be conceded that the plaintiff's reply, in the respect complained of, was not sufficient to amount to a denial of the charge of abandonment by her husband, yet it is to be remembered that no reply on that question on the part of the plaintiff was necessary. The matter averred on the part of the defendants was not a counterclaim, and was deemed to be controverted by the plaintiff as upon a direct denial or avoidance. Code, § 268. The arbitrators in their award had nothing to say about whether or not the plaintiff had been abandoned by her husband. They declared that she was a married woman during the period of the arbitration and award, and had children; and the court held that she was estopped in the present action by the judgment rendered in the superior court upon the award of the arbitrators.

The defendants further contend that, as the plaintiff admitted in the agreement to arbitrate that she was a citizen of this state, and in her declaration to become a free trader she stated that her husband was a citizen of Arizona, she had the right to convey her land by deed under express decisions of this court, and therefore, if she had a right to convey the land by deed, she would have a right to submit to arbitration the settlement of her title. But the decisions of this court which counsel rely upon do not sustain their position. We were referred to *Hall v. Walker*, 118 N. C. 380, 24 S. E. 6, and *Levi v. Marsha*, 122 N. C. 565, 29 S. E. 832. In the first-mentioned case the court said: "The sole question is whether section 1832 of the Code was constitutional." That section is as follows: "Every woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, * * * and she shall have power to convey her personal property and her real estate without the assent of her husband." In the case just above referred to the plaintiff's husband had deserted and abandoned her for five years, had been continuously out of the state, had

not been seen or heard from by the wife, and he had in no way contributed to the support of herself or her family. In the case before us there was no such evidence offered, and no finding by the arbitrators in their award of abandonment or desertion, failure to support, or cruelty on the part of the husband. In *Levi v. Marsha*, supra, the husband resided in Syria, and had never been in the United States, either as a resident or as a visitor. The wife contracted a debt with the plaintiff, and the sole question was whether she was liable on her personal contract. A married woman in North Carolina can be bound as to her land in only two ways—by her deed duly executed, with the written assent of her husband, and with her privy examination, or by the judgment or decree of a court of competent jurisdiction. As to the requirements of the first method, the decisions of this court are very numerous, and we will only mention those of *Scott v. Battle*, 85 N. C. 184, 39 Am. Rep. 694; *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 908, and *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984, 61 L. R. A. 878, and as to the latter method the cases of *Green v. Branton*, 16 N. C. 500; *Smith v. Ingram*, supra. But it may be asked, does not the present case fall within the decisions of the two last-mentioned cases? Was there not a judgment and decree against the plaintiff in a court which had jurisdiction of her person and of her property, and, if so, was she not bound by that decision and judgment? Undoubtedly, a married woman would have the right, under section 178 of the Code, to bring an action, without the joinder of her husband, to have settled the title or any right connected with her separate real estate, and if, upon the regular trial and disposition of that suit, a judgment or decree of the court should be rendered against her, she would be bound by it, and the judgment would be thereafter a matter of estoppel by record in any subsequent claim she might make to the property. The reason for that is that the married woman's interests are under the eye of the court, and its judgment or decree is based upon the law as it is written and applied to the conditions and facts brought out and developed in the case. In an arbitration the matter is entirely different. Arbitrators are not bound to make their award according to law, nor are they bound to weigh the evidence; and the court will make a judgment of the award, if it is regular on its face, and there are no evidences of fraud, without any inquiry as to how the arbitrators arrived at their conclusion. So it is perfectly evident that if a married woman could dispose of her real estate, without the joinder of her husband, by submitting her title to arbitrators, that part of section 6, art. 10, of the Constitution, which ordains that a married woman, with the written assent of her husband, may convey her real

estate, would be a dead letter. If such were the law, married women, from design or by means of fraud and deceit, might by arbitration be deprived of their real estate, and the husband deprived of his rights therein before he had knowledge of the matter, or the power to prevent it in either case. If a married woman could dispose of her real estate through arbitration, she would be enabled by an indirect method to do that which the Constitution and the laws prohibit, and that will never be allowed. That the plaintiff was a free trader can make no difference. As we have said, there are only two ways by which a married woman can dispose of her real estate—one by deed, with the written assent of her husband, with her privy examination, and the other by decree or judgment of a court of competent jurisdiction. However, the question of the right of a free trader to charge her separate estate does not arise in this case, for the record shows that the matter involved here did not concern any transaction other than the settlement of the ownership of the land. It does not appear that she had any creditors or owed any debts.

We omitted to state in the beginning of this opinion that the defendant's counsel state in their brief that the appellant has filed no exceptions to the judgment of the court below. The plaintiff took a nonsuit after an intimation of his honor that she was estopped by the award and judgment. We do not understand how this statement crept into the brief of the defendants. We know, however, that it was an inadvertence. There was a statement in the judgment that the nonsuit was taken by the plaintiff because of his honor's intimation, and from the judgment the plaintiff appealed. Besides, the assignment of error (and there is only one) is in these words: "That the court erred in holding that the record set up in the answer was *res adjudicata*, or an estoppel against the plaintiff, and that the plaintiff could not recover upon the admission of the plaintiff that she could not recover if such record did constitute an estoppel or *res adjudicata*."

Reversed.

WALKER, J., took no part in the decision of this case.

CLARK, C. J. (dissenting). This is an action for the recovery of land. The only exception in the record is to the ruling of the court that a former judgment between the same parties for the same cause of action is an estoppel upon the plaintiff in this action. The plaintiff brought an action for the recovery of a tract of land heretofore, and in its prosecution she submitted to an arbitration as a rule of court, which embraced also the subject-matter of this action. In that action it was adjudged in the superior court at spring term, 1891, after

reciting both matters in controversy as stated in the agreement therein to arbitrate under rule of court "that the plaintiff take nothing by this action, and judgment is rendered against plaintiff" for costs. The award was made by Marmaduke S. Robins and S. J. Pemberton, with Kerr Craige, umpire, and was approved by the court, without objection from her. She could hardly have suffered any injustice; but, if so, she should have objected then, not now.

The Code, § 178 (1), provides, "When the action concerns her separate property, she [a married woman] may sue alone." This action concerns the plaintiff's separate property, and she brought the former action (as she also brings this) without joining her husband. "If she may sue, she must be bound by a judgment in her favor; if it is against her, she must be bound by it also." Herman on Estoppel, § 174. In the former action she entered into an agreement of arbitration, the award to be a rule of court, and upon the coming in of the award judgment was entered thereon as above stated, the plaintiff making no exception nor taking any appeal. As she was a party to the action alone and *sui juris* then (as she is now) by virtue of the statute, she is bound by orders in the cause assented to by her or not excepted to, and especially by the final judgment, which referred to and adjudged the finding of the arbitrators. If she had any objection to the award either for misconduct of arbitrators or any alleged incapacity in her, a party to the action, to consent thereto, she was certainly under no incapacity to raise that objection then to judgment being entered thereon; and, not having done so, she is bound by the judgment like any other person bringing an action in her own right. If she was not bound by the arbitration and award, she was in court, and should have said so. She is certainly bound by the judgment thereon. When that judgment was interposed as a bar to this action, the court properly held that the judgment was an estoppel, "it being admitted that these lands are the same lands described in the plaintiff's complaint in the former action"; thus recognizing the agreement to arbitrate as an amended complaint, which it was in effect. A judgment cannot be thus collaterally attacked. The plaintiff should bring a direct action to set the former judgment aside; and though, in such action, a prayer for recovery of the land might be joined, there is in this complaint no allegation impeaching the former judgment; nor, indeed, any reference, even, thereto.

Objection is made that the former action, as originally brought, did not embrace this cause of action. But this, as well as the other cause of action, concerned only her separate property, and she could have sued for this as well as that without joining her husband. Code, § 178 (1). She could have

put both into the complaint when first stating her cause of action. By leave of court or by consent of parties the complaint could have been amended to embrace it. This was, in effect, done when both parties in a written agreement set out the matters in controversy referred by them to the arbitrators under rule of court. This, as to parties *sui juris*, would certainly be conclusive as to all matters embraced in such agreement, award, and judgment thereon, for after judgment it cannot be objected that no complaint at all was filed. *Robeson v. Hodges*, 105 N. C. 50, 11 S. E. 263; and numerous other cases cited in *Clark's Code* (3d Ed.) p. 190. Here the agreement in writing carefully recited the matters in controversy, as did the award which was approved by the judgment of the court. As to this matter, which is an action concerning her separate property, the feme plaintiff is made *sui juris*, and authorized to "sue alone" without joining her husband (*Code*, § 178 [1]), and hence is bound by the judgment as fully as any one else who is authorized to sue.

The formerly prevailing notion of the inferiority of married women to *femes sole* was based upon the fact that originally wives were bought, or captured in war, and were chattels. Shakespeare, who usually stated the English law of his time with accuracy, makes *Petruchio* say of his wife:

"She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything."

But in England any distinction between the property or other rights of a married woman and her single sister has long since been abolished, root and branch, as has been done in the English colonies, and in most of the states of this Union. In this state the distinction as to property rights between *femes sole* and *femes covert* was abolished by the Constitution of 1868, art. 10, § 6, save that as to conveyances of realty by a married woman the written assent of the husband was required. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784. It should be noted that this requirement is not any lingering idea of the inferiority of married women to single ones, or intended as a protection for a half-emancipated class, but is a provision for the exactly opposite purpose of protecting the husband's courtesy (if not abolished by legislation), and is merely a correlative of the wife's joining in the husband's conveyances to bar dower. Accordingly the statute empowers a woman to sue alone for her separate property, and the statute of limitations runs against her if she does not sue. Thus she was *sui juris* in the former litigation, competent to amend her complaint by the recital of any additional matters she wished to be passed upon, and bound by the judgment upon the award. By no process of reasoning, nor of metaphysics, nor stretch of imagination, can a judgment against the plaintiff in an action of ejectment be called a "conveyance" (unless collusion was char-

ged and shown). The wife must join in conveyances of the husband to bar dower; but, if he suffer an adverse judgment in an action to recover land, the judgment is not invalid because she is not a party to the action. This case is stronger, for the wife is expressly empowered by statute to sue alone. Even if the judgment had been broader than the complaint, or if there had been no complaint, the judgment, unappealed from, was binding upon her as upon any one else authorized to bring an action. This court has often so held. Here the judgment was obtained in an action brought by the married woman. This court has often held that a married woman is bound by a judgment, even when she is brought into court as a defendant and against her will. In *Vick v. Pope*, 81 N. C. 22, *Smith, C. J.*, says that, where a husband and wife are sued jointly, it is the duty of the husband to set up the wife's disability, and, if he fail to do so, the wife cannot have the judgment against her set aside on the ground of her incompetency to contract. He says that a judgment against a married woman, appearing in the suit by counsel of her husband's selection, is as binding as one against any other person, unless it be obtained by the fraudulent combination of the husband with the adverse litigant. He pertinently added at page 26: "If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? If she is disabled from resisting a false claim, how can she prosecute an action for her own benefit, when nothing definite is determined by the result? It is no sufficient answer to say that the defendant's execution of the note with her husband did not bind her. The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat it. As, then, a married woman may sue, and, with her husband, be sued on contracts, they, and each of them, must at the proper time resist the recovery as other defendants, and their failure to do so must be attended with the same consequences." This case has often been cited with approval on this point; among many other cases, in *Jones v. Cohen*, 82 N. C. 80; *Grantham v. Kennedy*, 91 N. C. 156; *Williamson v. Hartman*, 92 N. C. 242; *Neville v. Pope*, 95 N. C. 351; *Wilcox v. Arnold*, 116 N. C. 711, 21 S. E. 434; *Strother v. Railroad*, 123 N. C. 198, 31 S. E. 386. This is a stronger case, for here the plaintiff brought the former action *sui juris*, as authorized by the statute. She selected her own counsel, agreed to the arbitration as a rule of court, and made no objection to the judgment upon the award, which she was fully as competent to do in that action as she is in this, which is likewise brought by her suing alone. In the former proceeding the court unquestionably

had jurisdiction, and, if there was any defect, it was by error in entering judgment upon the award, and that was cured by failing to object and appeal. *Neville v. Pope*, 95 N. C. 346. In *Vick v. Pope*, supra, Smith, C. J., cites as authority *Taylor, C. J.*, in *Frazier v. Felton*, 8 N. C. 231, and *Green v. Branton*, 16 N. C. 504, in which the elder Ruffin says: "Married women are barred by judgments at law as much as other persons, with the sole exception of judgments allowed by the fraud of the husband in combination with another. * * * She must charge and prove that she was prevented from a fair trial at law by collusion between her adversary and her husband preceding or at the trial." In *Neville v. Pope*, supra, judgment had been taken against a married woman before a justice of the peace, and it was (unlike this) a direct action to set aside the judgment, the plaintiff laying stress upon *Dougherty v. Sprinkle*, 88 N. C. 800, in which it had been held that such action could not be maintained; but that ground was overruled. Judge Merrimon, following the three chief justices above named (*Taylor, Ruffin, and Smith*), and speaking for a unanimous court (*Smith, C. J., and Ashe, J.*), said: "It may be that if the plaintiff in this case had made defense, pleaded her coverture, and had appealed from the adverse judgment given against her, she would have been successful. But she did not make defense at all, and, as there was judgment against her according to the course of the court, it must be treated as conclusive that the cause of action and the facts were such as warranted the judgment." In *Grantham v. Kennedy*, supra, the same learned court said: "Married women and infants are estopped by judgments in actions to which they are parties in the same manner as persons *sui juris*." Yet in none of the above cases did the married woman waive her coverture, but, being in court, and not excepting to the judgment, she was held bound by it. But here the plaintiff went further, and voluntarily went into court, waiving her coverture by suing alone, as the statute authorized her to do, and as she is doing in this present action. This is not a motion to set aside the former judgment for excusable neglect or mistake, nor for irregularity, nor is it an action to impeach it for fraud. The judgment was taken according to due course upon an arbitration entered as a rule of court, signed by the plaintiff, and judgment was entered upon the award without objection from her or her counsel. After an acquiescence of nine years, this new action is brought for the same land whose title had been adjudicated by the former judgment. As our adjudications are uniform that "married women and infants are estopped by judgments in actions to which they are parties in the same manner as persons *sui juris*" (*Grantham v. Kennedy*, and other cases cited supra), his honor below correctly so held.

(108 Va. 314)

BURWELL v. BURWELL et al.

(Supreme Court of Appeals of Virginia. Dec. 8, 1904.)

PARENT AND CHILD—CONTRACTS—PRESUMPTION OF VALIDITY—BURDEN OF PROOF—ESTATES OF DECEDENTS—RENTAL VALUE OF LANDS—CHARGE TO OCCUPANT—ACCOUNTING—SET-OFF.

1. Where a mother gave her son a bond for services rendered, as her agent, under an agreement which had been terminated, there was no such confidential relation existing between the mother and son as to raise any presumption of invalidity, and the burden of showing that the son had procured the bond by fraud or undue influence was on the one attacking it.

2. Where a son cultivated the lands of his mother under an agreement with her that he was to receive a certain portion of the crops, as between the son and the estate of the mother, it was error to charge him for the rental value of the lands after the mother's death without giving him an opportunity to show what taxes and other proper charges he was entitled to have set off against the use of the land.

Appeal from Circuit Court, Franklin County (Saunders, Judge, not sitting).

Action by one Burwell against the estate of Mary E. Burwell, deceased. Judgment in favor of defendant, and plaintiff appeals. Reversed.

Dillard & Lee, for appellant. S. & M. Griffin, for appellees.

BUCHANAN, J. The appellant instituted a creditor's suit against the estate of his mother, Mary E. Burwell, deceased. His claim was evidenced by a bond for \$4,000, given, as stated in the bond, for services rendered his mother from January 1, 1869, until December 31, 1876, under a contract between the appellant and his mother for the management of her farm and business. That agreement was terminated by the mother at the expiration of the year 1876, and the appellant, who was unmarried, afterwards and until her death, in the year 1897, remained with her under an arrangement between them, by which he was to cultivate her lands, and each receive a certain portion of the crops.

The bond of the appellant was executed, as appears from its date, on May 14, 1884. The defense chiefly relied on to defeat the appellant's recovery is that he did not keep and perform his agreement with his mother, and was therefore not entitled to the compensation therein provided for, and for which the bond was given, and that he procured the execution of the bond by false representations to, and improper or undue influence over, her.

Upon a hearing of the cause the circuit court disallowed his claim. From that decree this appeal was allowed.

The appellant insists that the circuit court erred in holding that such confidential relations existed between him and his mother, when the bond was executed, as imposed upon him the duty of showing that its execu-

tion was procured in good faith after a full disclosure of all the facts and circumstances affecting the transaction, and in the absence of all undue influence.

There are certain relations in life, which, from the peculiar confidence necessarily subsisting, courts of equity feel bound to guard and protect. These are guardian and ward, trustee and cestui que trust, attorney and client, principal and agent, parent and child, and the like. Transactions between persons occupying such confidential relations are viewed with jealous vigilance by courts of equity. 1 Story's Eq. Jur. §§ 307-323.

While the natural and just influence which a parent has over a child renders it peculiarly important for courts to watch over and protect the interests of the latter, and to set aside contracts and conveyances whereby benefits are secured by children to their parents, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, the same rule does not apply where contracts and conveyances are made by which benefits are secured by the parent to the children. Instead of such contracts and conveyances being guarded with a jealous eye, they will generally be presumed to be free from suspicion, and the party who claims that they were procured by undue influence must generally prove it.

Mr. Pomeroy says, in discussing the transactions between parent and child, that: "A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts it lies upon the parent maintaining the gift to disprove the exercise of parental influence by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands upon the same footing as any other gift, and the question to be determined is whether there was a deliberate, unbiased intention on the part of the child to give to the parent. Where the positions of the two parties are reversed—where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority—conveyances conferring benefits upon the child may be set aside. Cases of this kind turn plainly upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid." 2 Pom. Eq. Jur. § 962. And a fortiori there is no such presumption as to a contract based upon a valuable consideration.

In the case of *Greer v. Greer*, 9 Grat. 332, a man in extreme old age conveyed the whole of his estate to one of his sons, and this court held that, as he had sufficient capacity to understand what he was doing, and there was no direct proof of fraud or undue influence, the improvidence and injustice of

the act in disinheriting his other children did not give rise to a presumption of an abuse of confidence, or justify the court in setting aside the conveyance.

In the case of *Orr v. Pennington*, 33 Va. 268, 273, 24 S. E. 928, where a father, a month before his death, had conveyed substantially all of his property to one of his four children, and it was sought to set aside the conveyance upon the ground that the grantee had procured its execution by the exercise of undue influence over the grantor when his mind was weakened by the infirmities of age and disease, the rule, as stated by Mr. Pomeroy, and quoted above, that such cases turn upon the exercise of actual undue influence of the child over the parent, and not upon any presumption of invalidity, was approved and followed.

While the bond in this case was executed for services rendered as agent, they were rendered under an agreement which had been terminated more than eight years before; long after the relation of principal and agent created by it had ceased to exist, and when they had the right to deal with each other in the same manner as other persons. 2 Pom. Eq. Jur. 959.

We are of opinion that there were no such confidential relations existing between the appellant and his mother, when the bond was executed, as raised any presumption of its invalidity. The burden, therefore, of showing that the appellant had procured the execution of the bond by fraud or undue influence was upon the appellees.

Their evidence consisted of the depositions of two brothers and two sisters of the appellant. Their testimony was for the most part hearsay or irrelevant, and upon exception that portion of it was excluded by the circuit court. They knew nothing of the circumstances under which the bond was executed; indeed, they did not know that it had been executed until after the mother's death. The evidence does not prove that any undue influence was exercised, or any false representation made, to induce the mother to execute the bond. There is no pretense that she was not a woman of vigorous mind, in full possession of all her faculties at the date of the bond and for years afterwards—up to the time of her death, so far as the record shows. She made her will in the year 1889, added codicils to it, and lived until 1897—13 years after the bond was executed.

Upon all the facts and circumstances of the case we are of opinion that the bond of the appellant is a valid claim against his mother's estate, and that the exceptions to the report of the commissioner, which so found, should have been overruled, and the report confirmed.

The action of the court in charging the appellant with the rental value of the lands of his mother's estate held by him since her death is assigned as error.

The answer filed in the case prays that if

the appellant's bond, or any part thereof, is held to be a valid debt against the estate of his mother, he shall be required to render an account of his transactions as manager of her lands, both during her life and since her death.

The commissioner, in ascertaining the value of the decedent's lands, took evidence of their rental value, and among other witnesses he called to testify upon that point was the appellant. Upon that evidence the court entered a decree against him for the rental value of the lands after his mother's death, without giving him an opportunity to show what taxes and other proper charges, if any, paid by him, he was entitled to have set off against the use of the land during that period. This was error.

For this error, and the disallowance of the appellant's debt, the decree appealed from must be reversed to that extent, and in other respects affirmed, and the cause remanded for further proceedings, in which such accounts may be ordered as are necessary to ascertain what sums, if any, the appellant is indebted to his mother's estate for the use of her lands.

(103 Va. 305)

RHEA et al. v. SHIELDS.

(Supreme Court of Appeals of Virginia. Dec. 8, 1904.)

JUDICIAL SALES—SALES FOR PERSONS UNDER DISABILITY—SALE OF REMAINDER INTERESTS—DECREE—CONCLUSIVENESS—TITLE OF BONA FIDE PURCHASER—ESTOPPEL.

1. The purpose of Code 1887, § 2616 [Va. Code 1904, p. 1332], authorizing guardians of minors, committees of insane persons, and trustees of an estate to file a bill in equity to procure a sale of the real estate for the benefit of the estate, is to invest courts of equity with that jurisdiction in respect to estates of all persons under disability.

2. Under Code 1887, § 2616 [Va. Code 1904, p. 1332], authorizing guardians of minors, committees of insane persons, or trustees of an estate to file a bill to procure a sale of the real estate of the minor, insane person, or beneficiary, whether there be or be not limited thereon any other estate, vested or contingent, a court of equity may, at the suit of the trustee of a life estate, sell not only the life estate, but also a remainder limited over to minors as to whom the trust does not extend, in which case the proceeds of the sale, or the property in which they are invested, are held upon the same trusts and subject to the same limitations as the property sold.

3. Where the court acquires jurisdiction both of the parties and of the subject-matter of litigation instituted under Code 1887, § 2616 [Va. Code 1904, p. 1332], authorizing the sale of land belonging to persons under disability, its decree, although erroneous, is conclusive until reversed or set aside.

4. Where the court acquires jurisdiction both of the parties and of the subject-matter of litigation instituted under Code 1887, § 2616 [Va. Code 1904, p. 1332], authorizing the sale of land belonging to persons under disability, the title of a bona fide purchaser under its decree is valid.

5. Although proceedings instituted under Code 1887, § 2616 [Va. Code 1904, p. 1332], authorizing the sale of land of minors and persons under

disability are irregular, yet where the minors, after reaching majority, file amended pleadings requesting the sale of the property, they are equitably estopped from objecting to the validity of the sale.

6. A party who has assumed a certain position in a cause and successfully maintained that position is precluded from thereafter assuming an inconsistent position to the prejudice of one who has acquiesced in the position formerly assumed by him.

7. Bona fide purchasers of the legal title to land are not affected by any latent equity founded on a trust, fraud, incumbrance, or other matter, whereof they have no notice, actual or constructive.

Appeal from Law and Chancery Court of City of Norfolk.

Bill in equity by L. H. Shields, trustee, against William H. Rhea and others. From a decree rendered in respect to a sale of the trust property, defendants Rhea appeal. Affirmed.

R. Randolph Hicks, for appellants. D. Tucker Brooke, A. B. Seidner, and John A. Baecher, for appellee.

WHITTLE, J. The real estate which is the subject of this controversy was devised by Robert Rhea, Sr., to his executor, in trust for his son, William H. Rhea, Sr., for life, with remainder to such of his children as should survive him. The property consisted of seven improved lots in the city of Norfolk.

By successive substitutions L. H. Shields succeeded the original trustee appointed by the will, and at August rules, 1889, filed a bill in equity in the corporation court of the city of Norfolk against appellants, William H. Rhea, Sr., and his children, the latter all being infants at that time, for the sale of four of the lots referred to for the payment of taxes, the repairs and improvement of the residue of the property, and the balance of the proceeds of sale to be invested as the court might think best to yield an income for the owners.

The proceedings in the suit were in technical compliance with the statute; and upon the report of a commissioner in chancery, to whom the matter was referred, recommending a sale, the lots indicated were regularly sold under decrees in the cause, the sales confirmed, the purchase money paid into court, and deeds executed and delivered to the purchasers.

The last sale of these lots was made and confirmed in February, 1890. The suit then remained on the docket of the court, without further steps being had therein, until August, 1894, at which time, after all the remaindermen had attained their majority, the trustee and William H. Rhea, Sr., the life tenant, and a defendant in the original bill, filed a joint petition in the cause, in which they allege that the deferred payment of the purchase money for a farm in Northampton county, which had been bought as a home for appellants, was long past due; that the

vendor was threatening to sell the property for the unpaid purchase money; and praying that the court would authorize the special commissioner to borrow a sufficient sum to discharge that indebtedness, and secure the loan upon some portion of the Norfolk city property still held by the trustee under the will. The remaindermen answered the petition by counsel, and united in its prayer. The loan, however, was not effected, but subsequently, upon the written request of all parties in interest, the court decreed a sale of the lot on Cumberland street.

The property was accordingly sold, and the sale confirmed, the purchaser complying with the terms and receiving a conveyance. The decree of confirmation of February 23, 1895, was entered by the court of law and chancery of the city of Norfolk, which was established in 1895, and to which court, by force of the statute, this suit, together with all other chancery causes pending in the corporation court, was regularly transferred.

In April, 1897, the trustee, William H. Rhea, Sr., and W. W. Sale, a temporary receiver, presented another petition to the court, in which, after reciting the proceedings in the cause and the fact that creditors, in a deed of trust for upwards of \$4,000, which had been placed upon a lot on Union street by authority of a former decree, intended to enforce their lien, they prayed that a sale of the property might be made to one H. Davis, at a private offer made by him, to satisfy the lien. Thereupon Davis exhibited his petition to the court, in which he alleged that the proceedings in the cause were not regular, and sought to be relieved from his bid. To obviate the objection urged by him to the regularity of the proceedings, the trustee and William H. Rhea, Sr., filed an amended and supplemental bill for the purpose of selling the lot in question, to which the remaindermen were made parties. These defendants, who, as remarked, were then of age, by their answer united in the prayer of the bill. There was a reference to a commissioner to ascertain, among other matters, whether the bid of Davis was a fair and sufficient one for the property; whether the interests of all parties directly or contingently interested in the property, would be promoted by the sale, or the rights of any party would be violated thereby.

Upon the report of the commissioner, which was not excepted to, that Davis' bid of \$5,500 was a fair price for the lot; that the interests of the persons directly or contingently interested in the property would be promoted by the sale; that all persons living who had any interest in the property were properly before the court as parties to the suit; and that the suit was in regular form, and the court had a right to sell the property—the bid of Davis was accepted, and the sale to him confirmed.

In February, 1898, practically similar proceedings were had with respect to the lot on

Cumberland street, which resulted in a public sale of that property to one of the appellees at the price of \$2,615.

Upon the foregoing facts appellants contend that it was not permissible, under section 2616 of the Code of 1887 as amended [Va. Code 1904, p. 1332], for a court of equity, at the suit of the trustee of a life estate in land, to sell not only the life estate, but also the remainder limited on that estate, over which the trust did not extend; that the decrees were therefore nullities; that the proceedings under them passed no right or title to the lots in controversy to appellees; that the court erred in dismissing appellants' petition to rehear the cause, and in refusing to declare the decrees and sales made in pursuance of them void, and of no effect.

The doctrine in this state is well settled that courts of equity possess no inherent power, as guardians of infants, to sell their real estate for the purpose of reinvestment, and the obvious purpose of the statute under which these proceedings were had is to invest those courts with that jurisdiction in respect to estates of all persons under disability.

The statute is highly remedial, and upon familiar principles must receive a liberal construction to give effect to the intention of the Legislature and enhance the remedy. See authorities cited in note to section 2616, 2 Va. Code 1904, p. 1333.

But, in addition to the foregoing considerations, the contention of appellants is opposed to the construction heretofore placed upon the statute and the course of judicial procedure under it, which has obtained for many years—certainly since the decision in the case of *Faulkner v. Davis*, 18 Grat. 652, 98 Am. Dec. 698. The practice has been to sell or exchange the absolute estate, in place of which the proceeds of sale, or the subject in which they are invested, or for which the property is exchanged, are held upon the same trusts and subject to the same limitations as the original estate.

The facts in the case of *Faulkner v. Davis*, supra, were as follows: Two vacant lots in the city of Richmond were conveyed in trust for Norton and his wife and the survivor of them for life, and upon the death of the survivor to be conveyed by the trustee to their children living at the death of the survivor, and the descendants of such of the children as should be then dead leaving descendants; and upon the further trust that, if Norton should think it expedient to sell the lots, or any part of them, the trustee should permit him to do so; the proceeds of sale to be secured and held upon the same trusts. Norton died, without having sold the lots, survived by his wife and five children, and a bill was filed by his widow against the children and trustees for a sale of the lots. This court held that, while courts of equity in Virginia have no authority under their general jurisdiction to sell real estate belonging

to infants, they did possess jurisdiction by statute to sell land in which infants were interested, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the court. Judge Moncure, speaking for the court, at page 675, 18 Grat., 98 Am. Dec. 698, says: "Of course, the sale in that case was of the entire and absolute estate, and not of the contingent interest merely. The proceeds of sale and the subject in which they might be invested were to stand in the place of the estate sold, and be subject to the same uses and limitations." The opinion treats the subject exhaustively, and gives in detail the history of the legislation with respect to such sales in Virginia.

In the still earlier case of *Cooper v. Hepburn*, 15 Grat. 551, it was held that a father, as guardian of his infant children, could maintain a suit to sell real estate held by himself for life and by his children in remainder.

So that, whatever may be said of appellants' contention as an original proposition, these decisions have adopted a different construction, and titles to property throughout the commonwealth have been acquired and rights become vested on the faith of it, and a departure from that construction at this time would be disastrous and indefensible, even if the court, as at present constituted, were of a contrary opinion.

It follows from what has been said that the corporation court and the court of law and chancery of the city of Norfolk acquired jurisdiction both of the parties and the subject-matter of the litigation; and where that is the case, although the decrees may be erroneous, they are nevertheless conclusive until reversed or set aside.

It also follows that the titles of appellees, who are bona fide purchasers for value, and without notice, to the lots first sold, are valid, and must be upheld.

In *Zirkle v. McCue*, 26 Grat. 517, the court said: "The only matter for inquiry is: Did the court have jurisdiction of the subject-matter? Were the proper parties before it? Were the proceedings regular? Was the sale proper, under all the circumstances then surrounding the parties? If so, there is no pretense for interfering with the title of an innocent purchaser, because in the light of subsequent occurrences the sale has proven injudicious and unfortunate for the interests of the infants."

It will also be remembered that the remaining lots were sold under decrees, upon amended pleadings in the cause, at the instance and request of the parties, all of whom were at that time adults; and, whatever may be said of the irregularity of the proceedings, they are now equitably estopped

from objecting to the validity of sales made at their own solicitation.

"A person who causes his land to be sold for some purpose of his own under a judicial proceeding which turns out to be void, and receives and retains the proceeds of sale, cannot afterwards be heard to question its validity. He has made his election." *Williamson v. Jones* (W. Va.) 19 S. E. 438, 25 L. R. A. 222; *Fairfax v. Muse's Ex'rs*, 4 Munf. 124.

Such conduct would also violate the rule whereby a party who has assumed a certain position in a cause and successfully maintained that position is precluded from thereafter assuming an inconsistent position, if it be to the prejudice of one who has acquiesced in the position formerly assumed by him. *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *C. & O. Ry. Co. v. Rison*, 99 Va. 19, 37 S. E. 820.

It must be observed that the only persons who are made defendants, and whose rights are sought to be affected by the petition to rehear, are appellees, all of whom belong to that favored class in a court of equity bona fide purchasers for value, and without notice. As to such purchasers, this court has declared that "It is settled law that a bona fide purchaser of the legal title is not affected by any latent equity founded on a trust, fraud, incumbrance, or otherwise, whereof he had no notice, actual or constructive." *Carter v. Allen*, 21 Grat. 241; *Iron Co. v. Trent*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 235; *Bank v. Blanchard*, 90 Va. 22, 17 S. E. 742.

While the court feels constrained to hold that the petition was properly rejected as to these defendants, an examination of the record makes it painfully apparent that there has been a miscarriage of justice in the case, a result brought about by the misconduct of the trustee and former counsel of these unfortunate litigants, by whose malversation and imposition on the courts they have been stripped of a valuable inheritance. The situation is rendered the more regrettable by the circumstance that the property has passed beyond the court's control, and it is powerless to repair a great wrong.

The developments in the case accentuate the necessity for the exercise of such vigilance on the part of trial courts, in dealing with this class of cases, as will render the recurrence of similar results impossible; otherwise a benign statute specially enacted for the protection of the unfortunate may be converted into an instrument for their destruction.

There is no error in the decree complained of, and it is affirmed.

(108 Va. 286)

ROCKY MOUNT LOAN & TRUST CO. v.
PRICE et al.(Supreme Court of Appeals of Virginia. Dec.
8, 1904.)APPEAL — REVIEW — SETTING ASIDE VERDICT —
SETTING ASIDE JUDGMENT — CONSENT OF PAR-
TIES — ESTOPPEL — BONDS — MATERIAL ALTER-
ATION — INSTRUCTIONS.

1. In an action on bonds one of the defendants filed a plea of non est factum, the cause being continued as to him, and a judgment was rendered against the remaining obligors. Thereafter an order was entered reciting that the defendant pleading non est factum, and another, an administrator, having filed their statement of defenses and pleas at the last term, and no order having been entered in respect thereto, it was agreed that the filing of such papers should be entered nunc pro tunc. *Held*, that in view of such order, and the subsequent action of the parties treating the judgment as set aside, plaintiff was estopped to deny that it had been set aside as to the administrator.

2. The action of the court in setting aside a verdict for misdirection of the jury cannot be reviewed on appeal, where the instructions given are not contained in the record.

3. Where, in an action on a bond, one of the obligors pleaded non est factum, an instruction that if such defendant did not sign the bond, and his name was signed without his authority, the jury must find for the defendant, and that the burden of proof was on the plaintiff, was proper.

4. On appeal the evidence is to be treated as on a demurrer to the evidence.

5. In an action on bonds one of the defendants claimed an alteration in the bonds, after delivery, by inserting the name of a certain person as an obligor. The evidence showed that the bonds were given for land sold to the obligors, and that after the sale the defendant in question sold a part of his interest to the one whose name had been added to the bond. The obligee testified that shortly after they were delivered to him the obligors told him they wanted them back to get some other parties who had come into the deal to sign them, and that the bonds were given back to one of the obligors, and afterwards again delivered to the obligee, and the one who purchased the bonds from him testified that when he received them they were in the same condition as at the time of the action. *Held*, that an instruction that if, after the bonds were signed and delivered, the name in question was added without the knowledge or consent of defendant, it was a material alteration, was not warranted, as the evidence tended to show that the real delivery of the bonds was when they were delivered the second time, and it did not appear that defendant did not know of the addition of the name in question.

6. In an action on bonds the fact that the name of one of the obligors was forged did not affect the liability of the others.

Error to Circuit Court, Franklin County (Saunders, Judge, not sitting).

Motion by the Rocky Mount Loan & Trust Company for judgment against H. C. Price and others on certain bonds. Judgment in favor of defendants, and the moving party brings error. Reversed and rendered.

L. W. Anderson, for plaintiff in error.
Hairston & Gravely and Dillard & Lee, for defendants in error.

HARRISON, J. This is a motion under the statute by the plaintiff in error, as as-

§ 6. See Principal and Surety, vol. 40, Cent. Dig. § 80.

signee of William Gentry, for judgment against the defendants in error upon two bonds dated November 18, 1890—one for \$500, payable one year after date, with interest from date; and the other for a like sum, payable two years after date, with interest from date. These bonds, copies of which are filed with the record, appear on their face to be the joint and several obligations of N. C. Carper, J. J. Carper, Jas. C. Greer, G. H. T. Greer, B. N. Hatcher, G. M. Helms, and H. C. Price.

On the 14th day of May, 1901, to which the notice was returnable, the defendant H. C. Price filed his plea of non est factum, whereupon the cause was continued as to him, and judgment rendered against the remaining six obligors, as to whom the order states there was no appearance. On the 5th day of October, 1901, the following nunc pro tunc order was entered: "This day came the parties by their attorneys, and the defendants H. C. Price and J. H. Ferguson, administrator of B. N. Hatcher, deceased, having filed their statements of defenses duly sworn to, and their special pleas in abatement, at the last term by leave of the court, and no order having been then entered in respect thereto, it is agreed between the parties that the filing of said statements of defenses and said special pleas shall be entered of record nunc pro tunc, which is accordingly done." It being contended by plaintiff in error that the judgment of May 14, 1901, is still in force against the administrator of B. N. Hatcher, deceased, it may be as well to state at this point that we are of opinion that this nunc pro tunc order entered by consent of parties, together with the subsequent action of the parties in the further progress of the cause, treating the judgment as set aside, estops them from now denying that to be its effect.

The defense relied upon by J. H. Ferguson, administrator of B. N. Hatcher, deceased, was that: "His testator signed his name to the bonds in action at the time of the execution thereof, and delivered the same to the obligee, William Gentry; that subsequently to this there was a material alteration made in both of the said bonds by the Rocky Mt. Loan & Trust Co., which had become the owner of the said bonds, or by the said Wm. Gentry, after the delivery to him, and before assignment to the Rocky Mt. Loan & Trust Co. without the knowledge or consent of his testator, in this: that the name of H. C. Price was signed to both of the said bonds, for the purpose of making him an obligor thereon, after the delivery and signatures aforesaid by the said original obligors."

Upon the issues joined on the plea of non est factum filed by H. C. Price, and upon the defense set up by Hatcher's administrator, the jury found in favor of the defendants in error. On motion of the plaintiff in error this verdict was properly set aside upon the ground of newly discovered evidence, and

because the verdict was contrary to the law and the evidence. But, apart from these considerations, this action of the court cannot be disturbed, because one of the grounds for setting the verdict aside was misdirection of the jury; and the instructions given are not in the record. This court cannot, in the absence of the instructions, assume that they were free from objection, or pass at all upon that ground for setting the verdict aside.

At a special term of the circuit court, begun on Tuesday, September 30, 1902, the case was again tried upon the same defenses, with the same result—a verdict in favor of the defendants in error. This judgment the lower court refused to set aside, and from that action a writ of error was awarded, bringing the case before this court for review.

Having, in what has been already said, disposed of several of the assignments of error, we come now to that which relates to the instructions given on the last trial.

The plaintiff in error objects to two instructions given for the defendants in error. The first is as follows: "The court instructs the jury that if they believe from the evidence that H. O. Price did not sign the bonds in the notice mentioned, but that his name was signed thereto without his authority, then they must find for the defendant H. O. Price, and in coming to a conclusion in this issue the jury must bear in mind that the burden of proof is on the plaintiff."

The evidence of H. O. Price tended to show that he did not sign the bonds, and under his plea of non est factum this instruction correctly propounded the law. We are of opinion, however, that upon the whole evidence the verdict of the jury was against the weight of evidence; but under the rule, treating the case here as upon a demurrer to the evidence, the judgment in favor of H. O. Price cannot be disturbed.

The second instruction is as follows: "The court further instructs the jury that any material alteration will vitiate the bonds, even though said alteration may not be prejudicial to the rights of said B. N. Hatcher, deceased; and if they believe from the evidence that after the bonds were signed and delivered by Hatcher and others to William Gentry, and he accepted the same as their obligation, and that afterwards the name of H. O. Price was added to said bonds without the knowledge or consent of said Hatcher, and that he did not subsequently ratify the same, such addition would be a material alteration, and in this action the jury must find for the defendants."

This instruction enters upon a field of inquiry not called for by any evidence in the case. The consideration for these bonds was a tract of land sold by William Gentry to the obligors. The original transaction was with the first six obligors, of which Hatcher was one. After the sale to these obligors,

Hatcher sold one-half of his interest in the purchase to H. O. Price. William Gentry, the obligee, says that a short while after the bonds were delivered to him the obligors told him they wanted them back to get some other parties who had come into the deal to sign their names to them; that he thinks N. C. Carper was the one he handed the bonds to; that some while afterwards they brought the bonds back; that he could not read or write, and did not know whether any new names had been added; that he then put the bonds away; and that they were not changed or altered in any way after he received them back. J. C. Greer, the only one of the obligors who testified, says that his recollection is that H. O. Price bought one-half of Hatcher's interest, and that the bonds were gotten back from William Gentry for the purpose of having the parties who came into the deal afterwards sign their names to them; that, as secretary and treasurer of the plaintiff company, he bought the bonds from William Gentry, and that they were exactly like they are now when he bought them, except the credits indorsed thereon of payments made by the obligors, including B. N. Hatcher and H. O. Price; that B. N. Hatcher always paid his dues on the bonds promptly; that he cannot say positively that he presented the bonds to him when he made his payments, but thinks he must have done so, as that would have been the natural thing for him to have done.

At the time this suit was brought three of the obligors were dead, and the foregoing is the entire evidence in the case touching the execution and delivery of these bonds.

The instruction under consideration proceeds upon the theory that B. N. Hatcher had no knowledge of the fact that the name of H. O. Price was subscribed to the bonds as one of the obligors therein. It was error to give an instruction predicated of that view, because there is no evidence in the record tending to show that the name of Price had been placed upon the bonds without the knowledge and consent of Hatcher. The evidence tends to show that the final completion and delivery of these bonds was when they were delivered the second and last time by the obligors to the obligee; that when these bonds were recalled by the obligors, as already seen, it was with the implied, if not expressed, agreement of all parties, obligors and obligee, that they were to be re-executed and redelivered to the obligee; that under this agreement, when the bonds were completed by the additional signatures desired by the obligors, and delivered to the obligee, it was the re-executed and finally completed contract contemplated by the parties. If this be true, the rights of the obligee and the liability of the other obligors were not affected by the fact that the name of one of the obligors may have been forged. The plea of non est factum bars the action only as to him who pleads it, and does

not affect the liability of the other defendants in a case like this. *Bush v. Campbell*, 28 Grt. 408.

For the foregoing reasons, the court is of opinion, the judgment complained of being joint, that the same should be reversed; and this court, proceeding to enter such judgment as the lower court ought to have entered, it is ordered that the plaintiff take nothing by its notice as to the defendant H. C. Price, and that he go thereof without day, and that the defendant H. C. Price recover of the plaintiff his costs in the circuit court about this suit in his behalf expended. And it will be further ordered that the verdict of the jury be set aside as to the defendant John H. Ferguson, administrator of B. N. Hatcher, deceased, and the case will be remanded for further proceedings against the personal representative of B. N. Hatcher, deceased, to be had in accordance with the views expressed in this opinion.

(120 Ga. 757)

GRAHAM & WARD v. MACON, D. & S. R. CO.

(Supreme Court of Georgia. July 19, 1904.)

CARRIERS—THROUGH BILLS OF LADING—RAILROADS—OPERATING STEAMBOATS—CONTRACT—VALIDITY—ACTION FOR BREACH.

1. Carriers may issue through bills of lading, and may make contracts for through shipments or for the interchange of freight between each other.

2. Railroad companies chartered under the general law may acquire and operate steamboats in connection with their lines of road.

3. There was, therefore, no public policy which prohibited a railroad company from entering into a contract with a firm by which the latter was to acquire and operate a steamboat and each party was to receive and deliver its freight to the other at the usual rates, in consideration of which the railroad company agreed to erect a hoist for the speedy and economical handling of freight between the boat and the cars.

4. Such a contract was not unilateral, was supported by a sufficient consideration, and the firm was entitled to maintain an action against the railroad company for damages for a breach of the contract.

5. Irrespective of the question as to whether the special damages declared on were improperly set out, or that the data for calculating the other damages were wanting, it was nevertheless error to dismiss the petition on demurrer, as the plaintiffs, in any event, were entitled to recover nominal damages for the breach of the contract.

(Syllabus by the Court.)

Error to City Court of Dublin; Adams, Judge.

Action by Graham & Ward against the Macon, Dublin & Savannah Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed.

A line of steamboats on the Oconee river was run in connection with a competitor of the Macon, Dublin & Savannah Railroad Company. In order to meet this competi-

tion, the railroad company, through its duly authorized agents, contracted with Graham & Ward that the firm should acquire a boat to be run on the river, agreeing to give them all the river freight controlled by the company, and to construct a hoist by which freight could be cheaply handled between the boat and the cars. It was further understood that Graham & Ward should deliver all the river freight controlled by them to the railroad company, and that both parties were to charge the usual rates. Relying on this contract, Graham & Ward leased a steamer for 12 months, and were ready, able, and willing to comply with their part of the agreement. Their petition against the railroad company alleges that the company failed to comply with its contract, and for more than 12 months neglected to begin the construction of the hoist, which had not been erected at the time of the filing of the suit; that they delivered to the company all freights hauled or controlled by them, but that the company failed on its part to do likewise; that by reason of the failure to erect a hoist they lost the larger part of the river freight, and the business worked up by them, as without the hoist they could not receive or deliver freight as quickly or safely as required by shippers, who would otherwise have given the same to petitioners—whereby they were damaged generally and specially. By amendment they added a list of persons who could and would have delivered certain designated amounts of freight, but were deterred from doing so by want of the hoist; also a calculation as to the amount of damage sustained by reason of the loss of the profits thereon. The petition was demurred to on the grounds that it set out no cause of action; that the contract was uncertain, wanting in mutuality, and without consideration; that the damages were too remote; and that the contract was contrary to public policy, and void. The judge sustained the demurrer, and Graham & Ward excepted.

Davis & Sturgis, for plaintiffs in error. Minter Wimberly and Akerman & Akerman, for defendant in error.

LAMAR, J. (after stating the facts). The contract for the exchange of freight was not void, as being contrary to public policy. Instead of defeating, it was intended to meet, competition. There is no suggestion of any restraint of trade, any increase of rates, any rebate or pooling, any unjust or unlawful discrimination, or anything that interferes with the right of a shipper to route his freight over a different or any desired line. Indeed, there is nothing to sustain this ground of attack, unless it be unlawful for parties who are able to contract to covenant to receive from and deliver to each all the freight controlled by the other. Graham & Ward, as individuals, had the natural and inherent

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 41.

power to make any contract not prohibited by law. The railroad company, on the other hand, had the power to make any contract not ultra vires, or not prohibited by law. Carriers can sell through tickets and issue through bills of lading. Each of these parties had the right from day to day to interchange freight with the other. If they could make such an exchange daily, there is no reason why they should not do so weekly, monthly, or by the year. If they could do so voluntarily, they, for a valuable consideration, could bind themselves to make the interchange. To such an agreement, the law would, of course, attach the incidents of prompt and adequate service, and the further qualification that the rights of the shipper or of the public should not in any way be prejudiced. But that the policy of the law is not against the traffic arrangement between these parties appears from the fact that the boat line and the railroad line were equivalent to an extension each of the other. The railroad company either had, or, as matter of course, could have obtained, the charter power to own and operate this boat on this river. Civ. Code, §§ 2174, 2183. Had it done so, of course no one would dispute that the interchange of freight between the boat and the cars would have been legal. And if this could have been done thus directly, there is no reason why it could not have accomplished the same interchange of freight indirectly, and without a purchase of the boat; for, in effect the contract was the acquisition of a qualified interest in a boat line. As long as the public is not harmed, there is no reason why the parties should not be held to the terms of the contract. Compare *Seaboard Air-Line R. Co. v. W. & A. R. Co.*, 97 Ga. 289, 23 S. E. 848; *Coles v. Central R. Co.*, 86 Ga. 251, 12 S. E. 749; *Wiggins Ferry Co. v. Chicago & Alton R. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *Cumberland Valley R. Co. v. Gettysburg R. Co.*, 177 Pa. 528, 35 Atl. 952; *Tonawanda R. Co. v. N. Y. Cen. R. Co.*, 42 Hun, 496; *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*, 142 U. S. 896, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Atchison, T. & S. F. R. Co. v. Denver R. Co.*, 110 U. S. 668, 4 Sup. Ct. 185, 28 L. Ed. 291, overruling *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* (C. C.) 15 Fed. 650.

4. As to the other grounds of the demurrer: The covenant of each of the parties was a sufficient consideration to support the promise of the other. Civ. Code, § 3861. The lease of the boat, and the firm's readiness to receive and deliver freight, amounted to a performance, which justified the demand by them for a corresponding performance of the railroad's agreement to erect the hoist and receive and deliver freight as stipulated. Nor was the contract unilateral, or wanting in mutuality. The uncertainty as to its duration might have made it difficult to decree specific performance. But here the contention that it was for too indefinite or too

long a period of time is answered by the fact that Graham & Ward only rented the boat for 12 months. And if, as contended, either party would have had the right to rescind, there is no allegation that any notice to that effect was given by the railroad company, which, instead of revoking, broke, the contract while it was in full force and being performed by Graham & Ward.

5. The case having evidently been dismissed on the ground that the contract was void, the question as to the elements and measure of damages was not passed upon. There was no statement as to the amount of freight diverted by the railroad company, and no data given from which the fact of damage therefor could be calculated. Any defect in this respect can be cured by amendment. But, whether there were any special damages or not, it was error to dismiss the petition on demurrer, since Graham & Ward were at least entitled to recover nominal damages for the railroad's breach of the contract. *Kenny v. Collier*, 79 Ga. 743 (1), 8 S. E. 58; Civ. Code, § 3801.

Judgment reversed. All the Justices concur.

(127 N. C. 99)

CAMERON-BARKLEY CO. v. THORNTON LIGHT & POWER CO.

(Supreme Court of North Carolina. Nov. 30, 1904.)

APPEAL—EXCEPTIONS TO CHARGE—INCORPORATION IN CASE—CERTIORARI—SETTLEMENT OF BILL OF EXCEPTIONS.

1. The statement of the judge in the case on appeal must be taken as absolutely true.

2. Under Clark's Code, § 412, subd. 3, providing that error in instructions shall be deemed excepted to without any formal objection, the trial judge cannot omit exceptions to the charge from the case on appeal as tendered by appellant.

3. Certiorari will issue to compel the incorporation of exceptions omitted from the case on appeal.

4. On certiorari to compel the incorporation of exceptions to the charge in the case on appeal, the trial judge should be given an opportunity to consider the case again with reference to the assignments, and counsel should be present at the final settlement of the case.

5. The requirement of Code, § 550, that the place appointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory.

Action by the Cameron-Barkley Company against the Thornton Light & Power Company. There was judgment for defendant, from which plaintiff appealed, and, on refusal of the trial judge to incorporate certain exceptions to the charge in the case on appeal, brings certiorari. Writ issued.

T. M. Hufham, for appellant. E. B. Oline, for appellee.

WALKER, J. This is an application by the plaintiff (appellant) for a certiorari. It

¶ 3. See Appeal and Error, vol. 2, Cent. Dig. § 2324.

is alleged in the petition that plaintiff served on the defendant a case on appeal, and defendant filed a counter-case; that the judge who presided at the trial was requested to name a time and place for settling the case, and he appointed as the place a town which is not in the Thirteenth Judicial District, and is at a great distance from the place of trial. The plaintiff further alleges that in the case on appeal, as tendered by its counsel, there were certain exceptions to the charge; and it complains that those exceptions were omitted by the judge, in his statement of the case, by inadvertence. It is also alleged that some of the exceptions contained recitals of instructions given by the court in its charge to the jury which are at variance with the charge set out in the case as settled and signed by the trial judge.

The statement of the judge in the case on appeal as to what occurred on the trial must be accepted in this court as importing verity. We always take it as absolutely true. *State v. Reid*, 18 N. C. 877, 28 Am. Dec. 572; *State v. Gooch*, 94 N. C. 982. If there is any exception to this rule, it has not yet been presented in any case which has come to this court, though it must be true that if the case is tried and the exceptions are noted during the course of the trial, in accordance with the provisions of Code, § 412 (2), the case will be heard here upon the exceptions as thus settled, for the statute virtually so directs. Code, § 550. But the rule as first above stated does not extend to exceptions taken to the refusal of the judge to grant a prayer, or to the granting of a prayer for instructions, nor to the assignments of error in the charge of the court, which alleged errors, by the express terms of the statute, are deemed to have been duly excepted to. *Clark's Code* (3d Ed.) § 412 (3). It follows from that provision of the law that the formal assignment of errors relating to such matters may be made for the first time in the case on appeal as tendered by the appellant, and it has so been frequently decided by this court. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513. See, also, *Clark's Code* (3d Ed.) p. 513, where the cases will be found fully collected and classified. The judge therefore has nothing to do with the appellant's assignment of errors, which is solely the act of the appellant, and must be treated as his assignment. This being so, it is not, of course, subject to the control or revision of the judge. The assignment of errors must appear in the case, and appear, too, as the appellant frames it; otherwise he may be deprived of a most important and valuable right given by the statute. The judge may say what the evidence was, and also what was the charge when it was not in writing, but he may not say how the alleged errors in it shall be excepted to or assigned by the appellant; nor can he omit the assignment of errors from the case be-

cause he does not believe it was properly made, or does not conform to the rulings upon the prayers for instructions or to the charge, provided it was set out in the case on appeal as tendered by the appellant. As to all matters concerning which the judge's statement is conclusive upon us, we will not grant a certiorari for the purpose of having the case amended unless it appears that an error or mistake has inadvertently been committed by the judge, and it appears further that there are reasonable grounds to believe that the judge will correct the case if he is afforded an opportunity to do so. *Porter v. Railroad*, 97 N. C. 63, 2 S. E. 580; *Clark's Code* (3d Ed.) pp. 935, 936. But in respect to an assignment of errors made in the appellant's case, he is entitled to have it stated in the case on appeal settled by a judge, as matter of right. Sometimes he may be put to this disadvantage: If the charge has not been reduced to writing by the judge, either voluntarily, or at the request of one of the parties under section 414 of the Code, and there is a conflict between the charge, or any part of it, as stated by the judge and as recited in the assignment of errors, we must be governed by the judge's statement of it, and the assignment must be disregarded. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364. When the charge is put in writing, there should, of course, be no such discrepancy, as the assignment must necessarily be directed to the charge as written.

While we decide that the plaintiff, upon the foregoing principles, is entitled to the writ of certiorari for the purpose of having his exceptions and assignment of errors, so far as they relate to the instructions given or refused, made a part of the case, the judge should, as a general rule, have the opportunity of considering the case again with reference to the assignment, so that he may the more intelligently and explicitly state what was actually done and said, having in view the questions intended to be raised by the appellant as they appear from his assignment of errors. This is but fair to the judge and to the appellee, and will certainly conduce to a better understanding of the merits of the case by us; and, besides, it will not take from the appellant any advantage to which he is justly entitled. Counsel should be present when the case is finally settled to protect the interests of their clients, unless their presence is waived; and, if any change is made in the body of the case, the appellant should be permitted to re-assign errors so as to conform the assignment to the changes thus made.

The principles we have thus laid down are well supported by the case of *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383, in which the present Chief Justice pointedly states the law upon the subject. That case has since been approved. *State v. Black*, 109 N. C.

856, 13 S. E. 877, 14 L. R. A. 205; Broadwell v. Ray, 111 N. C. 457, 16 S. E. 408; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; Bank v. Sumner, 119 N. C. 591, 26 S. E. 129. See, also, Boyer v. Teague, 106 N. C. 571, 11 S. E. 330, and Whitesides v. Williams, 66 N. C. 141.

It is alleged in the petition that the place appointed by the judge for settling the case on appeal was outside the district, and, owing to this fact and the great distance from the place of trial to the place so appointed, counsel did not attend. This, perhaps, is the cause of the defect in the case, as counsel, no doubt, would have insisted on their right to have the assignment set out in the case if they had been present. The law requires the case to be settled within the judicial district where it was tried (Code, § 550), and this must be done unless this provision is in some way waived, or counsel agree upon some place outside the district. This requirement of the law is mandatory, and should be strictly observed when a request to appoint a time and place to settle the case is made (Whitesides v. Williams and Walker v. Scott, *supra*; State v. Williams, 109 N. C. 846, 18 S. E. 880), and when the judge has not left the district. When he has so left, he may settle the case upon notice without returning to the district. Code, § 550.

The writer of this opinion concurs fully in the views of Justice DOUGLAS, who files a concurring opinion as to the right procedure in correcting cases on appeal by the writ of certiorari; and he also thinks that such rules of the court only should be adopted as are necessary for the proper and orderly transaction of the business of the court, and when adopted should be enforced, not harshly or too rigidly, but with due regard to the hearing of cases upon their real merits. But he does not think the question is presented by this application, and for that reason it is not decided, nor even discussed.

The answer to the petition does not meet its allegations in such a way as should induce us to withhold the writ. Pursuing the course, therefore, suggested in *Lowe v. Elliott*, *supra*, a certiorari will issue, and the case be remanded, so that the appellant's exceptions and assignment of errors may be inserted in the case on appeal, and so that the judge may, not resettle the case (*Boyer v. Teague*, *supra*), but make such amendments and corrections in the same as he may deem proper.

To that end, let a copy of the petition and the original case on appeal tendered by the appellant, and used as an exhibit in this court, be transmitted to the judge with the writ, for his information.

It is so ordered. Petition allowed.

OLARK, C. J. (concurring). The rulings of this court are uniform that a certiorari will

issue to send up the exceptions to the charge, if filed within 10 days after adjournment of court, because filing such exceptions is the act of appellant and the exceptions are a part of the record. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383. But as to all matters transpiring during the trial, if counsel cannot agree upon a statement, the judge settles the case, and the case thus settled is conclusive. This court has no power to examine witnesses and find the facts differently, nor can we command the judge to state the facts differently; for he acts under the obligation of his duty and oath of office. All we can do is to give him an opportunity, and it is but reasonable that we will do this only when it appears, upon affidavit, that there has been an inadvertence on the part of the judge. If this is denied by the other side, the matter is presumed to be as the judge has stated it, and the certiorari ought not to issue, unless it appear by a statement from the judge that he will probably make the correction, if given the opportunity. This ruling has never been based upon any idea of courtesy to the judge, but upon the principle of Magna Charta that we "will not delay justice." If the appellant has shown any diligence whatever, he has always ample time—for the case must be docketed and printed at least a week before it is called for argument—in which to make the application to the judge and learn whether or not he will make the correction, if given the opportunity. Certainly, if the appellant will not take the trouble to write a letter to the judge, he ought not to get a delay of six months upon a suggestion of error in the judge's case on appeal, when he was, or could have been, present when the case was settled, and his averment of inadvertent omission is denied by counter affidavit. To give such delays to an appellant upon a vague statement that he believes the judge will make a correction, when, if there is the slightest diligence shown, he can lay the judge's reply to his letter before us, would lead to the gravest abuse and a delay of several months in almost any case in which delay was desired by a party. This ruling has been uniform. *Smith, C. J., Porter v. Railroad*, 97 N. C. 66, 2 S. E. 531, 2 Am. St. Rep. 272, and cases there cited; *MacRae, J., Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205, and cases cited; *Broadwell v. Ray*, 111 N. C. 457, 16 S. E. 408; *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383; *Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276; and very many other cases both before and since Clark's Code (3d Ed.) p. 986. The ruling in this court has been uniform (but there is no "rule of court" on the subject), and it seems to be the uniform practice in all other jurisdictions, and for the same reason. A contrary practice would be unjust to the appellant and fruitful of unnecessary delays and expense. By the slightest diligence the appellant can always

ascertain whether the judge would probably make the correction, and lay that fact before us in making his application, in which case it is always allowed.

DOUGLAS, J. (concurring). I concur in the opinion of the court, and I am glad that the practice has been so fully and so clearly stated. There is, however, one point of practice in this court that has never met my approval, and that is its refusal to consider an ordinary petition for certiorari unless the judge below has already signified in writing his willingness to amend the record in accordance with the wishes of the petitioner. Such a course does not seem to be in accordance either with the dignity of this court or the rights of the petitioner, nor is it required by the courtesy due to the judge below. If any error has occurred through no fault of the petitioner, he is entitled to have it corrected as a matter of right. The question is not whether the judge is willing to correct the error, but whether the error has in fact occurred. We may rely upon the willingness of the upright gentlemen who hold our superior courts to correct in all places and at all times any error they may have committed, when called to their attention, and there is no reason why the matter should not be brought to their attention by this court in due forms of law, as well as by counsel in private interviews. When a party, under oath, asserts that there are errors in the record, and points them out with such particularity that they can be easily ascertained one way or the other, I see no reason why a certiorari should not be granted, and the judge who tried the case asked, in a respectful manner, whether or not the petitioner's allegations are true. The judge's statement would import just as much verity then as it does now, and would be just as final. It would not be the slightest reflection upon him in any way, and would relieve him from the private and ex parte importunities of counsel now unavoidable under the practice of this court.

Another matter I deem proper to mention: As long as our judges retain their independence of thought and action—and I trust they always will—there will be radical differences of opinion in the decision of cases. Similar differences may exist as to the adoption of rules of practice, but in such cases custom does not permit any written dissent. It follows that the adoption of a rule does not imply its unanimous approval by the members of this court, but simply that it met the views of a majority. In conclusion, I can only say, with the utmost respect for the court, that there are many of its rules that received neither my vote nor my approval. After their adoption they become the rules of the court, binding upon me as well as upon others, and, as such, have received recognition and support.

(127 N. C. 126)

QUANTZ v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 6, 1904.)

NEGLIGENCE—INJURY TO LICENSEE.

1. A passenger alighted from the train at a depot at night, and for purposes of his own passed along an open space on the right of way used by the public by permission in passing from one street to another. He left the right of way, and went into an open door in the depot building 12 feet away, and fell down a stairway and was injured. *Held*, that he was a licensee, and the railroad did not owe him the duty to keep the depot doors closed, but only of keeping the way free from dangers.

Appeal from Superior Court, Mecklenburg County; W. R. Allen, Judge.

Action by S. A. Quantz against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff reached Charlotte on defendant's train on the night of May —, 1904, at about 10 o'clock. The train stopped at the depot, the coach upon which defendant was being some distance below the end of the depot building. He went across the depot to a restaurant on Fourth street, not on defendant's right of way. He drank some coffee or milk, and, desiring to see a policeman, went from the restaurant towards Trade street, which runs the other side of the depot and parallel with Fourth street. In going towards Trade street he passed along an open space on the defendant's right of way, and just behind the depot building. This open space was unobstructed, and was, with the permission of the defendant, used by the public in passing from Fourth street to Trade street. About half way from Fourth street the depot building becomes wider, including the office, waiting room, dining room, etc. At this point there is an open way between the telegraph office and the baggage room. There is near this point, but not in the open way, a stairway. When plaintiff reached this point, he turned to go through the depot building to find the policeman. He saw through a window a light burning; saw the stairway going up in the inside. He crossed the curbing, and went to the door at the head of the stairway, being about 12 feet from the edge of the space. Finding the lattice door open, the plaintiff went in and fell, whereby he was injured. Standing at the back of the depot building, and looking through a window, a person could see the stairway on the inside of the building. A map accompanied the case on appeal, showing the depot and surroundings. The defendant at the close of the testimony moved the court to dismiss the action as upon a nonsuit. Motion denied. Defendant excepted. The only portion of the charge to which there was exception is as follows: "If you find from the evidence in this case that that street or passway was used by the public; that they were in the habit of using

it, or that persons who wished to become passengers upon the trains of the defendant were in the habit of using that passageway—then it became the duty of the defendant not to so construct its building, or not to leave its building in such condition, that there would be either on or near the passageway a dangerous place, and not to construct it in such condition that one would be misled by the light in the building, and induced to enter a dangerous place. And if you find from the evidence that the defendant has been negligent in that respect, has failed in the performance of its duty, and that that was the cause of the injury to the plaintiff, then you would answer the first issue, 'Yes; that the plaintiff was injured by the negligence of the defendant.' From a judgment for the plaintiff, defendant appealed.

W. B. Rodman and G. F. Bason, for appellant. C. D. Bennett, for appellee.

CONNOR, J. (after stating the case). His honor told the jury that the plaintiff had, at the time of his injury, ceased to be a passenger. In this we concur. We also concur in the opinion that he was not a trespasser. He was a licensee. His relation to the defendant growing out of the contract of carriage or the assumption of a public duty by the defendant was at an end. The case, thus simplified, presents the question as to the measure of duty which the defendant owed the plaintiff as a licensee. The plaintiff's right to recover is dependent upon sustaining the proposition that the defendant owed to him a duty, and that there was a breach thereof, which was the proximate cause of the injury. *Emry v. Navigation Co.*, 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699. It is conceded that the defendant did not owe to the plaintiff that high degree of care due a passenger. It is equally clear that it owed to him a higher degree of care than was due a trespasser. The authorities make a distinction between the degree of care due a mere licensee, one who by permission enters upon the premises of another, and one who does so by invitation. It is not always easy to say upon which side of this line a particular case falls. Assuming that the license given to the public to use this way to pass from Fourth to Trade street amounted to implied invitation to the plaintiff to enter upon and pass over it, we next inquire the extent of the license. It was to pass from Fourth to Trade street. The duty, therefore, of the defendant, was to keep the way free from dangerous obstructions or pitfalls, either on or so near to the way that a person exercising ordinary care would not be injured. The plaintiff went over the way for his own purpose, having no connection whatever with the defendant's duty to the public as a common carrier. There is no suggestion that there was any obstructⁿ to

prevent the plaintiff using the way to the full extent of his license. He went 12 feet out of his way to go to the front of the depot to look for a policeman for the purpose of ascertaining the whereabouts of a person whom he wished to find. There is no suggestion that the open door was dangerously near to the open space. Certainly, the defendant was not required to so construct its depot, before the license was given, as to enable licensees to walk around about and enter it at all times by day or night for the purposes entirely disconnected with the use for which it was built. The defendant owed no duty to the plaintiff to keep all of the doors of the depot building closed at night. No reasonable person would apprehend that in using the open space for the purpose of passing from one street to another a person would go 12 feet out of the way, and step into an open door. We can see no breach of duty to the plaintiff. We have discussed the case upon the assumption that the plaintiff was an invited licensee. It is by no means clear that the license was more than permissive, in which case a lower degree of care is imposed. In any view of the testimony the defendant was not liable. *Sweeny v. R. R.*, 10 Allen, 368, 87 Am. Dec. 644; *Redigan v. R. R. (Mass.)* 28 N. E. 1133, 14 L. R. A. 276, 81 Am. St. Rep. 520. "One who attempts to cross a platform at a railroad station for his own convenience as a short cut from one street to another is a mere licensee, and cannot recover for an injury received by falling into a hole in such platform, although the railroad company had passively permitted the plaintiff and the public generally to use it." *Elliott on Railroads*, § 1251. We are of the opinion that the motion for nonsuit should have been allowed.

Error.

(127 N. C. 153)

COBB et al. v. OLEGG.

(Supreme Court of North Carolina. Dec. 6, 1904.)

INJUNCTION — ULTIMATE RELIEF — TEMPORARY INJUNCTION — DISSOLUTION BEFORE TRIAL.

1. Where a suit was brought for a special injunction, as the main relief demanded, to restrain defendant from operating a café in a room in a hotel in violation of an alleged parol covenant in a lease of such room, and defendant answered, simply disavowing any information as to the facts alleged, and not by denial of each material allegation of the complaint, as required by the Code, it was not error for the court to refuse to dissolve a temporary injunction and to continue the same to the hearing.

Appeal from Superior Court, Guilford County; Bryan, Judge.

Suit by Marion Cobb and another against W. F. Olegg. From a decree continuing a temporary injunction to the hearing, defendant appeals. Affirmed.

The plaintiffs brought this action to obtain an injunction restraining the defendant from using a room in the Hotel Guilford,

which is situated in the city of Greensboro, as a café, restaurant, or eating place, contrary to the covenant contained in the lease of the said room to the defendant's assignor. They allege that on or about the 11th day of April, 1904, they leased the room verbally to one Sam Chouris for one year, to be used by him as a fruit, candy, and ice-cream kitchen, and for no other purpose, and that it was specially agreed at the time that the plaintiffs did not lease it for the purpose of being used as a café or restaurant, because of the offensive odors caused by such use, which were disagreeable to the guests of the hotel—it having once been used for that purpose, and found to be objectionable, and the plaintiffs afterwards, and before the lease to Sam Chouris, having refused to lease it for use as a restaurant or café, though a much larger rent was offered than that proposed to be paid by Chouris. It is further alleged that Chouris agreed to accept the lease upon the terms and conditions just stated, and expressly covenanted that he would not use the room as a restaurant or café, but as a fruit, ice-cream, and candy kitchen, which should be so conducted as not to emit therefrom any offensive odors and thereby render it objectionable to the hotel guests; that subsequently, on the 16th day of April, 1904, Chouris requested the plaintiff to give him a written memorandum of the lease, stating merely its duration and the amount of rent to be paid, and giving as his reason for wanting this memorandum that there had been frequent changes in the management of the hotel, and that he would need it for his protection; that plaintiffs, for his accommodation, complied with the request; the plaintiff Cobb dictating a letter for Chouris, which was afterwards written and signed by the plaintiffs, and accepted by Chouris in writing over his signature. The letter described the premises leased with some particularity, and also certain changes to be made by Chouris at his own expense in the arrangement of the room and the adjoining hall, but did not contain any reference to the alleged stipulation that it should not be used as a restaurant or café. It is then charged that the defendant, who is a business rival of the plaintiffs, well knowing or having the means of knowledge that said agreement had been made, and refusing to investigate the matter, in July, 1904, bought the lease from Sam Chouris, who had leased the room only for a candy kitchen, or from his brother John Chouris, to whom a pretended sale had been made, and announced his purpose to establish a restaurant and café at the place, whereupon the plaintiffs immediately notified him of said covenant of Sam Chouris not to use it for such a purpose, and insisted that the assignment to him was void, and that any use of the room as an eating place was clearly prohibited by the original lease, and he was forbidden to devote it to any such purpose, but that

defendant, notwithstanding the notice and protest from plaintiffs, began at once to make the necessary changes in the room to adapt it to said use as a restaurant, furnished and equipped it for that purpose, and has since conducted a restaurant in it, to the great annoyance and irreparable damage of the plaintiffs. It is alleged in the second, third, and fourth sections of the complaint that the agreement not to use the room as a restaurant, while contemporaneous with the making of the lease, was wholly independent of and collateral thereto, and that even if, in any sense, an integral part of the contract, it was not intended to be inserted in the written memorandum or to be reduced to writing at all, but to remain in parol, and in that way to be a binding covenant or stipulation between the parties to the lease. Each of those sections of the complaint is denied by the defendant as follows: "The defendant has not sufficient information to form a belief as to the allegations contained in [said] paragraph of the complaint, and therefore denies the same to be true." There were other allegations made in the complaint and denied in the answer, but it is not necessary, in the view of the case taken by the court, to set them forth. The defendant averred in his answer that he bought the lease from John Chouris, assignee of Sam Chouris, for full value, and without any notice of the alleged covenant, and that he has conducted a restaurant at the place in an orderly and cleanly manner, and without any annoyance to the plaintiffs' guests. Affidavits were filed by the respective parties in support of their allegations, but we need do no more than state that a careful examination tends to show that, as the case now stands, the proof preponderates decidedly in favor of plaintiffs' contention that there was a covenant between Chouris and themselves to the effect stated above. Upon the complaint filed, Judge Shaw granted an order to the defendant to show cause why an injunction should not issue as prayed for, and in the meantime restrained the defendant from conducting a restaurant in the room contrary to the alleged covenant, and at the hearing of the motion for an injunction before Judge Bryan, upon the return of the order to show cause, his honor continued the injunction to the hearing, whereupon the defendant, having duly excepted, appealed to this court.

W. P. Bynum, Jr., Scales, Taylor & Scales, and G. S. Ferguson, Jr., for appellant. Fuller & Fuller and King & Kimball, for appellees.

WALKER, J. (after stating the case). The plaintiffs contend that the contract of lease was not one required to be in writing, and that, as the entire agreement was not reduced to writing, and not intended to be, but a distinct and independent part of it

remained in parol, the plaintiffs are not forbidden to show the existence of the unwritten stipulation by oral evidence. They admit that, when parties reduce their agreement to writing, it is a rule of evidence that parol testimony is not admissible to contradict, add to, or vary it, for, although there may be no law requiring the particular agreement to be in writing, yet the written memorial is regarded as the surest evidence. But they insist that this case is not within either the letter or the spirit of the rule, as the writing is not a memorial of the whole agreement, which was severable into parts, one of the parts only having been committed to writing, and the other stipulations and terms of the agreement having been left open to parol proof, and that in such a case the rule is that the stipulations may be proved orally, unless the contract is one required to be in writing. They have cited numerous authorities to sustain their contention, and among them the following: *Twidy v. Saunderson*, 31 N. C. 5; *Manning v. Jones*, 44 N. C. 368; *Johnson v. McRary*, 50 N. C. 369; *Kerchner v. McRae*, 80 N. C. 219. Counsel also insisted that the rule they rely on applies even when the contract is an entire one, for which position they cited *Braswell v. Pope*, 82 N. C. 57; *Ray v. Blackwell*, 94 N. C. 13; and *Terry v. Railroad*, 91 N. C. 236, in the last of which cases the court cites *Hawkins v. Lee*, 8 Lea (Tenn.) 42, for the following proposition, which is therein stated: "When it is not intended that a written contract should state the whole agreement between the parties thereto, evidence of an independent verbal agreement is admissible." In the last edition of *Clark on Contracts*, which was recently published, the principle is thus stated: "Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitute one entire contract." *Clark on Contracts* (2d Ed.) p. 85. The defendant's counsel, on the contrary, argued that the above-stated rule upon which plaintiffs rely does not apply to the facts of this case, and that parol evidence is not competent, as its effect will be not to prove an independent part of the agreement which was not reduced to writing, but to vary and contradict the contract as written by the parties, and which the law presumes contains all the provisions by which they intended to be bound. In support of their view they cited *Parker v. Morrill*, 98 N. C. 232, 3 S. E. 511; *Meekins v. Newberry*, 101 N. C. 17, 7 S. E. 655; *Bank v. McElwee*, 104 N. C. 305, 10 S. E. 295; and especially relied on *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399, in which the court,

through *Shepherd, J.*, admonishes us that the rule against the admissibility of parol testimony to vary the terms of a written instrument has, perhaps, been relaxed too much, and that the farthest limit has been reached in admitting such testimony, beyond which it will not be safe to go. The court sounds the alarm, and warns us against the dangers ahead. It may be better, we admit, to trust to the writing—the memorial selected by the parties for preserving the integrity of their treaty—than to confide in human memory for the exact reproduction of the facts, for, says *Taylor, J.*, "time wears away the distinct image and clear impression of the fact, and leaves in the mind uncertain opinions, imperfect notions, and vague surmises." *Smith v. Williams*, 5 N. C. 426, 4 Am. Dec. 564. But whether this salutary principle does apply and should control in this case is a question which must be left open for future adjudication.

We have stated the contentions of the respective parties for the purpose of showing the impracticability of deciding upon the ultimate merits of the controversy in this, the preliminary stage of the case. This court should, when feasible, always avoid expressing an opinion which will anticipate the decision of the case at the final hearing, and when the facts have not been found by the tribunal appointed by law to pass upon them. The practice in this respect seems to have been long since well settled in applications for injunctions. It was based at first upon the distinction between a common and a special injunction. The former was granted in aid of or as secondary to another equity, as in the case of an injunction to restrain proceedings at law, in order to protect and enforce an equity which could not be pleaded, and it issued, of course, upon the coming in of the bill, without notice. As soon as the defendant answered, he could move to dissolve the injunction, and it was then for the court, in the exercise of its sound discretion, to say whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction should be dissolved or continued to the hearing. If the facts constituting the equity were fully and fairly denied, the injunction was dissolved, unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought, and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing, if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity, and there is a reasonable apprehension of irreparable loss

unless it remains in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in statu quo until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits, and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state are, we think, well supported by the authorities upon the subject. 1 High on Injunction (3d Ed.) § 6; Jarman v. Saunders, 64 N. C. 367; Hellig v. Stokes, 63 N. C. 612; Blackwell Durham Tobacco Co. v. McElwee, 94 N. C. 425; Purnell v. Daniel, 43 N. C. 9; Bispham's Eq. (8th Ed.) § 405. The cases of Marshall v. Commissioners, 89 N. C. 103, Lowe v. Commissioners, 70 N. C. 532, and Capehart v. Mhoon, 45 N. C. 80, would seem to be directly in point. In the first of these cases the court says: "The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon a preliminary hearing upon the pleadings and ex parte affidavits, but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action." Mr. Justice Bynum, for the court, in the second case cited, says: "The injunctive relief sought in this action is not auxiliary to another and main relief, but is the main relief itself and the object of the action, and therefore the dissolution of the injunction would be equivalent to a dismissal of the action. In such cases, where a reasonable doubt exists in the mind of the court whether the equity of the complaint is sufficiently negatived by the answer, the court will not dissolve the injunction, but continue it to the hearing. Much must depend upon the sound discretion of the court to whom the question of dissolution is referred." While the principle as stated in the last quotation is in itself sufficient to sustain our decision, we think the able and learned justice had in mind the rule of practice in the cases of a common injunction, which was dissolved upon the answer, unless the equity was confessed, or the answer was evasive,

or the equity was not sufficiently denied. Capehart v. Mhoon, supra. This will appear clearly from the following language of the court, speaking by Nash, J., in Troy v. Norment, 55 N. C. 318: "In applications for special injunctions (and this is such a one), the bill is read as an affidavit to contradict the answer; and where they are in conflict, and the injury to the plaintiff will be irreparable if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing to enable the parties to support by proofs their respective allegations. Justice demands this course. When there is nothing before the court but oath against oath, how can the chancellor's conscience be satisfactorily enlightened?" It will also appear by what is said by Pearson, J., for the court, in Purnell v. Daniel, 43 N. C. 9: "This is not the case of an ordinary or common injunction, in aid of and secondary to another equity; but it is the point in the cause—it is to prevent irreparable injury, as is alleged—and to dissolve the injunction decides the case, for to dissolve it allows the act to be done. By way of illustration, take the case of an injunction to stay waste in cutting down ornamental or shade trees. If the injunction be dissolved on bill and answer, and the trees are cut down, the damage is done, for the trees cannot be made to grow again. To dissolve this injunction before hearing the cause on proof, the defendant must show that the plaintiff has no case fit to be heard; and if, from the answer, it appear that there is any question of doubt on a matter that should be further inquired into, the injunction will be continued until the hearing." In Capehart v. Mhoon, supra, Pearson, J., states the difference between common and special injunctions with great clearness.

The injunction sought in this case is special, and we must be governed by the established rule applicable to that class of injunctions in deciding the question now presented. The Code provides expressly for such an injunction. Code, § 338 (2). Judge Bryan has merely granted a provisional injunction to the hearing, so that the controverted matters may then be settled by a jury, and the plaintiffs' right to a perpetual injunction be thus determined upon the merits. As said by Justice Bynum in Lowe v. Commissioners, supra, "The novel and important questions raised by the pleadings, and ably discussed before us, do not come up for decision now." We decide nothing upon the merits, but simply hold that the facts should be found in the ordinary way, so that we may consider and decide the case, if it again comes before us, on all of the facts as ascertained, and not merely upon facts, now disputed, which may never be found by the jury.

Before taking leave of the case, it may be well to state that the answer does not contain any denial of the second, third, and

fourth sections of the complaint, which comprise the main allegations of the plaintiff. The Code requires that the answer shall contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Instead of such a denial as is required by the Code, the defendant simply disavows any information of the facts alleged. This, of course, is not a denial even on information, nor is it in any respect a compliance with the Code. *Durden v. Simmons*, 84 N. C. 555; *Fagg v. Loan Ass'n*, 113 N. C. 364, 18 S. E. 655; *Bank v. Charlotte*, 75 N. C. 45. In other words, unless the defendant denies on knowledge, or on information which is held to be sufficient to raise an issue (*Kitchen v. Wilson*, 80 N. C. 192), or unless he wishes to be considered as admitting the truth of the allegation, he must disclaim both knowledge and information of the matter alleged (*Durden v. Simmons* and other cases supra).

Without passing upon the controverted facts, we are of the opinion that, in the present state of the pleadings and proofs, there was no error in the ruling of the court below, and the injunction should be continued to the hearing. This is in accordance with the practice in such cases as stated in *Erwin v. Morris* (at this term) 49 S. E. 53.

No error.

(137 N. C. 163)

WALKER BROS. v. SOUTHERN RY. CO.
(Supreme Court of North Carolina. Dec. 18, 1904.)

CARRIERS OF FREIGHT—DELAY IN TRANSPORTATION—PENALTY—BURDEN OF PROOF.

1. Acts 1903, p. 999, c. 590, providing that any railroad company failing to transport goods received by it for shipment, and billed to any place within the state, for a longer period than four days after receipt of the same, unless otherwise agreed between the parties, shall pay a penalty, etc., refers to a delay in beginning the transportation or starting the goods from the station of their receipt, and does not require a delivery at their destination within the time specified.

2. In an action against a railroad company, under Acts 1903, p. 999, c. 590, to recover a penalty for a delay of more than four days in the transportation of goods, the burden of showing where the delay occurred is on plaintiff.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Alamance County; Cooke, Judge.

Action for a penalty by D. M. Walker and another, constituting the firm of Walker Bros., against the Southern Railway Company. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

This action was brought to recover the penalty for failure to transport freight given by chapter 590, p. 999, § 3, of the Acts of 1903. Plaintiffs alleged that there had been a delay of four days, and demanded judg-

ment for \$40; that is \$25 for the first day and \$5 per day for the next three days of delay. The material portion of the evidence was as follows: (1) Bill of lading issued by the defendant, bearing date Cumnock, N. C., May 27, 1903, for a car load of lumber, to be transported to the defendants, at Graham, N. C. J. R. Burns was the shipper. (2) The receipt of the plaintiff for the said freight, bearing date, "Graham, N. C., June 4, 1903." D. M. Walker, one of the plaintiffs, testified that he and J. C. Walker constitute the firm of Walker Bros. The witness identified the bill of lading and freight bill hereinbefore referred to, and said the dates as therein stated were correct. The plaintiffs operated a sawmill situated about 160 feet from the main line of the North Carolina Railroad Company, some 300 or 400 yards east of the station at Graham, in Alamance county, and were accommodated by what is ordinarily known as an industrial or spur track running from the main line into their yard, which is inclosed. When they receive freight by the car load, the car is placed by the defendant on this spur track and unloaded in the millyard of the plaintiffs. The car in question was delivered to them in their yard on June 4, 1903. The bill of lading was received by the plaintiffs through the mails about the 28th May, 1903. Plaintiffs made demand upon the agent of defendant at Graham. The spur or industrial track was put in at the instance of the plaintiffs, and operated, as witness supposed, for the accommodation of both the plaintiffs and defendant, as the cars could be unloaded sooner. No extra charge was demanded or made against the plaintiffs for shifting and carrying cars from the main track of the defendant into the yard of the plaintiffs by means of the spur track. The cars containing freight for other parties were not put upon the spur track of plaintiffs without their permission, nor carried inside the gate of plaintiffs' yard. The witness did not know of his own knowledge when the car in question arrived at Graham Station. The train passed, but he did not see it come. The freight in question was brought in the car from Cumnock by way of Greensboro, and from the latter place to Graham. There are four stations or stops between Greensboro and Graham, and ten stations between Greensboro and Cumnock. The 31st day of May, 1903, was Sunday. Witness made demand on the railroad company for the car of freight in question, and at that time the car had not arrived in Graham. It was admitted by the parties that the defendant transported freight and passengers through several states, including this state, and is engaged in interstate commerce; and it was admitted that Cumnock and Graham are stations on different roads, both of which are operated by defendant within this state. Plaintiffs here rested their case. The defendant thereupon

moved to nonsuit the plaintiffs, under the statute, which motion was allowed, and judgment was rendered accordingly. Plaintiffs excepted and appealed.

Long & Long, for appellants. F. H. Buebee and King & Kimball, for appellee.

WALKER, J. (after stating the facts). It is provided by Acts 1903, p. 999, c. 590, § 3, that any railroad company failing to transport goods received by it for shipment, and billed to any place in this state, for a longer period than four days after the receipt of the same, unless otherwise agreed between the parties, or allowing such goods to remain at any intermediate point more than forty-eight hours, shall pay to the party aggrieved a penalty of \$25 for the first day, and \$5 for each succeeding day, of unlawful delay or detention, if the shipment is in car-load lots, and, if in smaller quantities, then a less sum, which is prescribed by the act. The plaintiffs claim that by the statute the defendant is allowed only four days to make the shipment, and any delay beyond that time subjects it to the penalty. We do not think that is the proper construction of the law. The word "transport" does mean to carry or convey from one place to another, but it also means to remove, and this is one of its primary significations, according to the lexicographers. Whatever may be the precise meaning of the word when considered by itself and apart from the special connection in which it is used, the context of the act under review clearly shows that the Legislature did not intend to be understood as requiring the entire transit to be made within four days from the receipt of the goods. Such a construction might produce serious results, and impose upon transportation companies not only a very onerous duty, but one which in some cases it would be difficult, if not impossible, to perform. It has been said that in regard to laws, as in other cases, difficulties will arise, in the first place, from the disputed meaning of individual words, or, as it is usually expressed, of the language employed, and, in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context. This is due in large measure to the imperfection of language and its inadequacy in conveying our meaning. We must therefore regard the context and the general scope of the law, as well as the mischief to be suppressed and the remedy provided for that purpose, so as to arrive at the intention of the Legislature. "When we see what is the sense that agrees with the intention of the instrument [or statute], it is not allowable to wrest the words to a contrary meaning. No text imposing obligations is understood to demand impossible things." Sedgwick, Stat. & Const. Law (1857) c. 6, pp. 225-235. Whenever the intention can be discovered it ought to be fol-

lowed, with reason and discretion, in construing the statute, although it may not seem to conform to the letter. Sedgwick, supra. We have no doubt as to the true intention of the Legislature in passing this act. The very phraseology of the statute indicates clearly the purpose that the penalty shall be incurred if the company delays to begin the transportation or to start the goods on their journey within four days after they are received for shipment. The fact that the law provides against unreasonable delay during the course of the transportation at any intermediate station is conclusive evidence that the neglect or omission to transport for a longer period than four days refers to a delay at the initial point or the place of departure. To hold it to have been contemplated that four days only from the time of receipt should be allowed for the shipment of the goods and their delivery at the place of final destination would impute to the Legislature an intention to adopt a harsh and impracticable rule, and therefore an unreasonable one, as the time allowed might not be sufficient in many cases for the transportation, as thus understood. Having concluded that the four days must apply to the time of shipment, we find no evidence as to when the goods left Cumnock, nor as to when they reached Graham; and, even if there had been such evidence, we have failed to discover any proof as to the distance between Cumnock and Graham, or as to the time reasonably required to carry the goods from the one place to the other. The burden was on the plaintiff to bring forward the proof necessary to establish his allegations and to make out his case, and, in the absence of evidence, we can raise no presumption in his favor. If the defendant has violated the law and incurred its penalty, the plaintiff must show it affirmatively. There is not in this case the slightest evidence as to the essential fact to be proved. The plaintiff, in the case of a nonsuit, is entitled to have the benefit not only of every fact which the evidence tends to prove, but of every legitimate inference from the facts as well, but this does not mean that he will be permitted to recover upon mere conjecture. The court did not err in refusing to submit the case to a jury, as there was a total failure of proof. The nonsuit was properly entered.

In the answer the defendant sets up as a defense the unconstitutionality of the act upon the ground that it interferes with interstate traffic. We were told by counsel in the argument before us that this defense was not relied on in the court below, nor did he insist upon it in this court. We think the point was properly abandoned. The act cannot be successfully assailed upon this ground. It has been thoroughly settled that such legislation does not contravene the commerce clause of the Constitution. The most recent decision of this court upon the sub-

ject is *Currie v. Railroad*, 135 N. C. 535, 47 S. E. 654. But other decisions on the point are abundant. *Bagg v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569; *Smith v. Ala.*, 124 U. S. 485, 8 Sup. Ct. 564, 31 L. Ed. 508; *Railroad v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Railroad v. Dwyer* (Tex. Sup.) 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926. Numerous authorities sustaining the right of the state to pass such a law are collected in the cases we have cited. Legislation of a state which incidentally or indirectly affects commerce between the states, and especially such as is passed in the exercise of the police power, is not to be considered regulation of that commerce, within the meaning of the Constitution of the United States. Besides all this, it appears in our case that the traffic was to be conducted wholly within this state, and it cannot, therefore, in any allowable view, be regarded as interstate trade; nor can the statute, in so far as it affects that traffic, be held invalid as an attempt to usurp the power of Congress to regulate interstate commerce.

In deciding this case, we have confined ourselves, as we should do in all cases, to the facts as they appear in the record. We have no right to supply any defect in the plaintiff's proof by assuming the existence of any fact which the testimony does not tend to establish. If the plaintiff has a good cause of action against the defendant, he must show it by legal evidence, and not leave anything essential to its completeness to surmise or conjecture. This must be required of him and all others similarly situated, as we cannot in any other way decide safely, and with a due regard for the rights and interests of litigants, which must be determined by well-settled methods of judicial procedure applicable alike to all cases, and not by any arbitrary or capricious notion of what should be done in any particular case in order to mete out justice. By pursuing the latter course, we would often base our judgments upon mistaken or misunderstood facts, and defeat the very purpose intended to be accomplished in all judicial investigations.

We find no error in the case, and it must be so certified. No error.

DOUGLAS, J. (dissenting). I am not disposed to dissent from the principles of law so ably laid down by the court in its opinion, as far as I understand them, but I fail to see the legal or logical connection between its premises and its conclusion. I do not think that the primary meaning of the word "transport" is simply to remove. It is from the Latin word "transportare," compounded from the words "trans," meaning over or beyond, and "portare," to carry. It does not mean simply to remove from one place, but includes also the idea of carrying to another

place. And yet I agree with the court that the Legislature did not intend to impose the penalty where the transportation was begun, but not completed, within the 4 days mentioned in the statute. To my mind, its clear intention was that the transportation should be begun within four days—that is, within 96 hours—after receipt of the goods, and should be continuously carried on and completed within a reasonable time. It certainly did not mean that the railway company could lawfully leave the goods at the initial point for 4 days, then transport them a mile or so and leave them there for 48 hours, and then transport them another mile or so, with another 48 hours' delay, and so on for perhaps a month. Neither did it mean that the railway company could keep the goods for a week or a month, and then say to the owner, "Prove, if you can, where the goods have been all this time." The railway company alone knows where they have been, and alone has the means of proving it. To place the burden of directly proving it upon the plaintiff deprives him of all remedy for a substantial injury, under the guise of a rule of evidence. If the circumstances tend to prove the plaintiff's case, it should be left to the jury, who alone can say what they do prove. If circumstantial evidence is sufficient to hang a man, I do not see why it is not sufficient in a civil suit to fasten upon a common carrier the just responsibility resulting from its breach of public duty.

The opinion of the court says: "There is not in this case the slightest evidence as to the essential fact to be proved." I presume it refers to the delay at Cumnock. Let us see about that. There is evidence that the car load of lumber was received for shipment by the defendant on May 28th, and was delivered to the plaintiffs on June 4th, seven days thereafter. It is also in evidence that both Cumnock and Graham, the terminal points of the shipment, are within this state, and on roads operated by the defendant, and that there were only 15 stations between them. Allowing 10 miles as an average between stations, but which is much above the average, there would be only 150 miles of transportation, which, at 20 miles per hour, would require only $7\frac{1}{2}$ hours. I do not know to what extent this court will take judicial cognizance of the geography of its own state. If it takes any, we will know that Cumnock is in Chatham county, on the Sanford & Mt. Airy Branch of the Southern Railway, 54 miles south of Greensboro, and Graham on the North Carolina Division of said railway, 23 miles this side of Greensboro. The entire distance between Cumnock and Graham would therefore be 77 miles. It seems to us that, with or without such judicial cognizance, under the circumstances in this case, the fact that 7 days elapsed between the receipt and delivery of this lumber is sufficient evidence from which the jury might reasonably infer that it was not transported from

Cumnock within the 4 days allowed by law. It is difficult to believe that it would require 3 days to transport an unbroken car load 77 miles, or that 1 mile per hour is a reasonable rate of speed over the greatest trunk line of the South. If there are other facts tending to exculpate the defendant, they are peculiarly within its own knowledge, and should be alleged and proved by it.

CLARK, C. J., concurs in the dissenting opinion.

(137 N. C. 96)

PEOPLES v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 30, 1904.)

RAILROADS—DEATH OF SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—QUESTIONS FOR JURY.

1. Where, in an action for the death of a train hand, the evidence tended to show that the decedent was killed while attempting to mount a shifting engine, with his back to approaching box cars, which gave no warning of their approach, and which were not manned with a lookout, the question of the company's actionable negligence was for the jury.

2. In an action against a railroad company for the death of a train hand by being struck by cars while mounting a shifting engine coming towards him from the opposite direction, an instruction that if decedent was informed that the cars were to be added to his train, and that the time between the receiving of this information and the time the cars were actually dropped in was short, it was his duty to keep a lookout, and, if he failed to do so, there could be no recovery, was erroneous, because it assumed that the failure to keep a lookout was the proximate cause of the injury.

3. The instruction was erroneous because it placed on plaintiff the burden of proving freedom from contributory negligence on the issue of defendant's negligence.

4. Where, in an action for the death of a train hand by being struck by moving cars while mounting a shifting engine coming towards him, the evidence for plaintiff showed that decedent was between the tracks, looking toward the approaching engine, and that on the track next to him and back of him were dead cars, which without warning were caused to move and roll down on him as he was making ready to mount the engine, the question of decedent's contributory negligence was for the jury.

5. Where a train hand was standing on a track, and a number of cars were kicked on the track some 200 yards from where he stood, and rolled down an incline, and collided with detached cars on the same track, and forced the latter against the servant and killed him, and no signal was given, the railway company was guilty of actionable negligence.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by J. M. Peoples, administrator of John B. Peoples, deceased, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for the negligent death of plaintiff's intestate. The issues submitted to the jury were: "(1) Was the plaintiff's intestate injured or killed by the negligence of the defendant's lessee, as alleged in the

complaint? (2) Did plaintiff's intestate by his own negligence contribute to his injury and death?"

George F. Bason, for appellant. Burwell & Cansler and T. C. Guthrie, for appellee.

CLARK, C. J. There is an irreconcilable conflict between the version given for plaintiff and for defendant. His honor submitted both phases of the evidence to the jury, and instructed them that, if they should adopt the defendant's version of the facts, they must answer the first issue, "No." The only exceptions are to the refusal to give three prayers for instruction asked by defendant, and fourthly to a paragraph in the charge, and are as follows:

1. Refusal to charge that, if the jury believed the evidence, to answer the first issue, "No." This was properly refused. There was evidence that at the time the intestate was killed he was in the discharge of his duties as an employé of the defendant, with his mind absorbed in the attempt to mount a shifting engine coming towards him, with his back to the approaching box cars, which were giving him no warning of their approach, and which were not properly manned with a lookout upon the leading car. The question whether or not the defendant was negligent in these particulars, and whether such negligence was the proximate cause of the injury, was properly submitted to the jury. *Lassiter v. Railroad*, 133 N. C. 247, 45 S. E. 570; *Smith v. Railroad*, 132 N. C. 824, 44 S. E. 663.

2. The second exception was for refusal to charge that if the jury found that "the intestate was informed that the string of cars was to be added to his train, and that the time between the conversation at which he received this information and when the cars were actually dropped in was short, and he was walking on No. 4 track, it was his duty to keep a sharp lookout for this string of cars, and, if he failed to do so, the answer to the first issue should be, 'No.'" This was properly refused, because the prayer assumed as a fact that intestate's failure to keep a sharp lookout was the proximate cause of the injury. Besides, this prayer was upon the first issue, and seeks to throw upon the plaintiff the burden of proving, not that the defendant was guilty of negligence, but that the intestate was not guilty of contributory negligence. Such instruction would have been clearly erroneous, if given. *Fulp v. Railroad*, 120 N. C. 525, 27 S. E. 74.

3. The third exception is for refusal to charge, "If the jury believe the evidence, the answer to the second issue shall be, 'Yes.'" This was properly refused for reasons given in considering the first exception. The plaintiff's evidence was that the intestate was not on the track, but between the tracks; that he was looking in the opposite direction towards his approaching shifting

engine, which he was preparing to mount; that on track No. 4, next to him, and towards his rear, were some "dead cars"; and that without warning the defendant "kicked" some cars onto track No. 4, striking the dead cars, and rolling them down on him as he was making ready to get upon his engine; there being no one on the rolling cars or dead cars to give notice of danger.

4. The fourth exception is that the court charged that "if the intestate was standing between the track, and some sixteen cars were kicked on the track some 200 yards or more from this place where the intestate was, and, rolling down an incline, they collided with two detached box cars, with no engine attached, and on the same track that the shifting cars were on, and forcing these two cars against the plaintiff's intestate, in close position to the cars, if that was his position, and, in consequence of that, killing him, and no signal was given, and no agent in charge of this train, this was negligence on the part of the defendant; and, if you are so satisfied that the plaintiff was injured in consequence of this want of care, you ought to answer the first issue, 'Yes.'" We find no error in this instruction. *Smith v. Railroad*, 132 N. C. 819, 44 S. E. 863. This was doubtless the defendant's own view, upon reflection, for he does not refer to this exception in his brief. *State v. Register*, 133 N. C. 746, 46 S. E. 21. Indeed, his brief is chiefly based upon the statement of facts averred by the defendant, and the court charged that, if the jury found that to be the truth of the occurrence, to find the first issue, "No," but the jury responded, "Yes."

No error.

(137 N. C. 140)

U. B. BLALOCK & CO. v. W. D. CLARK & BROS.

(Supreme Court of North Carolina. Dec. 6, 1904.)

SALES—TENDER OF PAYMENT—METHOD OF PAYMENT—CUSTOM—DELAY—QUESTION FOR JURY—EVIDENCE.

1. In an action for nondelivery of cotton, option for sale of which plaintiff had accepted by telegram, it was competent to prove the telegram by the testimony of the operator at the sending office, who, though not the operator who sent it, testified that he brought it from the file in his office.

2. In an action for nondelivery of cotton, evidence that plaintiff had to go on the market and buy cotton at an advance by reason of defendant's failure to comply with his contract was competent.

3. The error, if any, in admitting in an action for nondelivery of cotton evidence that plaintiff had to buy cotton on the market at an advance, was harmless, when the evidence was ruled out on the issue of damages.

4. In an action for the nondelivery of cotton, it was competent for plaintiff to state that when he went to get it he was prepared to pay for it.

5. Where a contract for the sale of cotton was silent as to the mode of payment, it was competent to prove a general custom among cotton dealers as to the method of payment.

6. A motion for a nonsuit at the close of plaintiff's evidence is waived if not renewed at the close of all the evidence.

7. Before plaintiff in an action for nondelivery of cotton can recover, he must show that when he demanded it he was able to pay for it in the method fixed by the custom among cotton dealers.

8. Where a contract for the sale of cotton is silent as to time of delivery, the buyer has a reasonable time within which to demand it, and what is a reasonable time is for the jury.

9. A refusal of a seller to deliver the article sold because the price has gone up, and on account of the buyer's delay, renders it unnecessary for the buyer to tender the price, to maintain a suit for nondelivery.

Appeal from Superior Court, Stanly County; O. H. Allen, Judge.

Action by U. B. Blalock & Co. against W. D. Clark & Bros. From a judgment for plaintiffs, defendants appeal. Affirmed.

Shepherd & Shepherd, R. T. Poole, and J. A. Spence, for appellants. R. E. Austin, R. L. Smith, and Adams, Jerome & Armfield, for appellees.

CLARK, C. J. This case was before the court in 133 N. C. 306, 45 S. E. 642, where the facts are fully stated.

The first exception, to the admission of the telegram, is without merit. It was proven by the operator at the sending office, who, though he was not the operator who sent it, testified that he brought it from the file in his office. Besides, the defendant, in his testimony, admits its receipt by him. The second exception, to the evidence of plaintiff that he had to go on the market to buy other cotton, at an advance, by reason of defendant's failure to comply with his contract, was competent. Even if error, it was harmless, as no price was given, and the court subsequently ruled it out upon the issue as to damages, to which alone it was applicable. Nor was it error (third exception) for plaintiff to state that when he went to get the cotton he was prepared to pay for it. The defendant could have cross-examined him upon that point. The contract being silent as to the mode of paying for the cotton, it was competent for plaintiff to show a general commercial custom and usage among cotton dealers as to the method of paying for cotton in large lots. *Simpson v. Pegram*, 112 N. C. 541, 17 S. E. 430; *Brown Chemical Co. v. Atkinson*, 91 N. C. 396; *Norris v. Fowler*, 87 N. C. 9; *Bank v. Williams*, 79 N. C. 141; *Moore v. Eason*, 83 N. C. 568. The defendant himself testified that he "never knew a large lot sold for spot cash. It is always sold for check, or shipped with bill of lading attached to sight draft." The plaintiff testified that this was the well-established custom. To same purport is the testimony of McAulay and Eard. Exceptions 4, 6, 8, and 12, addressed to the competency of such evidence, are without merit, as is exception 5, to the testimony of plaintiff that he

had made arrangements to pay in the customary mode. Nor was it error (exception 7) to admit testimony that defendant sold the cotton to McAulay. The defendant, in his testimony, stated the same fact.

The motion to nonsuit at the close of plaintiff's evidence was waived by not renewing it at the close of all the evidence. *Jones v. Warren*, 134 N. C. 392, 46 S. E. 740, and cases there cited. Besides, the same point was presented and held adversely to defendant in the former appeal.

There were several prayers for special instruction. The first eight were refused, but require no discussion, for, so far as applicable to this case, they were disposed of by the former decision. Prayers 9 and 10, that, as to conditions precedent, the act of God would not excuse, the court charged, were correct propositions of law, but properly held that they had no application to this case. The eleventh prayer was "that, before the plaintiff would be entitled to recover, he must satisfy the jury by a preponderance of evidence that at the time he demanded the cotton he had then and there the money ready to pay for the cotton," which the court gave, but added, "or was able, ready, and willing to pay for the cotton according to the custom of the community in buying and paying for cotton in large lots, of 160 bales or more, by giving valid checks for the same, or by shipping with bill of lading attached to sight draft, if the jury shall find first by a preponderance of the evidence that there was a well known and established custom in that community to pay for cotton in such lots in that way, and if the jury shall further find by a preponderance of the evidence that there was nothing said in the contract, or at the time of making it, about how the cotton should be paid for." The court further charged, after stating what is necessary to make a contract: "If you answer the first issue 'Yes,' you will then consider the second issue. In contracts for products like cotton, time is important in compliance with the contract, but the law gives the plaintiff a reasonable time to comply in a case like the one on trial; but it gives him a reasonable time only, and no more, and the jury is to be the judge, from all the circumstances, as to what is a reasonable time." So far there was no exception to the modification. ("If the contract was made, and the plaintiff came within a reasonable time, and was then ready and able to pay the cash, or, if not ready to pay the cash, and if the jury find by a preponderance of the evidence that there was a well known and established custom among persons in that section, embracing Troy, who bought and sold cotton in large lots, to pay in valid checks, or to ship with bill of lading attached to sight draft, and the plaintiff was ready to comply with this custom, and the defendant did not demand the cash, but refused to deliver the cotton because the price had advanced and because of de-

lay, then he would be entitled to damages, if the demand for the cotton was made within a reasonable time after 8th February.") That part of the above charge which is in parentheses was excepted to by the defendant. The court further charged: "If, when the plaintiff went after the cotton, on 12th February, it was raining, and if the jury find from a greater weight of evidence that the cotton was out in the open, and had to be weighed, and that the rain was his excuse for not complying with the contract on that day, that should be considered by you in determining whether he demanded the cotton in a reasonable time on the 15th February. It is hard to give a rule as to what is a reasonable time. If a man is careless or negligent in complying, or offering to comply, said offer would not be in a reasonable time. If he goes and offers to comply as soon as a prudent man would, under the circumstances, it is within a reasonable time"—and plaintiff excepted; but we see no prejudice accruing to defendant from the two additions above excepted to.

The defendant, in his testimony, stated: "I refused to deliver cotton on the 15th because cotton had gone up, and on account of plaintiff's delay." If so, there was no necessity to tender the money; and, even if the custom to pay by check with bill of lading attached had not been shown, it was immaterial. This was held in the former appeal. 133 N. C. 308, 45 S. E. 642, citing *Smith v. B. & L. Ass'n*, 119 N. C. 257, 26 S. E. 40, and *Grandy v. Small*, 50 N. C. 50. As to the other ground of reasonable delay, that was a matter for the jury, and upon proper instructions they found the issue in favor of plaintiff. *Blalock v. Clark*, 133 N. C., at page 308, 45 S. E. 643.

No error.

(137 N. C. 145)

BOND et al. v. WILSON.

(Supreme Court of North Carolina. Dec. 6, 1904.)

EXECUTION — AMOUNT — ASCERTAINMENT BY REFEREE — DEPARTURE FROM JUDGMENT — APPEAL — REVIEW OF EVIDENCE.

1. The Supreme Court cannot pass upon the weight of the evidence.

2. A judgment awarded a recovery of such sums as might be found by calculation to be due on the notes sued upon, and described the notes as reduced by certain enumerated credits, and provided the rate at which interest was to be computed. An execution was issued on the judgment, in which execution the debt was described as in the judgment, with each credit likewise set out. The court, on appeal from an order of the clerk refusing to recall the execution, appointed a referee to calculate the amounts due on the notes; the order of reference providing that the referee should not hear evidence of any kind. The referee failed to follow the judgment as to one credit, and adopted a different method of calculation than that prescribed by the judgment and the court set aside the original execution and affirmed his report. *Held* error: that there was no necessity for the intervention of the referee, and, he having been appointed, should have followed the judgment.

Appeal from Superior Court, Burke County; Neal, Judge.

Action by L. N. Bond and others against J. W. Wilson. From a judgment setting aside an execution issued on a judgment for plaintiffs and overruling exceptions to the report of a referee, plaintiffs appeal. Reversed.

John T. Perkins and A. C. Avery, for appellants. Avery & Ervin, for appellee.

MONTGOMERY, J. This case is an old acquaintance. It has been several times before the court. The action was commenced to recover the amount alleged to be due on two promissory notes, one for \$2,000 and the other for \$3,000, executed by the defendant to the plaintiffs. The defendant pleaded payment and the statute of limitations. The latter plea was found against him, and, judgment being rendered for the plaintiffs, he appealed to this court. A new trial was granted because of a failure of the judge to give certain instructions to the jury requested by the defendant on the question of the statute of limitations. *Bond v. Wilson*, 129 N. C. 387, 40 S. E. 182. On the second trial the defendant claimed several credits to have been made by him on the notes, but which were not indorsed upon the notes themselves; one of the credits being for the amount of \$800, paid for a mill wheel at the request of the agent of the plaintiffs, and the other was for the payment of \$240 freight charges on the wheel. The jury returned a verdict to the effect that the notes had been paid in part; that the balance was not barred by the statute of limitations; and in answer to the second issue, "What credit is defendant entitled to on said notes or either one of them?" they said, "All credits entered upon notes and all credits claimed by the defendant after January 1, 1879; also credit of \$1,040 for mill wheel, credited January 1, 1876." The court, in rendering judgment upon the verdict, after reciting the issues and answers of the jury thereto, further said: "And the court having submitted to the jury all of the credits pleaded by the defendant prior to January 1, 1879, as claimed by him upon trial, also all credits appearing upon the notes, together with the following credits, to wit, April 5, 1879, \$100; September 5, 1879, \$200; July 4, 1879, \$100; May 10, 1880, \$200; September 1, 1880, \$200; and having instructed the jury, not to consider any other credits than those submitted, and also having instructed the jury that the credit of \$600 growing out of the lot transaction, as pleaded by the defendant in his answer, was barred by the statute of limitations: Now, therefore, it is ordered and adjudged by the court that the plaintiff recover of the defendant such sum as may be found to be due by calculation on the notes sued upon, to wit, one note of \$3,000, dated January 1, 1875, bearing interest from date at 8 per cent., payable semiannually;

and one note of \$2,000, dated February 1, 1875, bearing interest from date at 8 per cent., payable semiannually; subject to and reduced by the following credits, to wit, January 1, 1876, \$1,040; January 1, 1877, \$480; January 1, 1879, by interest in full due on these notes to said date; April 5, 1879, \$100; July 4, 1879, \$100; September 5, 1879, \$200; May 10, 1880, \$200; September 1, 1880, \$200; September 1, 1881, \$500; November 26, 1883, \$2,500; June 3, 1884, \$509.04; August 12, 1884, \$154.90; September 11, 1890, \$310.03; August 7, 1893, \$258.21. That in ascertaining the amount due under this judgment interest is to be computed at 8 per cent., payable semiannually. It is further adjudged by the court that the defendant pay the cost of this action, to be taxed by the clerk." Both parties appealed from the judgment, the plaintiffs on the alleged ground and exception that there was no evidence to sustain the credit of \$1,040 for the mill wheel, and because his honor allowed the jury to return to their room and find the date of the credit of \$1,040, they having failed to fix that date when they first returned the verdict; and the defendant for alleged misdirection by his honor on the question of the statute of limitations. On the hearing in this court it was declared in both appeals that there was no error in the conducting of the trial below. *Bond v. Wilson*, 131 N. C. 505, 42 S. E. 956. A rehearing of the case was had upon the petition of the plaintiffs. The petition was dismissed, the court being still of the opinion that there was more than a scintilla of evidence to support the finding of the jury as to the credit of \$1,040. We could not pass on the weight of the evidence. It appeared to us to be very slight, and that the evidence offered on the other side was strong. But that was not a matter for us. It was for the jury. Upon the judgment the clerk of the superior court of Burke issued to the sheriff of McDowell county an execution against the defendant, in which execution the debt was described precisely and exactly as it was set out and described in the judgment, with each and every credit as to date and amount particularly set out just as they were in the judgment. Upon a motion made by the defendant to recall the execution the clerk of the court refused to interfere, and denied the motion on the ground that the execution was issued in strict conformity to the judgment. The defendant appealed to the judge of the district. At the hearing of the matter, C. D. Bennett, Esq., was made a referee "to calculate the amounts due on the notes and allow the credits according to the judgment." In that order of reference was included the following sentence: "The said referee to hear no evidence of any kind, but simply to calculate the amount due the plaintiffs according to said judgment." The referee reported, amongst other things, that: "The entry January 1, 1879, 'By interest in

full due on these notes to said date,' was intended to and does cover the interest up to that date, without taking into consideration \$1,040 mill wheel item directed by the judgment to be credited as of January 1, 1876. This your referee finds from an inspection of the whole judgment." The referee further, in his calculations of the amount due on the judgment, does not credit the amount \$1,040 as of date January 1, 1876, as directed by the judgment, but credited on the 1st day of January, 1879, with interest on the same, viz., \$187.20, from the 1st day of January, 1876. Upon the return of the report of the referee the plaintiffs filed the following exception: "(1) The judgment or order of Judge W. H. Neal directs the referee to ascertain the amount due on account of the judgment in this case by making the calculation of the interest and principal due thereon according to the provisions of the judgment in the case, and the said referee has allowed all the credits and entries on the two notes sued on to go in payment of the interest to January 1, 1879, and, instead of crediting the note sued on with the \$1,040 on account of the mill wheel on January 1, 1876, as directed in the judgment, the referee calculated interest on the \$1,040 from January 1, 1876, until January 1, 1879, and deducted the amount of \$1,040 and interest thereon from the sum of \$5,000 on January 1, 1879. The difference between the two methods of calculation amounts to more than \$2,000 at the present time. (2) The plaintiffs except to the report of the referee, C. D. Bennett, for that he fails to enter the credit of \$1,040 as of date January 1, 1876, as directed by the order referring it, and, as the plaintiffs contend, the judgment and the law direct A. O. Avery, J. T. Perkins, and E. J. Justice, Attorneys for Plaintiffs." And the court overruled the exceptions, to which the plaintiffs excepted in apt time. Upon the report and exception the exception was overruled, and the report of the referee in all things affirmed, and a judgment rendered that the execution be set aside, that the amount due on the judgment was \$2,854.82, and that execution might issue for the same. Costs were allowed against the plaintiffs, and they excepted to the judgment.

The exceptions must be sustained. The judgment upon which the execution was issued was clear in its terms. The original notes sued upon were mentioned and described as to amounts, date of execution, maturity, rate of interest, and time of its payment. The credits on the note were particularly set out, both as to amounts and dates. The execution which was issued upon the judgment as we have said, was a recital of the judgment in every particular, and the amount due on the execution is a simple mathematical calculation. There was no necessity for the intervention of a referee, and he did not follow the judgment as to

the credit of \$1,040. As we have already said, the jury, in allowing that credit, when they brought in their verdict had failed to fix the date when it should have been credited on the notes. They were instructed to return to their room and find the date. They fixed it as of the 1st day of January, 1876. The plaintiffs excepted to that procedure, and appealed to this court, but we held that it was a proper one.

His honor's order and judgment must be reversed.

CLARK, C. J., and WALKER, J., did not sit on the hearing of this case.

(137 N. C. 130)

AVERY v. OLIVER et al.

(Supreme Court of North Carolina. Dec. 6, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—RAILROADS—STATUTES—APPLICATION—NONSUIT.

1. Priv. Laws 1897, p. 83, c. 56, provides that any employé of any railroad company in the state who shall suffer injury in his employment by the negligence of any other servant, etc., shall be entitled to maintain an action against such company. *Held*, that where plaintiff was injured by the negligence of a fellow servant, while in the employ of defendant O., who was engaged by defendant railroad company to lower a grade in its track, and plaintiff claimed that O. was the servant of the railroad company, and not an independent contractor, as the railroad claimed, it was error to direct a nonsuit on the ground that plaintiff was guilty of contributory negligence, without first requiring a determination of the relation of the defendants to each other.

2. Priv. Laws 1897, p. 83, c. 56, providing that railroad companies shall be liable for injuries to employé by the negligence of fellow servants, has no application to injuries sustained by the servant of an independent contractor of a railroad company by reason of the negligence of a fellow servant.

Appeal from Superior Court, Burke County; M. H. Justice, Judge.

Action by Rufus Avery against W. J. Oliver and another. A nonsuit was directed at the close of the plaintiff's testimony, and he appeals. Reversed.

The plaintiff brought this action to recover damages for injuries to himself, which he alleges were caused by the negligence of the defendants. The testimony tended to show that he was employed by one Walter Queen, foreman of defendant Oliver, the latter having been employed by his codefendant, the Southern Railway Company, to lower a grade on the line of its railway about one mile west of Morganton. In order to do the work it was necessary to remove earth and rock from a cut, which was carried in cars over the road of defendant company to a place where the grade was being raised by it about two miles east of Morganton, and dumped there from the cars. While the plaintiff was thus employed, Walter Queen ordered him and others to go behind one of the dump cars, which was on a trestle, and

knock the chains loose and dump the car which was loaded with earth and stone. He obeyed the order, and tilted the car, but it would not dump the contents, and, on account of the greater weight of the earth and stone at the end of the car where he was placed, it fell back and caught and injured him. The cars were secured by chains on each side, and when they were dumped the stay chains were unfastened on what appeared to be the lightest side, so that the car would dump from the other side by reason of the greater weight there. If it did not dump, the hands would go on the side where the chains were loose and push the car over, without unfastening the chains on the other side, which were intended to stay the car, or to keep it in the proper position, and to prevent it from rebounding and injuring the hands. The chains on the other side had been unfastened by one of the hands, Will Largent, and the plaintiff knew, at the time he attempted to dump the car, that the chains on that side were loose, but did not think it was his business to have them fastened. If the chains on that side had been fastened, the accident would not have occurred, and the plaintiff knew this at the time. "The right way to dump is to fasten the chains on the other or opposite side of car and keep out of the way." There was further testimony tending to show that one Parsons, an engineer of the defendant company, was in charge of the work when Oliver was doing the grading. He showed how to make the grading, and set pegs, and inspected the work. McDowell testified that Parsons was the resident engineer of defendant company, and had charge, as engineer, of the work Oliver was doing, and everything was under his control. He would sometimes direct the work and the dumping. "He was all over the work." He would tell the hands when to dump the rock. Oliver had charge and employed his own hands, but Parsons directed the work. A freshet washed the piles away, and Parsons directed the work of restoration. This is a sufficient statement of the evidence to present the view taken by this court of the case. At the close of the testimony for the plaintiff, the court, on motion of defendant, nonsuited the plaintiff, who excepted and appealed.

Avery & Avery and Avery & Erwin, for appellant. J. T. Perkins, for appellee W. J. Oliver. S. J. Ervin, for appellee Southern Railway Company.

WALKER, J. (after stating the facts). In an action for negligence the first issue always is, was the plaintiff injured by the negligence of defendant? When contributory negligence is pleaded, the next issue is, did the plaintiff, by his own negligence, contribute to his injury? And in a case like this one these are the only issues necessary to be submitted to the jury in order to as-

certain whether the plaintiff has established his cause of action, as the third issue, sometimes submitted when the last clear chance to avoid the injury may have been open to the defendant, does not arise. The issue as to damages merely determines the amount of the recovery, and does not affect the cause of action, for, if the plaintiff succeeds in the action, he is entitled to recover something—at least nominal damages. In this case, the issues being those relating to negligence and contributory negligence, it was necessary, before the latter issue could be reached, that the jury should have found with the plaintiff on the first issue, namely, that the plaintiff was injured by the negligence of the defendants. If the defendant Oliver was an independent contractor, employed by the railway company to do the work specified in their contract, and not subject to the control and direction of the railway company, and the plaintiff was a servant in the employ of Oliver at the time he was hurt, the defendant company is not liable for the injury to him. If Oliver was an independent contractor, he is not liable to the plaintiff, because the injury was caused by the act of a fellow servant, as appears by the plaintiff's own testimony, and there is none to the contrary. The direct cause of the rebound of the car which struck the plaintiff was the loosening of the chain on the north side, and this was done by Largent, who was in the same service with the plaintiff, and actually co-operating with him at the time of the occurrence. Again, it may be said, if Oliver was an independent contractor, the question of the assumption of risk by the plaintiff may arise, because, when the servant enters into the employ of the master he assumes all of the ordinary perils and dangers of the service, though not those arising from the negligence of the master. It is incumbent on the master to furnish a reasonably safe place for the servant to perform his work, and reasonably safe machinery and appliances with which to do his work. *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432; *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125. When he has discharged this duty towards his servant, the latter then assumes all risks which may be incident to the service in which he is employed. These principles are, of course, modified, as to railway companies, by Act 1897, c. 56 (Priv. Laws 1897, p. 83), but they apply to individuals and to other corporations. It has always been held that one of the risks ordinarily incident to the service is the negligence of a fellow servant. If in this case, therefore, the injury was caused by the negligence of Largent, who was the plaintiff's fellow servant, the defendant Oliver, if he was an independent contractor, is not liable to the plaintiff, and, of course, the other defendant cannot be, as its liability depends upon that of Oliver, and, even if the latter was negligent, and thereby caused the

injury, the railway company would still not be liable unless Oliver was its servant, and not, as we have said, an independent contractor. It became necessary, therefore, to determine the relation of the defendants to each other. The court should have submitted this question to the jury with proper instructions as to the law, so that it might first be ascertained whether Oliver was an independent contractor, for, if he was, and the negligence of Largent, a fellow servant, caused the injury to the plaintiff, the act of 1897 would not apply, and the defendants would be acquitted of any and all liability, not because of any negligence on the part of the plaintiff which contributed to the injury, but for the reason that there was no negligence on the part of the defendants, as the law would attribute the injury to the negligence of the fellow servant, which was one of the risks and perils of the service assumed by the plaintiff. The question of contributory negligence could not, therefore, arise in that state of the case. The error of the court consisted in holding that the case turned, in the present stage of it, upon the contributory negligence of the plaintiff, whereas that question was not presented unless there was prior negligence on the part of the defendants. The defendants, indeed, may have been negligent, and it may become necessary in the development of the case to consider the issue as to the plaintiff's negligence; but the evidence now before us is such as to require the jury to first decide whether there was any negligence of the defendants upon the principles we have stated. The decision of the case by nonsuit upon the second issue was consequently premature.

We will not undertake to decide whether the evidence, taken in the most favorable light for the plaintiff, makes out a conclusive case of negligence on his part, which proximately caused the injury, but we will leave that question open for discussion if the case should again come before us. The evidence may be materially changed at the next trial. It is undoubtedly true, as argued by counsel, that if a servant is ordered to do certain work, and he attempts to do it in a way that is unsafe, when there is a perfectly safe way to do it, or if he does the work with a machine or implement which, in the language of the present chief justice, "is so grossly or clearly defective that the employé must know of the extra risk," he is deemed "to have voluntarily and knowingly assumed the risk," and if he is injured he cannot complain of his employer. *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17. The negligence of the servant which defeats his recovery depends not only upon the danger, but upon its obviousness. He is not permitted to do that which will necessarily result in injury to himself, and then hold his master responsible, because in such a case his

act is willful, and therefore voluntary, and no man can by his voluntary and wrongful act impose liability upon another. "*Volenti non fit injuria*." What we have said is subject, of course, to the full operation of the act of 1897. If Oliver was an independent contractor, the act does not apply; if he was not, but was an agent or servant of defendant company, it does apply. In the latter case the question of contributory negligence will arise. It will also arise in the former case if the jury should find that Oliver was an independent contractor, but that the injury was not due to the negligence of a fellow servant. If, however, they should find that it was caused by the negligent act of a fellow servant, it would not be necessary to consider the plaintiff's negligence. There was error in nonsuiting the plaintiff.

New trial.

(137 N. C. 150)

LASSITER v. RALEIGH & G. R. CO. et al.
(Supreme Court of North Carolina. Dec. 6, 1904.)

MASTER—DEATH OF SERVANT—NEGLIGENCE—
JURY QUESTION—RULE OF COM-
PANY—STATUTE.

1. Priv. Laws 1897, p. 83, c. 56, § 1, provides that the personal representative of any employé who shall have suffered death in the course of his services with any railroad company operating in the state by the negligence of any other employé or by any defect in the machinery, ways, or appliances, shall be entitled to maintain an action against the company. Section 2 provides that any contract or agreement, express or implied, made by any such employé, to waive the benefit of that law shall be void. *Held*, that the question whether, notwithstanding the contributory negligence of such employé, in an action for his death, the defendant had the last clear chance to avoid the injury, and would have done so by the exercise of proper care, is not taken from the jury merely because of a rule of the company, in a book for which the employé had receipted, providing that, "when a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger"; the parenthetical expression contained in the rule falling within the inhibition of the statute.

Appeal from Superior Court, Wake County; Bryan, Judge.

Action by Albert Lassiter, administrator of the estate of A. C. Lassiter, deceased against the Raleigh & Gaston Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

For former opinion, see 45 S. E. 570.

Day & Bell, T. B. Womack, and Murray Allen, for appellants. Battle & Mordecai and N. Y. Gulley, for appellee.

OLARK, C. J. This case was before this court, 138 N. C. 244, 45 S. E. 570. The defendant appellant says in its brief that "the facts developed by the plaintiff's testimony on the second trial do not differ materially from those on the former trial," but adds

that the defendant had put in evidence rule 404 of the rulebook (for which book plaintiff's intestate had receipted), which reads as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger." The first exception for refusal to dismiss at the close of the plaintiff's testimony was waived by the introduction of evidence by the defendant (*Prevatt v. Harrelson*, 132 N. C. 251, 43 S. E. 800; *Jones v. Warren*, 134 N. C. 392, 46 S. E. 740), and, besides, is settled by the former decision in this case.

The second exception is to the admission of evidence that greater care must be exercised in moving cars in a large town than in a small one. This is so held in *Arrowood v. Railroad*, 126 N. C. 631, 36 S. E. 151, and even if it had been error, it would be harmless error. This was not a yard off to one side of the town, but it was a side track in the main street of the town, and the town ordinance forbidding a higher rate of speed than six or eight miles was proved.

The third exception—for refusal to nonsuit at the close of all the evidence—was properly refused upon the former ruling in this case. Any conflict created by the defendant's evidence was a matter for the jury.

The fourth exception merely raised the same point by asking the court to instruct the jury that upon the whole evidence the plaintiff could not recover.

The fifth exception is without merit, for the court, in its charge, did instruct the jury, as asked, that the plaintiff's intestate, in any aspect of the evidence, was guilty of contributory negligence, and the jury so found. Whether this did not conflict with what was said in *Smith v. Railroad*, 132 N. C. 824-827, 44 S. E. 663, is not before us on this appeal by the defendant.

Exceptions 6, 7, 8, 9, 13, and 16 depend upon the effect of rule 404, and present really the only question in this appeal, the others having been decided on the former appeal. This rule can affect the right to recover only upon the assumption that it was a contract by the deceased, by implication, that, "when shifting and making up trains in yards a flagman need not be stationed in a conspicuous position on the front of the leading car to immediately signal the engineer in case of danger." If the intestate had entered into an express stipulation to that effect, it would have been void. *Priv. Laws* 1897, p. 83, c. 56; *Coley v. Railroad*, 128 N. C. 537, 39 S. E. 43, 57 L. R. A. 817; *Mott v. Railroad*, 131 N. C. 234, 42 S. E. 601; *Sigman v. Railroad*, 135 N. C. 184, 47 S. E. 420. Whether or not, notwithstanding the contributory negligence of the plaintiff's intestate, the defendant had the "last clear chance" to avoid the injury, and would have done so by the exercise of proper care, was

a question of fact properly submitted to the jury. The plaintiff was not, as defendant contends, barred of the right to have that question submitted to the jury by reason of rule 404.

Exceptions 10, 11, 12, 14, 15, 17, and 20 were settled by the former decision in this case.

Exception 18 is to the usual charge as to the "last clear chance," which was given in accordance with what was held in the former appeal, 133 N. C., near bottom of page 247, 45 S. E. 571.

Exception 21 is to a charge in favor of the defendant. The appeal substantially presents the proposition that the court should have told the jury, as a proposition of law, that it was not negligence in the defendant, as to an employé, not to have some one stationed in a conspicuous place on the front of the leading car to immediately signal the engineer in case of danger, when shifting cars backwards on the side track in *Henderson*. The court submitted to the jury the question whether there was negligence of the defendant in that respect upon the facts of this case, and whether, notwithstanding the contributory negligence of the plaintiff's intestate, such negligence of the defendant (if the jury found it to be negligence) was the proximate cause of the death of the plaintiff's intestate. In this there was no error of which the defendant could complain. *Smith v. Railroad*, 132 N. C., and cases cited at pages 824-827, 44 S. E. 663. A case exactly in point upon almost identical facts is *Railroad v. Boisseau*, 32 Can. 424.

No error.

(137 N. C. 237)

JONES et al. v. NANTAHALA MARBLE & TALC CO.

(Supreme Court of North Carolina. Dec. 13, 1904.)

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATION—WAIVER—ACTION FOR FEES—EVIDENCE—ADMISSIBILITY.

1. Where an attorney wrote a letter to his client as to the litigation, bearing on the amount that might be recovered against the client, and which, if known to the opposing side, might be harmful to the client, a copy of the letter sent by the attorney to his associate counsel constitutes a privileged communication.

2. Where defendant in an action to recover attorney's fees introduces as a witness an attorney who was associated with the plaintiffs in the litigation in which the claims for fees arose, for the purpose of showing that the plaintiffs' charges are excessive, he thereby waives the privilege of secrecy attaching to a confidential communication between the witness and defendant, a copy of which the witness had sent to the plaintiffs, and hence such communication is admissible to show that the witness entertained a different opinion at the time the communication was made.

Appeal from Superior Court, Buncombe County; Long, Judge.

Action by W. W. Jones and others against the Nantahala Marble & Talc Company.

From a judgment for plaintiffs, defendant appeals. Affirmed.

Frank Carter and H. D. Chedester, for appellant. Merrick & Barnard and Locke Craige, for appellees.

MONTGOMERY, J. The plaintiffs, partners in the practice of the law, brought this action to recover of the defendant certain fees for professional services rendered. The defendant denied that it owed the plaintiffs anything for professional services, averring that it had paid to the plaintiffs a reasonable compensation for the same. The only exception in the appeal arises on a matter of evidence. One of the plaintiffs, in his own behalf, testified as to the value of his services and his contract of employment. The defendant introduced as a witness an attorney who was associated with the plaintiffs as one of the defendant's attorneys in the suit in which the plaintiffs alleged that they earned the fees which are the subject of this action, for the purpose of showing that the fees and charges claimed by the plaintiffs were excessive and exorbitant. His testimony as to the amount involved tended to show that the fees were excessive. On his cross-examination the plaintiffs, to show that the witness had on a former occasion expressed himself otherwise than he testified as to the amount involved in the suit in which the plaintiffs' fees were alleged to have been earned, showed him a carbon copy of a letter which the witness had written and sent to the president of the defendant company on that subject, and which copy the witness had sent to the plaintiffs. The witness identified it, and, over the objection and exception of the defendant, his honor admitted it. The witness, for himself, was willing to waive any privilege he might be thought to have, but disclaimed any right to represent the defendant. The objection was that it was a confidential communication between attorneys and client, and could not be received as evidence over the objection of the client (the defendant). The letter, upon its face, shows that the matter was of a confidential nature between lawyer and client. It contained matters directly connected with the important features of the litigation, bearing on the amount that might be recovered against the defendant, and which, if they had been known to the opposing side, might have been harmful. The matters being confidential at the time the letter was written, they remained so perpetually, unless they should be afterwards waived by the client. It makes no difference that the carbon copy of the letter was sent to the plaintiffs by the witness. It was just as much a confidential communication as if it had been sent by the client to the plaintiffs. All communications, whether by conversation or in writing, between the attorneys for a party concerning the subject-matter of the litigation, are priv-

ileged. 23 Am. & Eng. Enc. of Law, 57, and authorities there cited.

The question then arises, did the defendant, by introducing the witness to prove that the charges of the plaintiffs were excessive, waive the privilege of secrecy and confidence? We think it did. The purpose and object of the defendant, as we have said, was to show that the plaintiffs' charges were exorbitant, and the chief method of doing that was in examining the witness as to the amount involved in the litigation. The witness, in his examination in chief, gave testimony on that head, the effect of which upon the jury was calculated to damage the plaintiffs' case. The views of the witness on that matter in the written communication to his client, the plaintiffs contended, were favorable to them, and different from his opinion expressed on the witness stand. Certainly the defendant could not get the benefit of the witness' testimony to disparage the plaintiffs' claim, and then exclude the plaintiffs from the benefit of an opinion of the witness expressed at another time, and which the plaintiffs claim was favorable to them. Opening up the question of the excessive amount of the plaintiffs' services through the method of showing the small amount involved was a waiver by the defendant of the seal of confidence which the law imposed upon the communication between the witness and the defendant on that question.

No error.

DOUGLAS, J., concurs in result.

(137 N. C. 204)

HARRIS v. BALFOUR QUARRY CO.

(Supreme Court of North Carolina. Dec. 13, 1904.)

INJURIES TO EMPLOYÉ—NEGLIGENCE OF VICE PRINCIPAL—PLEADING—SUFFICIENCY OF EVIDENCE.

1. In an action for personal injuries received while drilling out an unexploded blast in a rock, it appeared that defendant's vice principal in charge of the quarry, without himself making an examination of the hole, ordered plaintiff and other laborers to clean it out. While doing so, the blast exploded, causing the injury sued for. Held, that there was sufficient evidence of negligence to submit to the jury.

2. An employer is responsible for the negligence or incompetency of the vice principal in the scope of his authority.

3. In an action by an employé for personal injuries resulting from the negligence or incompetency of a vice principal, it need not be alleged that such person was vice principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice principal.

Appeal from Superior Court, Henderson County; Shaw, Judge.

Action for personal injuries by I. G. Harris against the Balfour Quarry Company.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 422.

From a judgment for defendant, plaintiff appeals. Reversed.

Smith & Valentine, for appellant. Merrick & Barnard, for appellee.

CLARK, C. J. This case was before us in 131 N. C. 553, 42 S. E. 973, and a new trial was granted because, in the opinion of a majority of the court, the pleadings were insufficient to justify the admission of evidence, and also that the evidence as then sent up did not show any negligence. The pleadings have since been amended to conform to the views then expressed by the court, and the evidence is also fuller, and the case should have been submitted to the jury. The witness who, on the former appeal, was not shown to be an expert, was on this trial found by the court to be an expert, and testified in effect that it was dangerous, and known to be dangerous, to drill out an unexploded hole without ascertaining that it had actually fired; that it could be learned by proper examination whether or not it had been fired, and that it was carelessness not to make such examination before ordering the hole to be drilled; that it could be ascertained whether the charge had gone off, and ordinarily this was ascertained by using a battery. No battery was used on this occasion, and there was no examination by the "boss" or any skilled operative. The evidence is that, two laborers supposing (after first differing about it) the hole had been fired, the vice principal in charge of the quarry, without making any examination himself or having it made by a skilled man, ordered the two men to clean it out; that they called the plaintiff to come and help them "churn" out the hole; that he did not go, whereupon the vice principal ordered him to go; that the hole was cleaned out by "churning" (which is done by raising a steel drill and dropping it hard into the hole); that the plaintiff was employed to drill holes, and it was not the rule in the quarry for men who drilled holes to clean out the tamping; that, while "churning," the boss told them to hurry up, and in so doing they raised the drill higher, when it fell exploded the charge, by which the plaintiff lost an eye and an arm, one of the other laborers was killed, and the third was badly injured. There was evidence of negligence, and the case should have been submitted to the jury, after opportunity to the defendant to show a different state of facts, if it could.

The ruling on the former appeal (131 N. C. 553, 42 S. E. 973) that in actions for negligence, where the negligence alleged is that of a vice principal, the complaint must allege that the negligence was that of a vice principal, that he was such vice principal, and that the employer had knowledge of his incompetency, cannot be questioned on this second appeal in the same case (Perry v. Railroad, 129 N. C. 333, 40 S. E. 191), and, if

it could be, it is not presented, because the pleadings have been amended in that particular, and there is no exception presenting the point. We would not overrule any case upon an obiter dictum. We simply would not be understood by our silence as reaffirming the former opinion upon that point. The employer is responsible for the negligence or incompetency of a vice principal in the scope of his authority, and it need not be alleged that he was vice principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice principal. His act is the act of the principal.

Error.

(137 N. C. 107)

SPENOER et al. v. SEABOARD AIR LINE RY. CO. et al.

(Supreme Court of North Carolina. Dec. 6, 1904.)

RAILROADS — CONSOLIDATION — DISSENTING STOCKHOLDERS — PAYMENT FOR STOCK — STATUTE — CONSTITUTIONAL LAW — EMINENT DOMAIN — EQUITY — JURISDICTION — LACHES — ADEQUATE REMEDY AT LAW.

1. Whether corporate acts are ultra vires is a conclusion of law to be drawn from the facts stated.

2. Priv. Laws 1901, p. 463, c. 168, confers authority on the Seaboard Air Line Railway Company to consolidate with any railroad or transportation company in the United States. Power is also conferred on any railroad or transportation company "now or hereafter incorporated" by the state of North Carolina, etc., to consolidate with the Sea Board Air Line Company. The Raleigh & Gaston Railroad Company was organized under an act of the General Assembly of North Carolina (Acts 1835-36, p. 17, c. 25). *Held*, that it was included in the class of companies with which the Seaboard Air Line Company was authorized to consolidate.

3. Under the act, power is conferred on both the Seaboard Air Line Railway Company and the Raleigh & Gaston Railroad Company to consolidate each with the other.

4. Priv. Laws 1901, p. 463, c. 168, empowering a majority of stockholders of certain railroads to consolidate with other companies, is an enabling act, and therefore imposes no duty or obligation on the corporations or their stockholders.

5. Priv. Laws 1901, p. 463, c. 168, empowering a majority of the stockholders of certain railroads to consolidate with other companies, and providing for assessing and paying the value of the dissenting stock, is an exercise of the power of eminent domain.

6. Since the right of railroads to consolidate under Priv. Laws 1901, p. 463, c. 168, authorizing payment of the value of dissenting stock, is an exercise of the power of eminent domain, a dissenting stockholder cannot rely on the inhibition of the federal Constitution as to the impairment of the obligation of a contract to defeat a consummated consolidation under the act, though her stock was purchased prior to Const. 1868, taking effect, reserving to the state the right to amend charters granted by it, and though her stock was issued by a company whose charter was granted when there was no constitutional reservation of power to amend.

7. Where, under the power conferred by Priv. Laws 1901, p. 463, c. 168, on railroads to consolidate, certain roads duly exercised the power,

and the consolidation became effective, so that an interference therewith would involve millions of dollars of private interests, a stockholder dissenting from such consolidation, who, instead of asserting her rights promptly by appeal to the preventive jurisdiction of the court, waits more than two years before invoking the equitable power of the court to declare the consolidation invalid, is in no position, because of laches, to pursue that remedy.

8. Where, under the power conferred on railroads to consolidate by Priv. Laws 1901, p. 463, c. 188, certain roads duly consolidated, so that an interference therewith would involve millions of dollars of private interests, a stockholder dissenting from such consolidation, who has been guilty of laches in pursuing her equitable right to appeal to the courts, is fully protected by the offer of the defendant to pay the value of the stock, notwithstanding plaintiff's failure to proceed to have her stock valued as prescribed by the act; it appearing that the court granted plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained pursuant to the statute, and also directed the production of the books of the corporation for use in proving the value of the stock.

Douglas, J., dissenting.

Appeal from Superior Court, Wake County; Brown, Judge.

Suit by R. P. Spencer and another against the Seaboard Air Line Railway Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

This is an appeal by the plaintiffs from a judgment upon a demurrer *ore tenus* at the October term, 1904, of the superior court of Wake county. The feme plaintiff, Ida T. Spencer, alleged: That she was the owner of seven shares of stock in the defendant corporation, the Raleigh & Gaston Railroad Company, of the par value of \$100 each; that she acquired the said stock in 1887, and has owned the same continuously to the date of the institution of this action; that said stock is represented by certificate No. 1,644, bearing date of April 13, 1887. "(2) That the defendant the Raleigh & Gaston Railroad Company was created and organized under an act of the General Assembly of North Carolina (chapter 25, p. 17, of the Acts of 1835-36), and has since that day continuously exercised the corporate powers thereby conferred, until the alleged merger of said corporation in what is known as the Seaboard Air Line Railway. (3) That the said Raleigh & Gaston Railroad Company, acting under and by virtue of certain alleged and assumed powers attempted to be granted under an act of the General Assembly of the state of Virginia, has endeavored to merge and consolidate itself with certain other railroads under the corporate name of the Seaboard Air Line Railway, and has become the alleged holding corporation in respect to said other subsidiary corporations; that such alleged merger and consolidation was and is *ultra vires*, and beyond the corporate powers of said Raleigh & Gaston Railroad Company, and is invalid and void in so far as the plaintiffs are concerned. (4) That at a meeting of the stockholders of the said Raleigh & Gaston Railroad Company

held in the city of Raleigh on May 20, 1901, in pursuance of a notice, a copy of which is hereto attached as part of this complaint, a majority of said stockholders undertook and attempted to take such action as would result in the merger and consolidation of said corporation as aforesaid; that said notice did not warrant such action; that at said meeting the said Ida T. Spencer, by her attorney in fact, said R. P. Spencer, appeared and protested against the action proposed to be taken by a majority of said stockholders, and thereupon filed a written protest against such action, a copy of which is hereto attached as a part of this complaint; that prior to said meeting several other meetings had been held, at which plaintiffs were not present, and of which they had no notice, at which certain proceedings were had, which plaintiffs cannot state, because the records of said corporation are not kept within the limits of the state, and plaintiffs have not been able to obtain access thereto; that the action of said meeting of May 20, 1901, was *ultra vires* and illegal and invalid and void as to the plaintiffs; that, after filing of said protest, said R. P. Spencer, for himself, and on behalf of said Ida T. Spencer, withdrew from said meeting, and was not present thereafter, and took no part in the proceedings. (5) That the said Raleigh & Gaston Railroad Company, so far as plaintiffs are concerned, has since the alleged merger and consolidation preserved its corporate identity and separate existence as a corporation, notwithstanding that since then it has nominally constituted an integral part of the so-called Seaboard Air Line Railway, and although it has not since then separately exercised its corporate powers and discharged its corporate duties; that it has not held any meeting of its stockholders or of its directors; that it has not published any statements of its receipts and disbursements; that it has not declared any dividends, but has subordinated itself to the management and control of the officers and directors of the said Seaboard Air Line Railway, although, as plaintiffs allege, it has done so contrary to law and in violation of its corporate duties and obligations. (6) That immediately prior to or immediately after said stockholders' meeting of May 20, 1901, the said Raleigh & Gaston Railroad Company, acting through certain officers and agents, of whom plaintiffs cannot procure definite information, attempted to sell, and sold 1,828 shares of the stock of said Raleigh & Gaston Railroad Company, which was held in its treasury for certain definite purposes; that the same was not sold for such purposes, but was sold in violation of the duties of said officers and of the rights of the plaintiffs; that it was sold to certain parties whose names plaintiffs cannot ascertain, but who were directly interested in the organization of the said Seaboard Air Line Railway; that it was sold secretly, without being offered for subscrip-

tion to the stockholders of said road, including the plaintiffs, or to the public, and without any opportunity for bidders to bid for same; that it was sold at a grossly inadequate price, and no account has ever been rendered in respect to its sale and purchase. (7) That, under the charter and amendments thereto of the said Raleigh & Gaston Railroad Company, it had no right or power to acquire stock of other corporations, nor to do any of the acts which it has attempted to do and has done in connection with said merger and consolidation; that said acts are unknown to plaintiffs in detail and in their entirety, and will be, if possible, ascertained and disclosed to this court during the progress of this action; that all of said acts and doings which have resulted in said so-called merger and consolidation have been ultra vires, contrary to law, and in derogation of the manifest and inherent rights and privileges of the plaintiff Ida T. Spencer as a stockholder in said corporation. (8) That, if the said Raleigh & Gaston Railroad Company had maintained and discharged its separate duties as a corporation created and existing under the laws of North Carolina, the said stock of the plaintiff Ida T. Spencer would have largely increased in value, and would now have been a valuable asset of said plaintiff, but that the said Raleigh & Gaston Railroad Company having undertaken to purchase the stock of other corporations and operate the same as a so-called holding corporation, having issued bonds to an amount at present unknown to plaintiff, having assumed the debts of many other corporations, having indorsed or guaranteed bonds of other corporations, having assumed the burden of extending lines of railway upon its own credit, all of which it has done, and done many other things which were ultra vires and destructive of plaintiff's rights in the premises as one of its stockholders, the said stock has been prevented from receiving the dividends the said road would otherwise have earned; that if the said Raleigh & Gaston Railroad Company had been operated as a separate and distinct corporation, as it was originally chartered, and as it was intended that it should be, the plaintiff's stock would have produced for her large dividends during the past few years, whereas, owing to the illegal and destructive acts hereinbefore mentioned, her stock has produced for her no dividends whatsoever. (9) That the value of plaintiff's stock is not measureable in any degree by its present market value, because it has none, nor by its antecedent market value, which is not pertinent to this controversy; that the effect of the merger and consolidation has been to completely destroy the corporate existence of said Raleigh & Gaston Railroad Company, in so far as the actors therein could affect such destruction, and to destroy completely the value of the plaintiff's said stock, both commercially and intrinsically. (10) That the said Raleigh &

Gaston Railroad Company, or the officers thereof, if any there be, or the officers of the Seaboard Air Line Railway, have either destroyed the books, records, and papers of the said Raleigh & Gaston Railroad Company, or have removed them beyond the limits of the state, either of which acts is contrary to law and in derogation of the rights in the premises of the said Ida T. Spencer as a stockholder in said corporation. (11) That the said corporation, the said Raleigh & Gaston Railroad Company, has ceased to act under and in pursuance of its charter and in compliance with its corporate duty and the laws of North Carolina for the two years last past, and since May 20, 1901; that thereby it has forfeited its charter, under the provisions of section 688 of the Code of North Carolina.

"Wherefore the plaintiffs demand judgment: (1) That the defendants the Raleigh & Gaston Railroad Company and the Seaboard Air Line Railway be required to disclose to this court as follows: When the attempted merger mentioned in this complaint went into effect, and what are its terms; what relation the defendant Raleigh & Gaston Railroad Company bore and now bears to said merger; what have been the annual receipts and disbursements of the said Raleigh & Gaston Railroad Company, as a separate entity, and in its distinct and separate corporate capacity, from January 1, 1901, to this date; what have been its annual net profits during said period; what stock of other companies it has acquired or attempted to acquire, what bonds of other companies it has purchased or assumed or guaranteed or endorsed; to whom it sold said 1,828 shares of treasury stock, when, and at what price; to what uses or purposes the proceeds derived from the sale of said stock were applied; what disbursements it has made out of the funds of said Raleigh & Gaston Railroad Company, or otherwise, to effect such merger and consolidation, or in connection therewith or incidental thereto; who are the present corporate officers of the said Raleigh & Gaston Railroad Company; when and where the stockholders of said corporation held their last annual meeting, and what were the proceedings of such meeting, if any such meeting was held. (2) That the defendant the Raleigh & Gaston Railroad Company be required, under the direction of this court, to render an accounting of all its receipts and disbursements since January 1, 1901, to this date, as a separate and distinct corporation. (3) That the alleged merger and consolidation of the said Raleigh & Gaston Railroad Company with other corporations into what is known as Seaboard Air Line Railway be declared ultra vires and void as to these plaintiffs. (4) That a receiver be appointed for said Raleigh & Gaston Railroad Company."

At the session of 1899, p. 127, c. 34, the Legislature of this state incorporated the

Richmond, Petersburg & Carolina Railroad Company, a Virginia corporation, and, by virtue of said act, declared that said new corporation should succeed to all of the rights, etc., of the Virginia & Carolina Railroad Company, etc. By the provisions of an act of the General Assembly of Virginia approved January 12, 1900, the Richmond, Petersburg & Carolina Railroad Company was authorized, upon petition filed in the circuit court of Richmond, to change its name, etc. The said railroad company duly filed its petition in said court, praying that it be permitted to change its name to the Seaboard Air Line Railway Company, and pursuant to said petition an order was duly made by said court changing the name of said corporation in accordance with the prayer in said petition. By chapter 168, p. 463, Private Laws of 1901 of North Carolina, the Seaboard Air Line Railway Company, successor to the Richmond, Petersburg & Carolina Railroad Company, was empowered to exercise in this state all of the powers, etc., vested in the Richmond, Petersburg & Carolina Railroad Company under its charter and amendments thereto, etc. It was also provided that: "With the approval of two thirds in amount of its stockholders given at any annual or special meeting * * * it may * * * lease, use, operate, consolidate with or purchase or otherwise acquire * * * the Seaboard & Roanoke Railroad Company, or any railroad or transportation company now or hereafter incorporated," etc., " * * * and from time to time it may consolidate its capital stock, property * * * of any other such railroad or transportation company upon such terms as may be agreed upon by the respective companies, power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act of the General Assembly of the state of North Carolina with the approval of a majority in amount of its stockholders respectively given at a meeting called for such purpose or at which all of the shares of capital stock are represented in person or by proxy to make and carry out such contracts of consolidation or lease, sale or other mode of acquisition or disposition," etc. Provision is made setting forth the terms of such contracts of lease, sale, etc., and requiring that a copy of the agreement be filed in the office of the Secretary of State. The statute contains the following proviso: "Any stockholder who dissents from any such consolidation or sale may within sixty days thereafter apply by petition to the superior court of Warren county, or any county in this state of which the dissenting stockholder was a resident at the time of the ratification of this act, to determine the value of his stock and shall be entitled to receive from said consolidated or purchasing corporation the value as thus determined of such stock upon transfer thereof to the new

corporation; such value shall be assessed by a jury trial if the same be requested by either party and if the owner of said stock shall be a non resident of this state application may be made to United States courts having jurisdiction."

The following notice was issued: "To the Stockholders of Raleigh and Gaston Railroad: Notice is hereby given that a special general meeting of the stockholders of the above named Company will be held at its office in the City of Raleigh, N. C., on the 20th day of May, 1901, at 9 o'clock a. m., for the purpose of taking into consideration Articles of Agreement of merger and consolidation of the following named railroad companies: Seaboard Air Line Railway, The Raleigh and Gaston Railroad Company [and other corporations named], heretofore entered into by the directors of said respective Companies, and at which meeting a vote by ballot will be taken for the adoption or rejection of said agreement. By order of the Directors: J. M. Sheerwood, Secretary."

The plaintiff filed the following protest: "To the Stockholders of the Raleigh and Gaston Railroad Company in Session at Raleigh, May 20, 1901, and to the President and Secretary of said Company: Mrs. Ida T. Spencer, upon whom notice was served of the meeting of stockholders of the Raleigh and Gaston Railroad Co., on May 20th, at 9 a. m., in Raleigh, to consider articles of agreement of merger and consolidation of a number of Ry. Companies, to wit, the Seaboard Air Line Ry., the Raleigh and Augusta Air Line Ry. Co., and others, appears by attorney in meeting only to protest against such action, and does hereby protest against the consideration of said agreement, or of the adoption of the same, as being ultra vires, and injurious to and in derogation of her rights as a stockholder. Respectfully, R. P. Spencer, Attorney in Fact for Ida T. Spencer."

Pursuant to said notice a meeting of the stockholders was held in the city of Raleigh, N. C., on May 20, 1901. The chairman submitted the proposed agreement of merger and consolidation which had been duly executed by the other corporations; also a certified copy of the resolutions of the board of directors of the Raleigh & Gaston Railroad Company in relation thereto. The plaintiff thereupon filed the protest set out herein. The following resolution was thereupon unanimously adopted by a stock vote by ballot: "Resolved," etc., "that they do hereby approve and adopt the agreement of merger and consolidation between," etc.; naming all of the roads entering into the merger or consolidation. It is not necessary to set out the terms of the agreement, as no controversy is made in regard thereto. The contract was duly executed as alleged in the complaint. His honor upon the hearing rendered the following judgment: "In this cause the plaintiffs move the court for

an order compelling the defendant the Seaboard Air Line Railway Company to bring within the jurisdiction of this court the records and books of the Raleigh & Gaston Railroad Company, and to permit plaintiffs to inspect the same. At the same time the defendants move the court to dismiss the action, and demur ore tenus to the complaint, because no cause of action is stated which plaintiffs can maintain, and that upon the pleadings the action cannot be sustained. The court is of opinion that under the provisions of the act of the General Assembly ratified February 27, 1901 (chapter 168, p. 463, Priv. Laws 1901), and the other acts pleaded and referred to in the answer, the only remedy the plaintiffs have is given by said chapter 168, viz., sue for the value of their stock at time of the consolidation, with interest thereon. The defendants having consented thereto, the plaintiffs may, if desired, file within thirty days an amended or new complaint for the purpose of recovering the value of their stock, and having the value assessed in the manner pointed out in said act. After such complaint is filed it will be competent to require the production of such books, records, etc., of the Raleigh & Gaston Company as tend to show such value. If the plaintiffs shall elect not to file such amended complaint to recover the value of their stock, then the court adjudges that this action must be dismissed, and defendants go without day and recover costs." From which judgment the plaintiffs appealed.

Busbee & Busbee, for appellants. Day & Bell, T. B. Womack, Shepherd & Shepherd, and Murray Allen, for appellee.

CONNOR, J. (after stating the case). The plaintiff attacks the validity of the contract of consolidation or merger whereby the Raleigh & Gaston Railroad Company, together with a number of other companies owning and controlling connecting lines, became a part of the Seaboard Air Line System, upon several grounds, which it will be convenient to consider in the order in which they are discussed in the very excellent brief of her counsel. It is, of course, conceded that as the cause was disposed of by his honor in the superior court, and is before us, upon a motion to dismiss as upon a demurrer ore tenus, every allegation made in the complaint, with such construction thereof as is most favorable to the plaintiff, must be taken as true. This, of course, is so for the purpose of drawing the legal conclusions therefrom. The plaintiff says that certain acts of the defendant are ultra vires. This is a conclusion of law to be drawn from the facts stated. It is also to be noted that although the complaint makes no reference to the several statutes enacted by the General Assembly, which, being private acts, do not come under our cognizance unless referred to and

ven, his honor's judgment expressly re-

fers to at least one of them, and, in the argument before us, counsel treated them as being properly before us. The plaintiff says that a careful analysis of chapter 168, p. 463, Priv. Laws 1901, fails to show that any authority is conferred upon the Seaboard Air Line Railroad Company to consolidate, merge with, or purchase from any other railroad than the Seaboard & Roanoke Railroad Company; that the statute conferring such extraordinary power upon railroad corporations should be clear and explicit, leaving nothing to construction or doubt. Why that single corporation should have been named, in conferring the power, and other railroad companies referred to in general terms, does not very clearly appear. We think, however, that, by a fair and reasonable interpretation of the language of the act, the Raleigh & Gaston Railroad Company is included among those companies with which the Seaboard Air Line Company is empowered to consolidate—"and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the states thereof." In conferring power upon other companies to consolidate, the language is equally comprehensive—"power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the General Assembly of the state of North Carolina," etc. The Raleigh & Gaston Railroad Company certainly comes within this classification. It would seem to follow that the other provisions of the act, unless otherwise expressed, must be construed as referring to all companies thus included in the class upon which the power is conferred to consolidate. Any other construction would render nugatory the power conferred.

The plaintiff next insists that no consolidation can take place unless the power to so consolidate is expressly conferred upon both consolidating corporations. This proposition is sustained by the authorities cited. The reasons therefor are manifest. 10 Cyc. 293. We think that such power is conferred upon both corporations. Chapter 168, p. 463, § 1, Priv. Laws 1901, expressly confers upon the Seaboard Air Line Railroad Company the power, "with the approval of two thirds in amount of its stockholders," etc., "to lease, operate, consolidate with or otherwise acquire," etc. As we have seen, the power is conferred upon the Raleigh & Gaston Railroad Company to enter into the contract of consolidation, etc. The evident purpose of the Legislature was to enable the Seaboard Air Line Railway to form, by consolidation, merger, or purchase, a system of transportation through the state, connecting with railroads in Virginia and South Carolina. The legislation in this state, together with that in Virginia, in regard to the Seaboard Air Line Company, which is expressly referred to in the preamble to chapter 34, p. 127, Laws 1899, and chapter 168, p. 463, Laws

1901, shows this to be the purpose and scope of the several statutes. This being ascertained, the principle by which we should be guided in interpreting the statute is thus stated: "Every statute is to be construed with reference to its intended scope and the purpose of the Legislature in enacting it; and where language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." Black on Interpretation of Laws, 56; Endlich, 73. It is settled that the power to consolidate may be conferred either in the charter, or by a general enabling act. 10 Cyc. 289.

The plaintiff next contends that, assuming that the statute confers the power upon the Raleigh & Gaston Railroad to consolidate, such power can be exercised only by the unanimous consent of the stockholders; that a dissenting stockholder cannot be compelled to surrender his stock in the corporation, and accept in lieu thereof stock in another company; that unless such power is conferred upon the majority of the stockholders in the charter, or by amendment thereto made before the subscription of the dissenting stockholder, an act of the Legislature conferring such power would be invalid, as impairing the obligation of the contract between the stockholders. This proposition is amply sustained upon principle and authority. The Supreme Court of the United States, in *Clearwater v. Meredith*, 68 U. S. 25, 17 L. Ed. 604, discussing a statute permitting a consolidation of several railroad companies, says: "The power of the Legislature to confer such authority cannot be questioned, and, without the authority, railroad corporations organized separately could not merge and consolidate their interests. But in conferring the authority the Legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the Legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. * * * When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interest shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purpose and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and, it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another—to assist in building a short-line railway, and averse to risking his money in one having a longer line of transit." *Botts v. Turnpike Co.* (Ky.) 10 S.

W. 134, 2 L. R. A. 594; *McCray v. R. Co.*, 9 Ind. 358. The defendant, conceding this to be the law, says that the statute conferring the power upon the several railroad companies consolidating expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent domain, and condemning the stock for a public use by making compensation therefor. The plaintiff contends that, at the date of the charter of the Raleigh & Gaston Railroad Company (1835), no power to amend charters of corporations was reserved by the Constitution of this state, and that, under the decisions of this court, they come within the protection of the doctrine of the *Dartmouth College Case*; that all of the stock was issued prior to the adoption of the Constitution of 1868, by which such power was reserved. He also says that no general statute was in force in this state authorizing such consolidation. This contention is undoubtedly correct. It will be noted, however, that chapter 168, p. 463, Laws 1901, does not undertake to amend the charter of the company, or to do more than empower a majority of the stockholders to consolidate with the other companies. It is an enabling act, and imposes no duty or obligation upon the corporation or its stockholders. It must be conceded, also, that the act of the majority of the stockholders does not change the relation of the plaintiff towards the corporation. The Legislature, in the exercise of its power, confers upon the majority of the stockholders the power to consolidate with the other constituent companies, and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the Legislature. The Legislature, having decided that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain, it empowers the corporation to condemn the stock of such dissenting stockholder when it cannot otherwise be acquired. This power is entirely distinct from the power to amend the charter. The right of eminent domain which resides in the state is defined to be "the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience, or welfare may demand." *Coolley*, Const. Lim. 524; 1 *Lewis on Em. Domain*, 1; 10 *Am. & Eng. Enc.* 1048. This right or power is said to have originated in state necessity, and is inherent in sovereignty, and inseparable from it. It is a part of the sovereign power of every state. *Id.*;

Railroad Co. v. Davis, 19 N. C. 451. When the state incorporated the Raleigh & Gaston Railroad Company, a contract was entered into with the corporation, the obligation of which could not be impaired. The state did not, in respect to the property of the corporation or its shareholders, divest itself of, or in any degree impair, its right of eminent domain. The Legislature could not divest itself of a power so essential to the integrity of the state. Mr. Justice Daniel, in *West River Bridge Co. v. Dix*, 47 U. S. 531, 12 L. Ed. 535, says: "No state, it is declared, shall pass any law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of the government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power denominated the 'eminent domain' of the state is, as its name imports, paramount to all private rights vested under the government, and these last are held in subordination to this power, and must yield in every instance to its proper exercise. * * * A correct view of this matter must demonstrate, moreover, that the right of eminent domain in no wise interferes with the inviolability of contracts; that the most sanctionious regard for the one is perfectly consistent with the possession and exercise of the other." 10 Am. & Eng. Enc. 1050. "The Legislature has the power to authorize the consolidation of railroad and other quasi public corporations, without the unanimous consent of their stockholders, when it makes provision for appraising and paying for the stock of dissenting stockholders. This power is entirely unaffected by the constitutional prohibition against impairing the obligation of contracts, and is based upon the sovereign power of eminent domain. Corporate shares, as well as other property, are subject to the paramount necessities of the state for the promotion of public interests." Noyes on Intercompany Rel. 51; *Black v. Delaware Canal Co.*, 24 N. J. Eq. 469. "In this busy age of restless activity and enterprise, when the brain of man is exhausting itself in his struggle with time and space, the two forces that most oppose his progress, the taking of private stock in such corporations to advance any of the purposes above indicated must be regarded as the taking of it for public benefit. There can be no doubt that a railroad company may be empowered to extend their road beyond the point to which it was built under the original grant, if proper compensation is provided for stockholders who may resist it; and I can see no difference, in prin-

ciple, whether the original company, in order to secure a through route under one management, is authorized to take the lands of individuals, or to take the property which individuals have in the stock of an existing road. In the first case, for the purpose of establishing a through route, one kind of private property, to wit, the lands of individuals, are taken by the corporation; in another case another kind of property, to wit, the shares of stock of individuals in an existing company, are authorized to be condemned. * * * The same rule applies to both cases, unless property in stock can claim a superior right to protection. This, with all other private right, is held under the dominant right of eminent domain."

In a very able opinion by Bigelow, J., in *Central Bridge Corp. v. Lowell*, 4 Gray, at page 481, it is said: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held in a measure, and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the Legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the Legislature for the compensation of those whose property or franchise is acquired, there is no violation of public faith or private right. The obligation created by the original charter is thereby recognized." We have in the history of the Raleigh & Gaston Railroad Company, a striking illustration of the operation of the principle so clearly stated by Justice Bigelow.

The right to take private property by condemnation proceeding for the purpose of constructing a railroad was first asserted, recognized, and enforced by this court in *R. & G. R. Co. v. Davis*, 19 N. C. 453. Ruf-

fin, C. J., wrote for a unanimous court an able and exhaustive opinion, tracing the power to its source, and giving it the application asserted by the defendant in this case. This opinion has always been cited and approved in this court as settling the law in this state. The same public convenience or necessity which would have justified taking the land of the citizen to open and construct a highway to meet the needs of the public in 1800 was invoked for taking the same land to meet the needs as they existed in 1836 to construct a railroad. The advancing needs and changed conditions in regard to transportation and travel are deemed by the Legislature to demand the formation of a great trunk line or interstate system of railroad in 1901. If the Seaboard Air Line Company had, instead of consolidating with the Raleigh & Gaston Railroad Company, constructed a separate line or track from Ridgeway to Raleigh, every foot of land on the route necessary therefor could have been condemned for that purpose. We can see no reason why, in the exercise of the same inherent sovereign power, the Legislature may not empower the corporation to condemn the plaintiff's stock. Whether the power is in this respect wisely conferred or exercised is beyond our province to say. This is a question for the decision of the Legislature. We have examined with care all of the authorities cited by the plaintiff's counsel. In those cases where the consolidating acts are declared invalid, no provision is made for assessing the value and paying for the dissenting stock. We find no more difficulty in holding that the condemnation of plaintiff's stock is for a public use than did Ruffin, C. J., and his learned associates, in finding that the railroad was originally constructed for such use. *Clark & Marshall on Private Corp.* 1051; *N. C. R. Co. v. C. C. R. Co.*, 83 N. C. 489. We are of the opinion that the Legislature had the power to confer on the corporation the right to condemn the dissenting stock, and that, upon a reasonable interpretation of the statute, it has done so. We find no valid objection to the mode prescribed for ascertaining the value of the stock. It is expressly provided that the value so assessed must be paid before the stock is transferred. It would seem that the mode prescribed is exclusive and must be pursued. *Railroad v. McCaskill*, 94 N. C. 751. It seems to us to be the only practicable remedy.

The mode of trial is free from any reasonable objection.

There is another view of this case presented by the defendant's brief which we think fatal to plaintiff's action. The board of directors of the Raleigh & Gaston Railroad Company on April 29, 1901, met and adopted a resolution reciting that the consolidation would greatly facilitate the busi-

ness and promote the interests of the company, etc. Thereupon a meeting of the stockholders was duly called, and May 20, 1901, fixed as the day for such meeting. Notice thereof was duly served on the plaintiff, and she filed her protest, setting forth that notice of the meeting and the purpose thereof had been served on her. At the meeting she appeared by her attorney and entered her protest. The tellers reported that all of the stock (14,988 shares) represented voted for the consolidation. It appears that the consolidation was entered into by eight separate railroad companies, traversing hundreds of miles, and representing millions of dollars of capital. The consolidation became operative at once, and new stock, common and preferred, to the amount of \$100,000,000, together with bonds secured by mortgage to the amount of many million dollars, were authorized to be issued and executed. It is a matter of general and public information, and known to the court by records before us at each term, the published reports of the Corporation Commission, and other public and official sources, that the consolidation of the roads forming the Seaboard Air Line System has become an accomplished fact; that vast private interests are involved, and public duties assumed. The plaintiff, instead of asserting her rights promptly by an appeal to the preventive jurisdiction of the court, waits more than two years before invoking the equitable power of the court to declare invalid and set aside the consolidation. It is not to be understood that the courts will refuse to protect the rights of a single stockholder, if invaded by the majority, however large, or refuse relief against aggression of consolidated capital, however powerful. The chancellor originally took jurisdiction in many cases because of the inability of the complainant to maintain his suit at law with his adversary, because of his great power and large number of retainers. The question is not whether the plaintiff is without remedy, but, rather, whether the law has given to her an adequate remedy otherwise than by the exercise of the extraordinary power vested in the court. She demands that the court declare the charter of the Raleigh & Gaston Railroad Company forfeited; that the merger and consolidation be declared void as to her; that a receiver be appointed, etc.; that an accounting be had of the receipts of the company since the merger etc. It is an elementary principle of equity jurisprudence that relief is granted to the vigilant, and will be refused when there has been unreasonable delay, amounting to laches. This is especially true where valuable rights have been acquired by innocent persons. This familiar principle was announced and enforced by this court in *Pender v. Pittman*, 84 N. C. 372; *Smith, C. J.*, saying, "But this equity ought to be

promptly asserted, and not deferred until by a sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done, and restore matters to their former condition." In that case it was held "that an injunction against carrying out a contract of sale made under a power contained in a mortgage will not be granted when the relief to which the plaintiff considers himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened." Mr. Noyes says: "Acquiescence for an extended period, during which time the interests of third parties have intervened, may itself constitute laches, and prevent a stockholder from attacking a consolidation even on the ground of fraud." *Inter corporate Rel.* 49. The authorities upon this subject are uniform and abundant. As was said by Sir John Romilly, Master of the Rolls: "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is ultra vires of the company to which they belong, watching the result; if it be favorable and profitable to themselves, abide by it and insist on its validity, but, if it prove unfavorable and disastrous, then to institute proceedings to set it aside." *Gregory v. Patchett*, 33 Beav. 595. The proposition is tersely stated by Van Fleet, V. C., in *Rabe v. Dunlap*, 51 N. J. Eq. 48, 25 Atl. 959: "If he wants protection against an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." *McVicker v. Ross*, 55 Barb. 247; *Watts' Appeal*, 78 Pa. 370; *Kent v. Mining Co.*, 78 N. Y. 159.

We think that, in any view of the case, the plaintiff is not entitled to the extraordinary relief demanded. We are at a loss to see how it is practicable to preserve the status of the corporation as she suggests for her benefit. We notice that the defendant, in its answer, says that notwithstanding the failure of the plaintiff to proceed to have the value of her stock ascertained within the time and by the method prescribed by chapter 168, p. 463, Laws 1901, it is now willing to pay her the value thereof. His honor granted to the plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained. He also directs upon the trial of that issue that the books of the corporation be produced, etc. We think that the order of his honor fully protects the rights of the plaintiff. She will have 30 days from the next term of the superior court to amend her complaint and proceed to have the value of her stock ascertained, and judgment rendered therefor.

Upon a full and careful consideration of the record, the agreement of counsel, and the authorities, we find no error in the judgment of his honor. Let it be so certified. No error.

DOUGLAS, J. (dissenting). I wished to express my views more fully upon this case, but circumstances which I regret confine me to a few lines. I do not see how the right of eminent domain, one of the sovereign powers of the state, can be invoked in favor of railroad consolidation, where not a foot of additional road is built, and nothing is added to the public convenience. Private property can be taken only for a public use. What use can the public make of the private stock of a corporation, aside from its roadbed and other material property, which are already devoted to the use of the public? Is it not establishing a dangerous principle to permit the consolidation of railroads without the consent of their minority stockholders—dangerous not only to private rights, but equally so to the great economic principle of railroad competition, in which the public is so vitally interested?

(127 N. C. 128)

HALL v. MISENHEIMER.

(Supreme Court of North Carolina. Dec. 13, 1904.)

VENDOR AND PURCHASER—STATUTE OF FRAUDS—MEMORANDUM OF SALE—SUFFICIENCY OF SIGNATURE—NECESSITY OF EXECUTION BY VENDEE—EXPRESSION OF PRICE—NECESSITY.

1. A receipt by the vendor of land, reciting that the vendee—naming him—had made a payment, the receipt having been drawn at the instance of the vendee, was sufficiently signed by the vendee to bind him under the statute of frauds.

2. Under Code, § 1554, requiring a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith, the vendee cannot be held unless he has signed the required memorandum.

3. The doctrine that part performance of a sale of land takes it from within the statute of frauds is not recognized.

4. Code, § 1554, requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith. *Held*, that a memorandum of a contract for the sale of land is not good as against the vendee unless it shows the price to be paid.

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by J. A. Hall against M. J. Misenheimer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action by the vendor against the vendee for the specific performance of a contract to convey land, or, stating it in another way, to recover the price agreed to be paid for the land. The plaintiff testified that he agreed to sell the land to the defendant for \$1,200, and the defendant, on the other hand, agreed to buy it at that price. That afterwards defendant presented to him a paper, and said: "The price is very high, but I will take the land. Here is a receipt that I have prepared; you sign it now, and I will pay you five dollars"—and the latter signed

¶ 3. See *Frauds*, Statute of, vol. 22, Cent. Dig. § 239.

the receipt, which is as follows: "Salisbury, N. C. Jan. 18, 1904. Received from M. J. Misenheimer five dollars, part payment on one five room house and lot, extending across Tar branch, on Boundary Street, No. house 630. [Signed] J. A. Hall. Witness: M. D. Laffer." The receipt was written by M. O. Ruffly for the defendant, and at his request and dictation. Plaintiff surrendered the premises to defendant, who took possession thereof, but afterwards refused to pay the purchase money, though plaintiff tendered a deed for the land on the 21st day of January, as defendant had requested him to do. Defendant alleges in his answer that he was to have until the 20th of January to decide whether or not he would take the lot, and he notified the plaintiff before the expiration of the time that he would not take it. At the close of plaintiff's testimony the court, on motion of defendant, nonsuited the plaintiff, who excepted and appealed.

Walter H. Woodson, for appellant. Burton Craige and Walter Murphy, for appellee.

WALKER, J. (after stating the case). The argument in this court proceeded mainly upon the question whether there had been a sufficient signing of the receipt, under the statute of frauds, to bind the defendant. Upon this point our opinion is with the plaintiff. It has been held in England, whose statute (29 Car. II) has been substantially copied by us, that if the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by the said party or by his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum, the statute not requiring that the name should be subscribed. *Evans v. Hoare*, 1 Q. B. (1892) 593. The principle, as thus stated, has been adopted by Clark in his work on Contracts (2d Ed.) p. 89, and he cites numerous cases to sustain it. To those he cites may be added *Higdon v. Thomas*, 1 Har. & G. 139. We think the same rule has been approved by this court in *Plummer v. Owens*, 45 N. C. 254, in which case it appeared that the names of the vendor and the vendee were written at the top of the memorandum, the latter being in the form of an account. The court held that the memorandum would have been sufficient in other respects if the description of the land had been more specific. See, also, *Clason v. Bailey*, 14 Johns. 484, and the other cases cited in Clark on Contracts (2d Ed.) p. 89, note 110. In our case, the name of the vendee was inserted in the paper by his own direction, and it cannot be questioned that he fully intended thereby to bind himself by the receipt as evidence of a contract to buy the land, so far as a signing of the writing was necessary for that purpose.

Cherry v. Long, 61 N. C. 468, seems to be directly in point. It was not contended that the defendant was not bound by what his agent did in writing the receipt, though the latter's authority was given by parol. *Neaves v. Mining Co.*, 90 N. C. 412, 47 Am. Rep. 529.

But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith, or by his lawfully authorized agent. Code, § 1554. In order, therefore, to charge a party upon such a contract, it must appear that there is a writing containing, expressly or by implication, all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto. *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484, especially at page 10, 74 N. C., 21 Am. Rep. 484, where *Rodman, J.*, states the rule: *Miller v. Irvine*, 18 N. C. 104; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Rice v. Carter*, 33 N. C. 298; *Neaves v. Mining Co.*, 90 N. C. 412, 47 Am. Rep. 529; *Mayer v. Adrian*, 77 N. C. 83. Many other cases could be cited from our Reports in support of the rule, but those we have already mentioned will suffice to show what is the principle and how it has been applied. In commenting on the policy of the statute, so far as it affects the vendee, and answering a suggestion that the statute applies only to the vendor, who alone conveys the land or any interest therein, *Ruffin, C. J.*, for the court, in *Simms v. Killian*, 34 N. C. 252, says: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract, of which the sale of land is the subject, in respect of a party—that is, either party—who does not charge himself by his signature to it after it has been reduced to writing." So, in a case where a stipulation that the vendee would open a street, which constituted a part of the price to be paid for the land, was not stated in the writing, it was held by this court that the vendor could not recover for a breach of the stipulation, because, being a part of the price, it was also a part of the agreement, and was not evidenced by a writing which had been signed by the defendant. *Hall v. Fisher*, 126 N. C. 205, 35 S. E. 425; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698. The fact that the defendant in this case paid \$5 on the purchase money and took possession of the land does not change the result. The doctrine of part performance is not now recognized by this court.

The party to be charged upon a contract, within the meaning of the statute, is the defendant in the action, or the party against whom it is sought to enforce the obligation

of the contract. It is not the vendor, unless he occupies upon the record the position of the party who is called upon to perform his contract. "The object of the statute was to secure the defendant." *Pearson, J., in Rice v. Carter*, 33 N. C. 298. See, also, *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Love v. Welch*, 97 N. C. 200, 2 S. E. 242; *Green v. Railroad*, 77 N. C. 95; *Love v. Atkinson*, 131 N. C. 544, 42 S. E. 966. Anything said in *Taylor v. Russell*, 119 N. C. 30, 25 S. E. 710, in conflict with this view of the statute, cannot, we think, be sustained. *Green v. Railroad*, *supra*, which is cited in *Taylor v. Russell*, does not support the proposition that the vendee is not protected by the statute. In that case the plaintiff, who was the vendee, sued the defendant, who was the vendor, to recover the value of the wood which he agreed to give for the land at a stipulated price. The court held merely that as the plaintiff had sued on the contract, and the defendant had waived the statute, he was bound by its terms, and must recover, if at all, not the value of the wood, but the price agreed upon. He could not in such a case repudiate his contract when defendant was willing to perform it. In support of this ruling, the court cited *Mizell v. Burnett*, *supra*, which case directly sustains the doctrine as we have stated it. The defendant, therefore, can avail himself of the statute as the party to be charged.

This court has held, it is true, that the consideration of the contract need not be stated. *Miller v. Irvine*, 18 N. C. 104; *Ashford v. Robinson*, 30 N. C. 114; *Thornburg v. Masten*, 88 N. C. 293. But in each of those cases the vendor was the defendant and the party to be charged. There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter can be shown by parol, as at common law, and the writing, as said by *Ruffin, C. J., in Miller v. Irvine*, *supra*, need not contain any matters but such as charge him (the vendor); that is, such stipulations as are to be performed on his part. He is to convey, and the writing must be sufficient to show that this duty rests upon him, as one of the parties to the contract, when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him. *Clark on Contracts* (2d Ed.) pp. 85, 86, and 87; *Williams v. Morris*, 96 U. S. 444, 24 L. Ed. 360. It must show the price, for otherwise the true contract of the vendee, as to one of its essential terms, would not be reduced to writing, and we could not see from the writing what it is, so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent. *Simms v. Killian*, *supra*; *Williams*

v. Morris, *supra*. The receipt in this case does not show the price. How, then, can the court be informed as to what the price is, unless it admits parol testimony to prove the fact? To do so would be in direct violation of the statute—its letter and its spirit. The judgment of nonsuit was properly granted in the court below.

No error.

DOUGLAS, J., concurs in result only.

(127 N. C. 171)

PINCHBACK v. BESSEMER MIN. & MFG. CO.

(Supreme Court of North Carolina. Dec. 18, 1904.)

DEEDS — MISTAKE — CORRECTION — EQUITY — PARTIES — REFERENCE — STATUTES — CORPORATIONS — RESOLUTION OF STOCKHOLDERS — CONTRACT — MODIFICATION.

1. Where a contract between a grantor and grantee required the grantor to convey all its real estate to the grantee, but the secretary of the grantor mistakenly represented to the attorneys instructed to draw the deed that certain lots had been sold by the grantor, whereby they were not inserted in the deed, the deed was subject to correction in equity.

2. A deed by one corporation to another recited a resolution of the grantee's stockholders that the corporation acquire all the property of the grantor, and a resolution of the stockholders of the grantor that a conveyance of all the grantor's property be executed to the grantee, and all the property of the grantor was conveyed by appropriate recitals, but certain lots were excepted and reserved. *Held*, that on the face of the deed the grantor had no beneficial interest in such lots.

3. Where a stockholder sued the corporation to compel it to sell certain lands and distribute the proceeds among the stockholders, but the defense was that the land should have been included in a conveyance previously made by the corporation, but that by mistake the lands had not been included, the court should have made the corporation's grantee a party to the suit.

4. Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the defense was that the lands were mistakenly omitted from a conveyance previously made by the corporation, the stockholder was entitled to introduce evidence to show that recitals in the deed of the corporation, excepting the lands in question, correctly expressed the purpose and intention of the parties.

5. Where two corporations, pursuant to resolutions of their stockholders, made a contract whereby one was to convey all its property to the other, and at a meeting of all the stockholders of both corporations the spokesman for the grantee corporation stated that the grantee did not care for certain lots belonging to the grantor, his remarks could not have the effect of surrendering the rights of the grantee in such lots under the contract.

6. The fact that a corporation has gone into the hands of a receiver, and that its property has been sold, has no effect as concerns the existence of the corporation.

7. *Clark's Code*, § 421, subsec. 5, provides that, where the parties do not consent, the court may on application of either, or on its own motion, direct a reference, where issues of fact and questions of fact arise in an action of which the courts of equity of the state had ex-

clusive jurisdiction prior to the adoption of the Constitution of 1868. *Held*, that where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake, whereby an issue was raised as to the intention of the parties, it was a proper case for a reference.

8. Where the stockholders of two corporations by a resolution authorized a conveyance by one of all its property to the other, a claim that the contract between the corporations had been modified, so as to except certain property, could only be substantiated by a showing that the modification was made by an act of all the stockholders.

Appeal from Superior Court, Gaston County; McNeill, Judge.

Suit by J. A. Pinchback against the Bessemer Mining & Manufacturing Company. From a decree in favor of plaintiff, defendant appeals. Reversed.

The defendant company was, on and prior to November 16, 1892, the owner of certain real estate, a portion of which had been surveyed and laid off into building lots. A plat was made showing the location, number, etc., of each lot. Some time prior to November 16, 1892, the Bessemer Mining Company made a proposition to the defendant company to take a conveyance and assignment of the real estate and all other property and assets of the defendant company, in consideration whereof the said mining company agreed to pay \$50,000, a part of which was to be applied to the discharge of certain indebtedness of the defendant company and the balance paid in cash, and to issue to the stockholders of the defendant company stock in the said mining company to the amount of \$325,000, to be apportioned among them as they should determine. The proposition was duly accepted by the stockholders of the defendant company. Thereupon the defendant company executed a deed to the said Bessemer Mining Company, reciting the action of the said company, evidenced by a resolution duly adopted at a meeting of the stockholders. So much of said resolution as is material to the decision of this appeal is in the following words: "Whereas, for the purposes of its business, it is deemed advisable for this company to acquire all the property, real, personal, and mixed, including all accounts, bills receivable, and assets of every name and nature, of the Bessemer Mining & Manufacturing Company," etc. The deed further recited that the proposition of the said mining company, at a special meeting of the stockholders of the defendant company called for that purpose, had been duly accepted, and that a resolution had been duly passed authorizing the directors, president, and secretary to execute "all such deeds of conveyance, bills of sale, inventories, transfers, and legal instruments as may be necessary to vest the title to the property of said company in the Bessemer

Mining Company, and to carry into full and complete effect the foregoing action of this company," etc. Following these recitals is appropriate language to convey and transfer to the Bessemer Mining Company "all the real estate, property, and rights of property owned by the said Bessemer City Mining & Manufacturing Company is in any manner entitled, wheresoever situate and by whatsoever name known, and more specifically and particularly the lands * * * hereafter described," etc., "to wit." Following is a description of the lands conveyed: "Excepting and reserving, however, from the operation of these presents the following town lots and blocks in Bessemer City, N. C., to wit." Twenty-six lots are thereupon described by block, number, etc. "Also the lot on which T. A. McGill now resides, * * * described in the deed to McGill, but not yet registered." Then follows a reservation of certain lots conveyed to the Bank at Durham, etc. This deed was duly proven and recorded. It was shown in evidence that the 325 shares of stock was duly issued, of which the plaintiff received 650 shares. The debts were canceled and the balance of the \$50,000 paid and distributed among the stockholders of the defendant company. Since November 16, 1892, the defendant company has transacted no business, held no meeting of its stockholders, nor in any manner exercised any corporate powers. The plaintiff was the owner of 375 shares of the stock of defendant company, the certificate of which the jury find has been lost or mislaid.

Maj. Guthrie, introduced by the defendant, testified that he was attorney for defendant company; that the resolutions set forth in the deed were duly passed; that all of the stockholders were present, including plaintiff; that Mr. Cooley and himself undertook to draw a deed in accordance with the terms of the resolution and for the purpose of carrying it into effect; that it was their purpose and intention to so draw it as to convey all of the property, real and personal, belonging to the Bessemer Mining & Manufacturing Company; that J. A. Smith, the secretary and treasurer, had a map showing the location, etc., of the property; the company had sold off a number of lots, as shown on the map, and they incorporated a clause, intending thereby to except from the operation of the deed all the lots which had been sold by the defendant company; they obtained the information in regard to the number of lots sold from Mr. Smith; he called out the lots which he said had been previously sold, and they, relying upon him, excepted from the operation of the deed the 26 lots mentioned in the complaint; if they had been notified by Mr. Smith that the lots had not been sold, they would not have excepted them; the deed was delivered to the mining company, and he heard no more of it until a short time before this suit was instituted; that the witness and Mr. Cooley

read the deed over to the parties and explained it; that defendant company executed the deed with full knowledge that the lots described in the complaint had been excepted, and the mining company accepted it with like knowledge. The said mining company is not complaining of the excepted lots, so far as witness knew. Maj. Guthrie further testified that Mr. Cooley and himself excepted the lots because they thought that they had been sold and conveyed to third parties, as was the case with the other deeds excepted from the operation of the deed.

Mr. J. A. Smith was introduced by the plaintiff, and testified that he stated to Maj. Guthrie and the stockholders of the defendant company, when the stockholders of both companies were present for the purpose of purchasing and selling the property, that the 26 lots had been sold before that day, and under what circumstances; and it was agreed by all of the stockholders of both companies there assembled in meeting, with a full knowledge of all the facts, that said 26 lots should be reserved from the operation of the deed. The company had contracted to sell the lots to Capt. Runlett. He was present at all of the meetings. He had bought 60 or 80 shares of stock of the company, and was entitled, when the shares were paid for, to one lot for each share. The company had agreed by written contract to convey them to him. Witness made known the contract to the stockholders, explaining it fully. Mr. Carrington, who was spokesman for the mining company, said that they did not care for the lots; wanted the land for the minerals. The stockholders said that the contract with Runlett should be carried out. Witness gave the written contract to the mining company, books, papers, etc., at the time the deed was made, and has not had them since; does not know what became of them. Carrington said that the mining company had no stock to sell at 50 cents on the dollar. He suggested that the only way to carry out the contract was to reserve the lots from the deed, and that witness gave some of his stock to Runlett for the defendant, and to reserve enough lots to make the contract good. Runlett had paid a part of the amount due for the stock. It was unanimously agreed that the defendant company should carry out its contract with Runlett, and that witness should give him some of his individual shares for the company; that when the same were fully paid for, the defendant company should deed him the 26 lots, which should be reserved from the operation of the deed. All understood this. The mining company were eager to get the property; wanted it for mining purposes; said that it was worth \$3,000,000. The defendant company, on the day before the deed was executed, made a deed to Runlett for 43 lots, which represented a part of the lots it was to convey to him, being all of the lots which he was able to pay for

that day. This represented as many shares as he had paid for. When Maj. Guthrie drew the deed, witness told them that 26 lots described in the complaint had been sold, and should be excepted from the deed, in accordance with the agreement. It was agreed that everything that the old company had should be conveyed to the new company. Runlett did not pay for the shares and lots. He died some four years afterwards. The contract fell through. Witness told Gen. Carr, the president of the company, that Runlett had not paid for the lots; but, as he had accounted to the company for the stock, he was entitled to them, and asked him to make me a deed for the lots. He is not now contending for the lots, but thinks that they should be sold and the proceeds divided between the stockholders. Gen. Carr said that he thought witness was entitled to them. Witness did not give in the lots for taxation, had not been consulted about the matter, and does not consent or desire that the company should set up the defense that this or that lot should be conveyed to the mining company. It has no right to same and has not made any claim for them.

This action is brought by the plaintiff to compel the defendant company to sell the said lots, to divide the proceeds between the stockholders, to have a receiver appointed, etc. The defendant in its answer says that it is advised, informed, and believes that the defendant company does not own any property, assets, or effects which should be sold or distributed among its stockholders; that the exception from the operation of the deed of the 26 lots described in the complaint was the result of a mutual mistake of the parties and the draftsman; and that the deed should be corrected in that respect. The defendant, upon the whole evidence, moved for judgment of nonsuit, which was denied, and defendant excepted.

The court submitted to the jury the following issue in regard to the alleged mistake: "Were the lots described in the complaint excepted from the conveyance by the mutual mistake of the Bessemer City Mining & Manufacturing Company and the Bessemer Mining Company?" The defendant then asked the court to charge the jury: "If the jury shall believe, from the evidence, the defendant company contracted to sell and to convey to the Bessemer Mining Company all of its property of every description; that it was represented to Maj. Guthrie and Mr. Cooley, the attorneys instructed to draw the deed, that the 26 lots described in the complaint had been sold; that by reason of this representation, which was made by the secretary of the defendant company, the said 26 lots were excepted from said deed; that but for this representation the said 26 lots would have been conveyed by said deed; and therefore the jury will answer the fifth issue, 'Yes.'" This instruction was refused, and the defendant excepted.

From a judgment upon the verdict the defendant excepted and appealed.

Burwell & Cansler, for appellant. Osborne, Maxwell & Keerans and C. E. Whitney, for appellee.

CONNOR, J. (after stating the facts). The defendant was entitled to the instruction asked. It was not alleged that the officers of the defendant company did not know that the lots were excepted when they signed the deed, but that the insertion of the exception was the result of Mr. Smith's mistake in saying to the draftsman that the lots had been conveyed. It is clear how the mistake was made. Mr. Smith was evidently not advertent to the difference between the status of the 26 lots as it existed and the status of those which had been in fact conveyed. Maj. Guthrie testifies that, if he had been informed as to the real condition of the title to the lots, he would not have excepted them from the operation of the deed. If the jury accept his testimony, there can be no question in respect to the equity for correction. If one sign a deed supposing it to convey black acre, and the insertion of white acre was purposely made by the draftsman, it is fraud in the factum. It is not the "act and deed" of the party signing. *Lee v. Pearce*, 68 N. C. 76. If the insertion of white acre was caused by the mutual mistake of the parties, under an erroneous impression that it was included in the negotiation, equity will give relief, not upon the ground that both parties were ignorant of the fact that it was included in the description, but that it was so included by mistake. Ordinarily the mistake will be shown by extrinsic evidence. When, however, the terms of the negotiation—the contract pursuant to which the deed is executed—is inserted in the deed as an essential recital, as for the purpose of showing the power vested in the person signing, and the description of the property is inconsistent with such recital, a court of equity will make the correction upon inspection of the deed. "When the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake; for then there is clear evidence in the instrument itself that it operates beyond its real intent. If, however, there is no recital of any agreement, but a mistake is alleged, and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are most difficult to define. The prima facie presumption of law is that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be consistent with that contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide,

but with which it is in fact inconsistent, or if it is admitted or proved that an instrument, intended by both parties to be prepared in one form, has, by reason of some undesigned insertion or omission, been prepared or executed in another." *Adams, Eq. 109; Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308; *Fort v. Allen*, 110 N. C. 183, 191, 14 S. E. 685. If the defendant had rested its defense upon the recitals in the deed, and asked for correction, or relied upon the recitals as a defense to the plaintiff's demand, we are of the opinion that the court should have either made the mining company a party, so that the title should be settled before a decree was made, or dismiss the action. A court of equity will not compel a trustee to sell a doubtful title, especially where it is apparent upon the face of the bill that by bringing in other parties the title may be settled before decree. The plaintiff, however, was entitled to introduce evidence to show that in truth the recitals did not set forth the real contract, or that, as contended here, the contract set out in the recitals was modified, and that the deed, taken in all of its parts, correctly expressed the purpose and intention of the parties. Certainly, either upon the face of the deed or upon Maj. Guthrie's testimony, if accepted by the jury, the defendant company had no beneficial interest in these lots. The question thus arises what effect Mr. Smith's testimony has upon the rights of the parties. He concurs with Maj. Guthrie in many respects, but goes further, and says that he explained to the stockholders of both companies the status of these 26 lots; that the defendant company had made a contract with Runlett by which he had subscribed for certain shares, which, when paid for, entitled him to 26 lots; that Mr. Carrington suggested that the lots be excepted, so that the company should be in a position to carry out the contract; that he gave the written contract with Runlett to the secretary of the mining company. It would seem clear that under the contract expressed in the resolutions the purchase money due by Runlett belonged, when paid, to the mining company. This was recognized by Mr. Smith when he delivered the writing to the secretary. The exception of the lots from the operation of the deed, from this point of view, left the legal title in the defendant company for the purpose of conveying to Runlett, when he complied with his contract; the purchase money going to the mining company. Runlett having failed to carry out his contract, it would seem that they should be conveyed to the mining company.

Mr. Smith, however, says that it was understood that he was to transfer to Runlett, when paid for, some shares belonging to himself. It is not very clear what were the terms of this understanding, or what was done by Mr. Smith. He says, however, that Runlett never took the shares. Whether the

contract made by the defendant company with the mining company was modified by the conversations testified to by Mr. Smith is not very clear. While it is true, as contended by plaintiffs, that, unless expressly required by the by-laws, it is not necessary that a written record of the proceedings of a stockholders' meeting be made, and that they may be proven by parol, it is also true that before the solemn acts of a corporation, especially when contractual, can be set aside, it must appear that a meeting was held, and that the stockholders, acting as such, voted to do so. *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889. It would endanger the integrity of corporate contracts, if, after being solemnly made and reduced to writing in the form of resolutions, they could be changed and modified by mere conversational statements of the stockholders. We should require very strong and satisfactory proof, both as to the manner and clearness of such conduct, before giving it such effect. The remarks of Mr. Carrington could not be given the effect of surrendering the rights of the mining company in the property. It is true that Mr. Smith says that all parties assented to the exception of the lots. Maj. Guthrie says the same, but it is evident that they did not understand such consent in the same way.

It seems that the defendant corporation has gone into the hands of a receiver, and its property sold. This, of course, does not affect the existence of the corporation. The officers of the defendant corporation, being, as they say, convinced that their corporation does not own any beneficial interest in the lots, very properly brought the facts to the attention of the court. They could not have done less, when called upon by the plaintiff to sell property which they do not believe belongs to them. It is not material that Mr. Smith does not wish the defense made. They, in justice to themselves, could not have done otherwise.

There are a number of exceptions to the introduction of testimony, which in our view of the case are not material. We are of the opinion that the judgment should be reversed, and a new trial ordered. If the defendant company wishes to have the deed corrected, we think: (1) That, in the absence of any parol evidence, sufficient appears on the face of the deed to entitle it to have a decree. (2) That, if the plaintiff seeks to repel this equity by showing by parol evidence that there was a modification of the contract by the stockholders of both corporations, he should be required to show clearly that such modification was made by the act of all of the stockholders. (3) If the defendant company relies upon the equity to have the title settled before any sale is made, all parties in interest should be brought before the court. In the present condition of the title neither corporation can sell the lots for their face value. It would seem that this case is a

proper one for a reference under the provisions of section 421, subsec. 5, Clark's Code. It was one of which a court of equity had exclusive jurisdiction prior to 1868. The mining company should be made a party, to the end that a final decree may be made settling the title. In view of the peculiar condition of the appeal, neither party will recover costs.

New trial.

WALKER, J., did not sit on the hearing of this case. DOUGLAS, J., concurs in result only.

(137 N. C. 206)

HELMS v. HELMS et al.

(Supreme Court of North Carolina. Dec. 13, 1904.)

DEEDS—CONDITION SUBSEQUENT—ASSIGNMENT OF POSSIBILITY OF REVERTER.

1. Where a deed conveys land in consideration of the support of the grantor for life by the grantee, and provides that the land shall stand good for such support, and if the grantee fails to support the grantor the deed shall be void, the support is not a condition precedent, but a condition subsequent.

2. The bare possibility of reverter under a condition subsequent in a deed is not assignable.

Clark, C. J., and Douglas, J., dissenting.

On rehearing. Denied.

For former opinion, see 47 S. E. 415.

CONNOR, J. We directed a rehearing of this case upon the question raised by the defendants' exception to the refusal to submit the issue in regard to the alleged mistake of the parties and draftsman in failing to insert in the deed certain parts of the contract. We have examined the authorities with care, and, with all possible deference to the learned gentlemen of the bar who differ from us, we are unable to see any error in our former decision. 47 S. E. 415. The counsel thus clearly state their contention: "Suppose the words alleged to have been omitted were actually in the deed; then we would have the stipulation that the deed is made in consideration of the support during the natural life of the party of the first part by the party of the second part, * * * and it is further understood and agreed between the parties that the above land shall stand good for the support and maintenance of the said Elmira Helms during her natural life, and if the said W. L. Helms fails to support her, then this deed is to be void." This, they say, would clearly express the intention that the support was a condition precedent. We think that the contrary intention is manifest. The consideration is the support. The land is to "stand good" (that is, to be charged with the support); and by the failure to support the grantor, the deed is to be void. An estate is granted. Apt and appropriate

¶ 1. See Deeds, vol. 14, Cent. Dig. § 490.

words are used for that purpose. The grantee is to do something in the future as the consideration. No words appropriate to making a condition precedent are used, as "if he shall support" or "provided he support," but "in consideration of the support"; that is, his undertaking to support. The charge is made; that is, the land is to "stand good," be liable for, etc. Then follow the words, if inserted, "If he fails to support, this deed is to be void." These are apt words to create a condition subsequent. If no title was to pass, then there was no necessity for declaring that the deed should be void.

In *Nicoll v. Railroad*, 12 N. Y. 121, the deed was made upon the express condition that the grantee should build a railroad track, and the court said that "this was not a condition precedent, as was argued by plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition." Marshall, C. J., said: "If the act on which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent." The deed is not made to take effect upon the happening of a certain event, but in present, and is to be divested by the grantee's failure to perform the condition. Land was devised, "provided a schoolhouse is built." Held a condition subsequent. *Hayden v. Stoughton*, 22 Mass. 528. To construe the language as creating a condition precedent would lead to the singular result of postponing the vesting of any title until Elmira Helms died; hence a failure to support her to the last moment of her life would prevent the estate vesting, because the rule is well settled that conditions precedent must be literally and punctually performed. 13 Cyc. 688. We fail to find any authorities supporting the position that such language creates a condition precedent.

While it is true that the intent must control, it is equally true that the intent must be gathered from the whole instrument. The defendants' counsel say, however, that the doctrine that none but the grantor can take advantage of the breach of the condition is no longer law. We find in the last volume of Cyc. (volume 13, p. 689) the law laid down as held by the Supreme Court of the United States as late as 1878: "If the condition subsequent is broken, that did not ipso facto produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime only the right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger." *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; 1 Jones on Conveyances, 728; *Nicoll v. Railroad*, supra, where the question is discussed and de-

cided. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said that such possibilities were assignable in equity, but those were interests of a very different character. Chancellor Kent says: "A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent." 4 Kent, Com. 130.

While it is true that contingent interests and choses in action are assignable in equity, and under our Code actions may be brought in the name of the assignee, we find no case holding that a bare possibility of reverter comes within this principle. We have carefully examined the case of *Cross v. Carson*, and notes, 44 Am. Dec. 742, and find nothing therein inconsistent with the trend of authority on the subject.

The petition to rehear must be dismissed. Petition dismissed.

CLARK, C. J. (dissenting). The written agreement was that the "lands shall stand good for the support and maintenance of said Elmira Helms during her natural life." This shows that the intention was that the lands should stand good for Elmira's benefit. While inartificially drawn, it would seem clear that the title was not finally and irrevocably to pass from her, and the lands were not to become the property of the grantee, until that condition precedent had been complied with. Otherwise, the lands could not "stand good" to secure her maintenance. This was but prudence, and the grantor evidently intended to be prudent by holding her grasp on the land till the consideration had been paid. Till then the lands "stood good"; were still hers, notwithstanding prior words of conveyance, till the promised maintenance for her lifetime had been furnished. There is nothing unusual in this. Mortgages and deeds retaining vendor's liens are similarly written to retain a similar security. If the parties did not intend this, but that the grantee should get a full title, with no remedy to the grantor upon a breach but a lawsuit, would this have been ordinary prudence on her part? And why, if such was the agreement, did the grantee not take possession? Surely the issue should have gone to the jury to ascertain whether or not, by mistake of parties and the draftsman, words to make this meaning clear had not been omitted. The issue is presented upon the pleadings, and the defendants have a right to have it passed upon by the jury.

There was evidence offered that the deed had never been delivered, and that the plaintiff so admitted. That, coupled with the fact that the grantee did not take possession, was some evidence that the deed was

not as favorable to the grantee as now claimed, and that words which the parties intended to be in the deed, and supposed to be there, have been omitted by ignorance or mutual mistake. Evidence was offered, and rejected at the instance of the plaintiff, that he has paid nothing for this property. How the deed got upon record has not been explained. The grantee, having abandoned the contract, should not recover this land against the defendant, to whose grantor Elmira conveyed it subsequently, in consideration of a maintenance fully rendered. No case more powerfully appealing to a court of conscience could be presented; and reasoning which might be properly based upon a technical and accurate use of words, when written down by skilled draftsman, ought not to prevail against what is undeniably the right. A jury of "good men and true" should be allowed to pass upon the question whether the parties intended that the absolute title was not to pass till the support had been rendered, and whether by ignorance or mistake material words to express that intent were not omitted. The failure of the grantee to take possession, and evidence tending to show nondelivery of the deed, would be potent in that view.

In such circumstances as surround this transaction, subtle shades of meaning as to "conditions precedent" and "conditions subsequent," of which these parties doubtless never heard, are but "as the small dust in balance." Elmira knew naught of technical differences between conditions precedent and subsequent, but she had no intention of her land passing from her till the consideration, her life support, had been paid for it. Whether a condition in a deed or will is a precedent or subsequent one depends upon the intention of the grantor or testator, to be gathered from the whole instrument. *Tilley v. King*, 109 N. C. 463, 13 S. E. 936. Whether they be precedent or subsequent is a question purely of intent, and the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates. *Railroad v. Brewer*, 67 Me. 295, 299. The deed upon its face showed that the consideration was something to be performed in the future, and that the lands "stood good" for the future performance of this consideration. The lands therefore remained the property of the grantor, certainly, at least, until the grantee should accept the contract and trust; and he having failed to do this or to do anything toward carrying out his contract, and the grantor having remained in possession, so that no re-entry was necessary, the legal title of the grantee never became complete, and the grantor could make the subsequent conveyance. The plaintiff, out of possession, suing to recover possession under the deed, the consideration of which is the subsequent

support of the grantor, cannot recover without showing compliance with that agreement.

The case of *Driesbach v. Serfass* (Pa.) 17 Atl. 513, 3 L. R. A. 836, is exactly on all fours with this case. In that case, Peter Berger made a deed to his niece, Mrs. Serfass; the consideration being the future support of the grantor. Mrs. Serfass and her husband entered into possession and carried out the contract until the death of Mrs. Serfass, after which her husband abandoned the premises and refused to carry out the contract. Berger, finding himself abandoned, made a similar deed to Driesbach, who supported the grantor until his death. The heirs of Mrs. Serfass then brought an action to recover possession against Driesbach. The defendant on the trial offered to prove the failure of Serfass to carry out the contract to support, which evidence was excluded; the court below holding that Mrs. Serfass took a fee in the land, which descended to her heirs at law, and that Berger had no right to make a second conveyance to Driesbach, his only remedy being an action of covenant against Mrs. Serfass for nonperformance. The Supreme Court of Pennsylvania, in reversing this ruling, says: "The right of Serfass to recover possession in this action depended upon whether the consideration agreed upon had been paid. Being out of possession, he could not recover upon the contract, unless he could show performance. This he was not required to do. The defendant then proposed to take up the burden of proof that rested on the other side, and to show affirmatively the nonperformance of the contract, under which alone the plaintiff could recover. This evidence should have been admitted. It would be contrary to the original intention of the parties, as well as against good conscience, to permit the vendee to recover the possession of land from his vendor, or one holding his title, without rendering or offering to render the equivalent contracted for."

By the words "deed to be void" the grantor doubtless meant "to be void and of no effect" till the consideration was fully paid. This view was presented by the evidence offered and ruled out upon the plaintiff's objection. It should have been admitted. And if the defendant's pleading that the agreement was that "the deed should be void," technically construed, means a "condition subsequent," it is in conflict with the whole tenor of the evidence offered, and the defense intended, and the solemn interest of justice requires that the case should go back, that the evidence may be admitted, and a "condition precedent" pleaded in more technical language, according to the clear intent of the defense set up.

DOUGLAS, J. (dissenting). Where the law is in doubt, my mind naturally turns to the great equities of humanity. These are all

on the side of the defendant. The plaintiff is seeking to recover land under a contract which he repudiated and for a consideration which he never gave. He is seeking to get something for nothing, and take the land away from those who have done what he should have done, and have paid what he should have paid. I concur in the dissenting opinion of the Chief Justice.

(187 N. C. 240)

DEAVER v. DEAVER.

(Supreme Court of North Carolina. Dec. 13, 1904.)

COVENANTS—AGAINST INCUMBRANCES—BREACH—DEEDS—RECITALS—CONCLUSIVENESS—STATUTE OF FRAUDS—COLLATERAL UNDERTAKINGS—PAROL TRUSTS—WITNESSES—TRANSACTIONS WITH DECEASED PERSONS—TRIAL—SUBMISSION OF ISSUES.

1. Where the payment of the consideration is necessary to sustain the validity of a deed or contract, the acknowledgment of payment is contractual in its nature, and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money, it is only prima facie evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by parol.

2. A promise by a purchaser of land, in consideration of the sale to him, to assume and pay a debt secured by deed of trust on the land, is not a promise to answer for the debt or default of another within the meaning of the statute of frauds.

3. One who merely holds the legal title to land, and conveys it, without consideration, to the beneficial owner at the latter's direction, is not bound to pay an incumbrance on the land assumed by the beneficial owner in the transaction by which he acquired the beneficial ownership, and for failure to do so is not liable on the covenant against incumbrances.

4. In an action for breach of a covenant against incumbrances, the fact that the nonliability of defendant depends on his having held the land merely as a trustee under an admitted parol trust does not prevent the court, because of the statute of frauds, from investigating the matter and awarding defendant relief from liability.

5. Under Code, § 590, providing that a person interested in the event of an action, or a person from whom an interested person derives his title, shall not be examined as a witness in his own behalf or interest, or in behalf of his successor in interest against the executor, etc., of a deceased person, concerning a personal transaction or communication between the witness and the deceased person, a distributee of an estate of a grantee, who had purchased an interest in the property from the grantor and had afterwards conveyed that interest to the grantee, was not incompetent to testify, in an action by the administratrix of the grantee for breach of the covenant against incumbrances, that the grantor held the property merely as a trustee for the grantee, and conveyed it to the grantee without receiving any consideration, and that the grantee assumed, as part consideration for the transaction by which he acquired the beneficial interest, the incumbrance on account of the existence of which suit was brought.

6. It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy, and each party has a fair opportunity to present his version of the facts and his view of the law.

Appeal from Superior Court, Buncombe County; Long, Judge.

Action by Ella B. Deaver, administratrix of A. E. Deaver, deceased, against R. M. Deaver. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action upon a covenant against incumbrances contained in a deed for a tract of land from the defendant, R. M. Deaver, to his brother, A. E. Deaver, dated May 11, 1897. The deed also contained covenants of seisin and of warranty. The consideration recited in it is \$3,000, the receipt of which by the defendant is acknowledged. The breach alleged consists in the fact that at the time the deed was executed there was an incumbrance on the land, to wit, a deed of trust dated October 21, 1890, from the defendant to J. E. Rankin, securing a debt of \$1,000, which was evidenced by a note of the defendant payable to Mrs. Mary J. Lusk, and due January 1, 1891. The defendant admitting the execution of both deeds and the existence of the indebtedness to Mrs. Lusk, secured as above stated, alleges in his answer that the plaintiff's intestate became the beneficial owner of the land, and that the defendant, having only the naked legal title, and having no other interest of any kind, executed the deed of May 11, 1890, and thereby conveyed the land to the intestate, the latter for a valuable consideration having at the time assumed the debt due to Mrs. Lusk and promised to pay the same to her, and thereby satisfy and discharge the deed of trust to Rankin. The defendant further alleges that the deed of May 11th was executed with the distinct understanding and agreement that it was intended merely to convey the legal title which was then in the defendant, and for no other purpose, and that in fact no such consideration as is mentioned in the deed passed from the intestate to the defendant, and that the intestate never paid the defendant anything for the land in money or money's worth. Issues were submitted to the jury, and, among others, three, which are numbered 5, 6, and 7, were based upon the averments of the answer just set forth. In order to sustain the affirmative of those three issues, the defendant proposed to prove by W. E. Logan that the tract of land was originally purchased by the intestate and the defendant from one Roberts, who was directed to convey it to the defendant, Deaver, for the purpose of being held by him in trust for himself and his brother until some pending matters could be adjusted. The witness afterwards bought the interest of the defendant, with the understanding between himself and the intestate that the defendant should continue to hold the legal title for them; that afterwards the witness sold his interest to the intestate, and it was agreed in the settlement between them that the intestate should assume and pay the debt due to Mrs. Lusk as a part of the consideration for the

land, and that the defendant, instead of making the deed to the witness for his interest, should convey the whole interest directly to the intestate; that no consideration passed to R. M. Deaver in the trade and transfer, but he was merely required to convey the legal title held by him to the intestate, in order to carry out the agreement between the witness and the intestate; that the plaintiff, who is the administratrix of A. E. Deaver, was notified of the arrangement between the witness and her intestate as to the assumption by the latter of the debt due to Mrs. Lusk. The court, upon objection by the plaintiff, excluded this testimony, except the part concerning the notice to Mrs. Lusk, and the defendant excepted. There was other similar testimony offered by the defendant which was also ruled out by the court, and the defendant excepted. Evidence was introduced tending to show that A. E. Deaver bought the one-half interest of W. E. Logan at the same price the latter had agreed to pay the defendant for it. From a judgment in favor of the plaintiff, the defendant appealed.

Tucker & Murphy, for appellant. Merri-
mon & Merrimon, for appellee.

WALKER, J. (after stating the facts). We do not see why the testimony of the witness Logan was not relevant and admissible, nor why he was not a competent witness. The testimony certainly tended to show that A. E. Deaver had agreed in the settlement with Logan, who had bought the defendant's one-half interest, that in consideration of the sale to him of that interest he would pay the Lusk debt and satisfy the deed of trust, and it is not incompetent because it contradicts the recital in the deed, namely, that the \$3,000 had been paid. Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual in its nature, and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money, it is only prima facie evidence of the payment, and the fact that there was no payment or that the consideration was other than that expressed in the deed, may be shown by oral evidence. Washburn thus states the rule, and the quotation seems to fit this case exactly: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages, in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." 3 Wash. R. P. (5th Ed.) marg. p. 614. This passage from Washburn is quoted and approved in *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, and the authorities in

support of the principle are there collected and cited by the present Chief Justice. See, also, *Harper v. Dail*, 92 N. C. 397, where Ashe, J., states clearly the distinction recognized in the books between a case where the evidence would affect the validity of the contract or deed, and one where it would not, but would only rebut the prima facie case made by the acknowledgment, treated as a receipt for money.

The assumption by A. E. Deaver to Logan of the Lusk debt was not within the statute of frauds. It was an original promise, and not one superadded to the liability of R. M. Deaver. The intestate bought Logan's interest in the land, and, in consideration of the sale to him, promised to pay the Lusk debt. It seems to us that the case, in this respect, comes directly within the principle of *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612, and *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31, where other like cases will be found. The sale of the land to the intestate by Logan constituted a new and original consideration for the promise of the former to pay the Lusk debt, and is in no respect a promise to answer for the debt or default of another within the intent and meaning of the statute of frauds. If, in the arrangement between the parties when the intestate acquired Logan's interest, he promised to pay the Lusk debt, it would indeed be unjust if he or his representative should be allowed to repudiate the promise and subject the defendant to the payment of damages.

If the facts are found to be as we have stated them, and the defendant merely held the legal title by agreement of all the parties, and conveyed it by their direction, there was no breach of the covenant, for it was not the defendant's duty to pay the debt. If the defendant did not in fact receive the consideration recited in the deed, there is no rule of law, and certainly none of equity, which forbids him to show the truth of the matter in order to defeat the enforcement of an inequitable claim.

We are at a loss to understand how the doctrine of parol trusts has any bearing upon the case. There is no attempt here to establish any such trust. The person supposed to be charged with the trust—that is, the defendant—admits it. The law concerning parol proof of trusts has nothing to do with the case, as we view it. The sole purpose is to show the entire nature of the transaction from its inception, when the defendant bought from Roberts and took the legal title for himself and his brother, the intestate, to its conclusion, when the alleged promise was made by the intestate to pay the Lusk debt. We cannot, therefore, conceive how the fact that an admitted parol trust comes incidentally into the case as part of the proof of the ultimate fact prevents the court, even under the most rigid application of the statute of frauds, from proceeding to investigate the matter with a view of ascertaining the facts and then of doing jus-

time between the parties upon the facts as found.

The witness Logan was not incompetent as a witness under section 590 of the Code: (1) He is not a party to, nor is he in any way interested in the event of, the action; nor (2) does he propose to testify in behalf of himself, or (3) in favor of a party who derived his interest from him, or (4) against the representative of a party deceased who claims adversely to his assignee; nor (5) does his testimony relate to a personal transaction or communication with a deceased person whose representative is suing, or being sued by the assignee of the witness. A careful reading of section 590 will show that the objection to the witness upon the ground of his incompetency is not within either the letter or the spirit of the enactment. *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043. The case appears to show that instead of proposing to testify so as to affect himself beneficially, either directly or indirectly, the witness was in fact ready to testify against his own interest, as he is the heir and distributee of A. E. Deaver, who was his uncle.

If it was at all necessary to plead specially the matters set up in defense, it may be that the answer was not drawn with that fullness and technical precision required by the rules of good pleading, but this defect may be remedied by amendment. We are inclined to the opinion, though, that while issues 5, 6, and 7 were properly submitted under the answer as it is now framed, yet that the excluded testimony was admissible under issues 8 and 9. It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits. *Warehouse Co. v. Ozment*, 132 N. C. 389, 44 S. E. 681. The court erred in excluding the testimony as above indicated.

New trial.

(137 N. C. 214)

BARKER v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 13, 1904.)

RAILROADS—RIGHT OF WAY—HOW ACQUIRED—PRESUMPTIONS—ADMISSION OF EVIDENCE.

1. In ejectment for a strip of land adjacent to the defendant's railroad, evidence of a charter granted in an adjoining state to a railroad of that state which afterward by consolidation became a part of defendant's (lessor was admissible for the purpose of showing the history and original creation of defendant's lessor.

2. In ejectment against a railroad company, the act of the Legislature relating to the consolidation of a local railroad company with a company of an adjoining state—the consolidated company being defendant's lessor—is admissible, though the act confers no power to condemn land.

3. A railroad charter (Laws 1854-55, p. 274, c. 229, § 11) provided that, in the absence of a contract between the company and the land-

owner in relation to the lands through which the road may pass, it shall be presumed that the lands on which the road is constructed, together with 100 feet on each side of the center of the track, have been granted to the company for railroad purposes only, unless the owner shall, within two years after the construction of the road, sue for the recovery of the same. Held, that, on a foreclosure of a mortgage given by the company, the purchaser took the rights that the company had acquired under such section.

Douglas, J., dissenting.

Appeal from Superior Court, Henderson County; Shaw, Judge.

Action in ejectment by T. G. Barker against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action brought for the recovery of a strip of land described in the complaint as bounded by the main line of the Asheville & Spartanburg Railroad on the east, by W. H. Ray on the north, by the street leading from Anderson avenue by the machine shops of the Henderson Lumber Company on the west, and by Henderson avenue on the south. The plaintiff showed a chain of title from the state to himself. The defendant admitted that it was in possession of the locus in quo. It was alleged that such possession was held by virtue of the lease from the Asheville & Spartanburg Railroad Company; that the road claimed the right of possession as and for a right of way; that possession of the land was taken by the grantee charter of its grantee, a right of way was acquired in and over the land.

Use of the company for railroad purposes, and the land is used and is necessary for the operation of the road; and that by virtue of such lease and possession, by the terms of

The plaintiff located the land as described in the deed and complaint, and it was shown that the land was used for railroad purposes to load and unload cars, and had been used for depot purposes since 1878-79. The road was extended from Hendersonville to Asheville in 1880, and completed in 1886. The defendant introduced the charter (Laws 1854-55, p. 269, c. 229) entitled "An act to incorporate the Greenville & French Broad Railroad Company." Section 11 of the act is as follows: "In the absence of any written contract between the company and any owner or owners of said land through which the said railroad may be constructed, in relation to said land, it shall be presumed that the land upon which the said railroad may be constructed, together with 100 feet on each side of the center of said road, has been granted to said company by the owner or the owners thereof; and the said company shall have good right and title to the same, and shall have and hold and enjoy the same unto them and their successors so long as the same may be used only for the purposes of said road and no longer, unless the person or persons to whom any right or title to such land * * * descend or come, shall prosecute a suit for the same within two years next after the con-

struction of such part or portion of said road as may be constructed upon the land of the person or persons so holding or acquiring such right to the title as aforesaid; and if any person or persons to whom the right or title to said lands, tenements or hereditaments belong, or shall hereafter descend or come, do not prosecute a suit for the same within two years next after the construction of the part of said road upon the land of the person or persons so having or acquiring said right or title as aforesaid, then he or they and all claiming under him or them shall be forever barred to recover the same." The defendant, under plaintiff's objection, introduced the law of South Carolina (15 St. at Large, p. 348, No. 274) entitled "An act to incorporate the Spartanburg & Asheville Railroad Company." Section 4 of said act conferred upon said corporation power to construct a railroad from Spartanburg, S. C., to the North Carolina line, in the direction of Asheville. Plaintiff excepted. (3) The defendant introduced chapter 27, p. 23, Laws 1874-77, entitled "An act to amend the charter of the Greenville & French Broad Railroad Company." The preamble of said act is as follows: "Whereas the Greenville & French Broad Railroad Company of North Carolina and the Spartanburg & Asheville Railroad Company of South Carolina have, in pursuance of the laws of North and South Carolina, been consolidated into one company; and whereas it is deemed expedient to repeal some of the restrictions contained in the charter of the Greenville & French Broad Railroad Company." The plaintiff objected to this statute for the reason that it does not appear that there was in fact any consolidation of the two companies mentioned in the act, and because no power is given in the act to the Asheville & Spartanburg Railroad Company to condemn land, and no corporate rights are given whatever. The objection was overruled, and the plaintiff excepted. A certified copy from the records of Buncombe county of a deed in trust from the Spartanburg & Asheville Railroad Company to Inman & Cleveland. This deed has been registered in Henderson county from this certified copy. The plaintiff objected to the deed because it appears to be a copy, and was ordered to registration and was registered in Henderson county from a copy from the records of Buncombe county, and because it was not properly admitted to probate and registered in Henderson county. The objection was overruled, and the plaintiff excepted. The defendant next offered a certified copy of the record in the case of Tomny v. Spartanburg & Asheville Railroad Co. and others, in the Circuit Court of the United States, in which the mortgage deed was foreclosed and the property sold, and also the deed from Inman & Cleveland, trustees, to the Asheville & Spartanburg Railroad Company, conveying all of the property rights of said company, bearing date April 4, 1881, and duly regis-

tered. The defendant rested. The plaintiff introduced Book 37, p. 162, of the record of deeds of Henderson county, showing the deed from T. G. Barker, plaintiff, to the Spartanburg & Asheville Railroad Company, conveying land known as the "Stock Lot," on the side of the railroad track, opposite the land in controversy. This land was conveyed to the company for use as a stock lot and other railroad purposes. The plaintiff showed the location of the stock lot. And at the conclusion of the testimony his honor directed the jury to answer the first issue, "Is the plaintiff the owner and entitled to the land in controversy set out in the complaint?" "Yes," subject to the right of way of the Asheville & Spartanburg Railroad Company, as provided in the charter of the Greenville & French Broad Railroad Company, as contained in chapter 229, Acts 1854-55; to the second issue, that plaintiff was not entitled to the possession. Plaintiff excepted. From a judgment upon the verdict, the plaintiff appealed.

Smith & Valentine, for appellant. G. F. Bason and F. H. Busbee, for appellee.

CONNOR, J. (after stating the facts). The plaintiff's first exception to testimony becomes immaterial by reason of the answer to the first issue. His second exception is pointed to the introduction of the South Carolina statute, for that it is irrelevant and cannot affect the rights of a citizen of this state. The exception is based upon a misconception of the purpose for which the statute was introduced. For the purpose of showing the history, original creation, and consolidation of the two corporations, we can see no valid objection to its competency. It certainly could not confer upon the corporation chartered in South Carolina any rights, privileges, or powers in respect to the property of the plaintiff in this state, nor does it profess to do so. It simply charters a railroad company, with power to construct a road to the North Carolina line. The exception was not urged in this court, and cannot be sustained.

The third exception is directed to the act of 1874-75, because (1) it does not appear that in fact there was any consolidation of the two companies; (2) it does not confer any power on the corporation to condemn land. These objections go rather to the effect of the act than to its competency. The recital that a consolidation had been made in pursuance of the laws of the two states must be taken as *prima facie* true for the purposes of this case. In regard to the second ground, the claim of the defendant does not depend upon the right of eminent domain, but upon a statutory presumption. The exception cannot be sustained. The exception to the introduction of the deed in trust must also be overruled.

We are thus brought to the consideration of the real question presented by the appeal. Whatever corporate rights vested in the Greenville & French Broad Railroad Company

passed to and vested in the Asheville & Spartanburg Railroad Company by the consolidation. 10 Cyc. 803, 804. The power to enter upon land for the purpose of constructing the road was clearly conferred upon the Greenville & French Broad Railroad Company. It was further provided by section 11 that, in the absence of a written contract, it shall be presumed that the land upon which the said road may be constructed, together with 100 feet on each side of the center of the road, has been granted to said company by the owners thereof. The validity of the consolidation is not material to this controversy. It was recognized by the General Assembly in the manner herein set forth. The trust deed executed by the Asheville & Spartanburg Railroad Company vested in the trustees, for the purposes therein set out, the title to the property of the consolidated railroad companies. This title passed to and vested in the Asheville & Spartanburg Railroad Company by virtue of the proceedings, decree, sale, etc., of the Circuit Court of the United States. By virtue of section 697 of the Code the purchaser became the Asheville & Spartanburg Railroad Company. We do not think that the decision of this court in *James v. Railroad*, 121 N. C. 523, 28 S. E. 537, 46 L. R. A. 306, conflicts with this view. The question presented in that case is easily distinguished from the one under consideration. At the time of the purchase, April 4, 1881, the Spartanburg & Asheville had entered upon and constructed its track over the land in controversy. The plaintiff's witness puts it at about 1879 or 1880. This court, in *Railroad v. McCaskill*, 94 N. C. 746, discusses and construes language similar to that contained in section 11 of the charter of the Greenville & French Broad. It was held that "the presumption of the conveyance arises from the company's act in taking possession and building the road, when, in the absence of a contract, the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated, of the specified width, unaffected by the ordinary rules in reference to repelling presumptions." The decision in this case has been modified in *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779. It is there held that under similar conditions, construing the same language, the road acquires not a title to the land, but an easement which entitles it to possession of the whole right of way only when it shall appear that it is necessary for its purposes in the conduct of its business. We do not understand that in any of the decisions of this court the doctrine of *McCaskill's Case* has been otherwise modified. In *Dargan v. Railroad*, 131 N. C. 623, 42 S. E. 979, *Stur-*

geon's Case was approved. A railroad under a charter such as the one before us may acquire its right of way in three different methods: (1) By purchase, which includes dedication, in which case it will be confined to the width set forth in the deed and act of dedication. (2) By condemnation, in which case it will be confined to the width set forth in the map or profile which is required to be filed under the statute. If in either case it contents itself with accepting and paying for less than 100 feet, it must be content to be restricted to such limits as are fixed. The first method, of course, arises out of a contract. The second is in the exercise of the right of eminent domain, and all statutory provisions for taking property in this way must be strictly construed, and no such power can be granted by implication. This is elementary learning. (3) In the absence of any written contract, it shall be presumed that the land upon which the road may be constructed, together with 100 feet on each side of the center of the road, has been granted to the company by the owners thereof, and it acquired a good right and title to the same, so long as the land may be used only for the purposes of the road, and no longer, unless the owner shall prosecute a suit within two years to recover either the land or damages by way of condemnation. This mode of acquisition is not an exercise of the right of eminent domain. It is based upon a purely statutory presumption. The concurring conditions are (1) entry and construction of the road; and (2) the failure of the owner to prosecute an action for two years. These concurring conditions existing, the statute fixes the term of two years within which the owner may prosecute his action, and in default of which the road acquires the easement described, to wit, "one hundred feet on each side of the center of the road," with the limitation fixed as to time and use. It would seem that there could be no doubt in regard to the meaning of the Legislature. With the policy which prompted the Legislature in the early history of railroad building in this state to put this provision in the charters of the contemplated roads, we have nothing to do. Finding them to be constitutional, it is our duty to interpret and enforce them in accordance with well-settled principles of legal construction.

The boundary is fixed at "one hundred feet on each side of the center of the road," and we have no right to restrict it. The duration of the easement is "so long as the same may be used only for the purposes of the road, and no longer." This court, in *Sturgeon's Case*, has defined the extent of the easement, both in respect to the width and the use to which it must be confined. It is said, however, that the presumption only arises in the absence of any written contract, and the burden is upon the defendant to show this condition. It must be conceded that, when one relies upon a presumption to establish a

right, he must show every fact out of which the presumption arises. While we have no disposition to violate the elementary principle of law that a party who claims to have acquired the title to property, or any easement therein, or right to put any burden thereon by presumption, must establish his claim by showing the facts upon which it is based, we must not refuse to give to the clearly expressed intent of the Legislature, especially when it assumes the form of a contract, a fair interpretation. Whether, in the first introduction of railroad building in this state, the Legislature conferred power, in respect to the acquisition of rights of way and other special privileges, too freely, it is not within our province to say. Whether the growth in wealth and development of the natural resources of the state, incident to the improvement of facilities for transportation, has compensated for such grants, it is equally beyond our province to discuss. This court best serves its purpose and discharges its legitimate function in our governmental system when it confines itself to its constitutional orbit—"to review any decisions of the courts below upon any matter of law or legal inference." Const. art. 4, § 8.

When the defendant showed its actual occupancy of the land for two years in the manner and for the purposes to which it was appropriated, in the absence of any deed or written contract or proceeding for condemnation, the statutory presumption arose with the effect upon the rights of the parties declared by the statute. If one is sued by the state for land, and shows a possession, either by himself or others, for 30 years, under the law as it existed prior to 1863, then arose a presumption of a grant as against the state, and a similar possession of 21 years presumed a deed as against an individual. The charter simply defines the kind, character, and purpose of the possession, and raises the presumption of a grant of an easement of fixed limitations at the end of two years. Charters containing these provisions have been granted in this state since 1833. No serious question has ever been raised as to their validity. *Railroad v. Davis*, 19 N. C. 451; *Railroad v. McCaskill*, supra; *Railroad v. Sturgeon*, supra. The plaintiff must recover on the strength of his own title. The easement having been acquired by the statutory presumption, and the defendant being in the actual enjoyment of it, the plaintiff cannot oust it.

His honor stated that there was no contradiction in the testimony, and, as a question of law, directed the verdict. In his ruling we find no error.

DOUGLAS, J. (dissenting). This is another case in which I would wish to state my views at greater length; but it is perhaps unnecessary to do so, in view of my dissenting opinions in *Jones v. Commissioners*, 130 N. C. 457, 42 S. E. 144, and *Dargan v. Rail-*

road, 131 N. C. 626, 42 S. E. 979. I need only repeat that in my opinion any construction of a statute which has the effect of taking private property without compensation, and without giving the owner any adequate remedy for obtaining compensation, is contrary to the Constitution of this state, as well as the fourteenth amendment to the Constitution of the United States. I may also say that in my opinion any statutes of limitation which discriminate against the citizen by taking from him his property while in the actual possession thereof, and giving it to a railroad corporation upon a mere constructive possession, is contrary to the letter and spirit of section 3, art. 8, of the Constitution of this state, which provides that "all corporations shall have the right to sue and shall be subject to be sued in all courts in like manner as natural persons." I am especially interested in the principles decided in this case on account of its unjust tendencies and dangerous possibilities. Hitherto the lands thus taken have been of comparatively small value; but, if the principle is correct, what is there to prevent railroad companies from demanding a right of way 200 feet wide through our principal cities, and thus appropriating perhaps millions of private property without the shadow of compensation? The value of the property would make no difference in the justice and legality of the claim. The cabin of the poor is as sacred as the mansion of the rich, and both should equally receive the fullest protection of the law.

(56 W. Va. 220)

MARTIN v. THOMAS.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—POSSESSION—EQUITABLE DEFENSES.

1. A court of equity will not enforce, against an innocent purchaser, who has paid the purchase money and taken legal title to land, without notice, a prior executory contract for the purchase of the land.

2. An answer which seeks to defeat the right of a bona fide purchase of land on the claim that the party filing the answer had made a prior executory contract for its purchase from the same owner must aver that when the plaintiff paid purchase money and took title he had notice of such prior contract.

3. To make possession of land notice to subsequent purchasers, such possession must be inconsistent with the occupant's apparent or record title, because such possession will be presumed to be under such title, rather than under another right.

4. The mere sole possession of one coparcener or tenant in common is not notice to subsequent purchasers of shares of other coparceners or tenants in common of the right of such occupant to those shares under a prior unrecorded purchase of them by such occupant.

5. Section 20, c. 90, Code 1891, allowing equitable defense under a writing for the purchase of land applies only to suits involving possession, not to a contest for the land between two purchasers of the same land from the same vendor.

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County; John Homer Holt, Judge.

Bill by Isaac P. Martin against Elisha Thomas. Decree for defendant, and plaintiff appeals. Reversed in part.

P. J. Crogan, for appellant. J. A. Brown, for appellee.

BRANNON, J. Elisha Thomas and Elizabeth Corbin were joint equal owners of a tract of 244 acres of land in Preston county. Mrs. Corbin died childless, and her half went by descent to kindred—Elisha Thomas, a brother; the children of a dead brother, Frank Thomas; and three sisters, Hannah Coombs, Mary Ann Cole, and Permella Jenkins. Elisha Thomas acquired the share of Permella Jenkins, and, owning his original half, equal to five-tenths, and one-tenth as a brother of his dead sister, Elizabeth Corbin, and the one-tenth acquired from Permella Jenkins, he owned seven-tenths. Hannah Coombs and Mary Ann Cole, by deed of March 28, 1898, and the heirs of Frank Thomas, by deed of same date, conveyed their shares to William G. Brown, which deeds were for money consideration cash paid. Brown, being thus owner of three-tenths, conveyed the same to Isaac P. Martin by deed December 28, 1898, for the consideration of \$1,000. Martin brought a chancery suit against Elisha Thomas conceding that Thomas owned seven-tenths of said land, and claiming himself three-tenths, and asking a partition according to such ownership. Elisha Thomas defended the suit, claiming the whole tract, denying Martin's right to any share on the ground that in December, 1895, he had entered into a written contract with an agent of Mrs. Coombs, Mrs. Cole, and the heirs of Frank Thomas, not recorded, whereby they sold their shares to him. He claimed that the deeds to Brown were illegal, wrongful, and not on adequate consideration, and denied Martin's right. He asked a decree for the whole tract. The court dismissed the bill, and Martin appealed.

The answer and amended answer, which were objected to, but admitted, present no defense to defeat the bill. The plaintiff is a purchaser of the shares of Mrs. Cole, Mrs. Coombs, and Frank Thomas for valuable consideration, and the answers charge no actual notice on Martin, or his grantor, Brown, of the right of Elisha Thomas when they obtained the legal title. When two persons claim the same land as purchasers from the same vendor, if neither has the legal title, but that is still in the vendor, the purchaser first in time has preferential right to call for the legal title; but where the junior has paid purchase money and received a conveyance of legal title he is accorded preference in equity, since his legal title gives him superiority in a court of common law. *Urpman v. Lowther Oil Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027, point 10. In 23 Am. & Eng. Ency. L. (2d Ed.) 475, is a full

discussion of this important subject, and a reference to the many authorities. Such a purchaser has the legal title, and his claim upon the conscience of a court of equity, if he is honest, is as high as that of his adversary. "No party can occupy a higher ground than that in a court of equity, and if he can maintain that position his title is established and his position impregnable." *Briscoe v. Ashby*, 24 Grat. 478. We find in 1 Am. & Eng. Dec. in Equity, 249, that equity "will not interfere, either for relief or discovery, against a bona fide purchaser of a legal estate for valuable consideration, without notice of the adverse title, or of any circumstance affecting the apparent right to that which he purchases." "Courts of equity will not take the least step imaginable against an innocent purchaser in such a predicament; and will, on the other hand, allow him to take every advantage which the law gives him, for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim." 2 Story, Eq. § 1503. "Relief of cancellation will not be granted against a bona fide purchaser for value without notice of the fraud or other ground for cancellation." 6 Cyc. 319. This rule is universal. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; *National Bank v. Harman*, 75 Va. 609; *Carter v. Allen*, 21 Grat. 241. Seeing that the title of Martin is good, unless he had notice of the claim of Thomas, surely those answers should charge notice. One who would nullify a deed because fraudulent as to creditors must aver notice against the purchaser, because his title is good, unless he had notice, just as Martin's title is.

Though neither of the answers charge actual notice, yet one of them charges that, in pursuance of his purchase of the interests of Mrs. Coombs, Mrs. Cole, and Frank Thomas, Elisha Thomas took actual possession, and such possession, prior to the deeds to Brown and Martin, is alone notice of the rights of Elisha Thomas under said executory contract of purchase. *Urpman v. Lowther Co.*, 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027, point 11. This raises the question whether, when one of several coparceners is in possession, and others not themselves in actual possession, and that one in possession makes an executory contract to purchase the shares of those others, such possession of that one is constructive notice to the world of his purchase, so as to warn all persons from purchasing the shares of those purchasers not in possession themselves. We know that the possession of one coparcener is the possession of all, in the absence of an actual ouster. His possession is not adverse to, but consistent with, the rights of his co-owners. In 23 Am. & Eng. Ency. L. (2d Ed.) 506, is the rule that, to give possession the force of notice, "the possession must be inconsistent with the apparent or record title of the grantor, else it will not be sufficient to put upon the pur-

chaser the duty of making further inquiry; the reason being that in such case the possession is presumed to be under the grantor's title." Many cases are cited for the text. *Warvel on Vendors*, p. 330. 3 *Washburn R. Prop.* § 2201, says, "No inference is to be deduced from possession when it is consistent with the possessory title on record." Apply this principle to this case. *Elisha Thomas* was in possession under his joint tenancy with *Elizabeth Corbin*, and on her death with her heirs. The recorded title showed his right. One had right to ascribe his possession to his own apparent title on the record. He was, after *Mrs. Corbin's* death, as one of her heirs, a coparcener in her half with her other heirs, and the law would ascribe his possession both to his right as original owner of an undivided moiety and as a coparcener with other heirs in the *Corbin* moiety under her recorded right. His possession would not be inconsistent, but would be consistent with, the rights of her other heirs. *Mullins v. Nickel*, 25 *Mont.* 525, 65 *Pac.* 1004, 87 *Am. St. Rep.* 430, holds in point with our case: "In so far as persons other than the tenants themselves are concerned, the actual occupancy of one tenant in common is the rightful possession of all the owners; and if a title under which they might hold is on record, and is consistent with the occupancy, the possession must be referred to the record, and will not be constructive notice of any other title." "Where a person occupies premises, and the record shows a conveyance under which he would be entitled to the possession, in such case his possession will be referred to the record title, and a subsequent purchaser will not be charged by it with any other undisclosed title or equity which the occupant may have. The possession is a matter which may incite inquiry; but the fact that the occupant has placed upon record written evidence of his right, with the terms of which his possession is consistent, arrests inquiry at that point, and reasonably informs the purchaser that he may rest upon the knowledge thus obtained. Thus a wife was entitled to an interest in land by inheritance. A partition was had with other heirs, but the deed made thereupon was to both husband and wife, vesting title to her portion in them as tenants in common, and as against lien creditors of the husband her possession was held notice only of an undivided half interest." *Webb on Record Title*, § 232. The deed was made to husband and wife by mistake by the other heirs after voluntary partition. It was the wife's land. The creditor knew nothing of her equity to the whole. *Farmers' Bank v. Wallace*, 45 *Ohio St.* 152, 12 *N. E.* 439. A tenant in common in possession purchased the interest of his co-tenant not in possession, and failed to record his deed, and there is no visible change in the possession except some improvements, and later the interest of the co-tenant who had conveyed to his co-tenant was sold on execution. The

purchaser, who had no actual knowledge of the prior conveyance, is not chargeable with notice from possession of the co-tenant's right under the deed. *May v. Sturdivant*, 75 *Iowa*, 116, 39 *N. W.* 221, 9 *Am. St. Rep.* 463. A possession justified by the record title is referable to it, and is not notice of any other title, unrecorded, which may have been subsequently acquired. *Dutton v. McReynolds*, 31 *Minn.* 68, 16 *N. W.* 463. There is much authority for the position that possession begun under one right is not notice of a later acquired right. 2 *Pom. Eq.* § 817. However this may be generally, surely the occupation by one heir might be assumed to be only under his own heirship right, and would not hint that he had a secret right for his brother's share. Must the purchaser go to him to inquire if he has acquired his brother's share? May he not assume that he has only his own apparent right? *Wade on Notice*, § 297, says that when one is in possession under a recorded title which would justify that possession, possession is attributed to it, and is not notice of any undisclosed title or interest which the possessor may have. For these reasons the answers on their face are not good to defeat *Martin's* right, or call for specific performance by taking title from him as a bona fide purchaser.

The answer charges that the deeds to *Brown* are fraudulent. Wherein we are not told. No facts of fraud are given. It also charges inadequacy of consideration. What has *Thomas* to do with that? This would not hurt the deeds even between the parties thereto. *Wood v. Harmison*, 41 *W. Va.* 376, 23 *S. E.* 560. The answers appeal to section 20, c. 90, Code 1891, and say that the deeds to *Brown* and *Martin* are of no force by reason of that statute, which reads: "A vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, land sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." This statute has no point in this case. By common law a title bond or executory contract for sale of land stipulating for future conveyance of legal title conveyed no right to the land whatever. It would only be basis for action for damages for nonconveyance. A court of law knew no right to land save the legal title. Such an instrument gave an equity recognized in equity as basis for specific performance. At law the vendor could bring ejectment or writ of right, repudiate the contract, and turn the vendee out of possession, even if he had paid all the purchase money. The Virginia statute changed this by allowing the purchaser to plead his equity in such action for its defeat, if he had fully complied with the contract. Our statute dispenses with performance. Thus, an equitable title is now recognized in a law court. It does not give the purchaser right to recover possession of

the vendor, unless it provide for possession; but, if let into possession, he can hold it. Newell, Eject. pp. 435, 318; Warvel on Vendors, § 874. The vendor's only remedy is in equity to sell the land. The statute was made only to remedy this defect in the common law, to give some force to the writing in a law court for defense of possession. The statute applies only in actions to recover possession in law courts. *Davis v. Teays*, 3 Gratt. 284; *Suttle v. Railroad*, 76 Va. 284. This is not an action of ejectment or unlawful detainer involving possession. This is a suit in equity involving a right to some interests between conflicting claimants under a common vendor; not an action merely involving right between vendor and vendee. If Mrs. Cole, Mrs. Coombs, and the Frank Thomas heirs were to sue Elisha Thomas for possession, he could use his contract, under the statute, against them. Or if Martin had notice of Elisha Thomas' purchase, and were to sue for admission to possession at law, Thomas could use the contract. This is a suit in equity involving the right under a common vendor to the same thing—conflicting claims. The statute is irrelevant, because the solution of the controversy depends on the equity law as between two purchasers of the same thing, depending not merely on a sale, but the superadded question whether the one party is a bona fide purchaser, or his right is inferior by reason of fraud. I do not understand that adverse possession is involved. Viewed without the right of Elisha Thomas under the sale, there is no show of ouster as between coparceners. Viewed with that contract, as possession of the purchaser under an executory contract is not adverse to his vendor or those under him, it cannot be sustained.

Another reason against Elisha Thomas is delay. Thomas claims that he bought the contested shares from an agent of the parties. That agent says the contract was conditional. He was to have the shares, if he paid for them in a given time, which Thomas himself says was four months. He also says himself that it was a sale "providing I should pay in a certain time." Not having paid within that time, we may fairly say it never became a contract. In this view he could not enforce it. But, say that it was not conditional. The writing was mislaid; but a paper was filed pending the cause as the paper, though not clearly proven. It fixed no time for payment, but provided for a deed on payment. It was thus payable at once. Payment was demanded of Thomas, but he did not pay or offer to do so. He was insolvent, unable to pay. The contract dates December 18, 1895. The agent who sold to Thomas considered the arrangement ended. Three years afterwards Brown purchased. Why wait longer when Thomas was utterly insolvent, as he himself says? He could not perform. Thomas

never sought performance until he filed his answer in December, 1899. If these interests had not been sold to Brown, I would say that Thomas could not enforce his alleged contract, because to get equity to grant performance one must show himself prompt and willing to comply on his part; but these shares have been conveyed to Brown, and he has paid \$400, and Brown conveyed to Martin, Martin paying \$1,000. Thus the condition of things has changed. The rights of Brown and Martin have intervened; and they must lose heavily, without hope of indemnity, if Thomas is allowed to awake from his supineness and get advantage from his negligence. Equity will not grant specific performance of a contract to convey land when the vendee has unreasonably delayed in performing the contract and asking relief. Conditions have changed in the situation of the parties, and it would work hardship and loss to the vendor or other persons affected thereby. *Urpman v. Lowther Co.*, 53 W. Va. 502, 44 S. E. 433, 97 Am. St. Rep. 1027; *Dyer v. Duffy*, 39 W. Va. 149, 19 S. E. 540, 24 L. R. A. 389. I have assumed that the agent had power to sell the contested shares, and that there was a valid contract, though these facts are contested, and there is grave reason to doubt them; but, as they involve no law necessary to be stated, I will not prolong this opinion, now too long for the case, by discussing them. I add that, even if the answers did charge actual notice of the alleged sale, the evidence is doubtful, and short of sustaining it, whereas the law requires full proof as it is a charge of fraud.

We reverse in part the decree of the circuit court, and do adjudge, order, and decree that Isaac P. Martin is entitled to have partition made between him and Elisha Thomas of the tract of land in the record of the cause described, assigning and confirming, to be held by him free of other parties, respectively, in severalty to said Martin three-tenths and to said Thomas seven-tenths, according to quantity and quality; and the cause is remanded to the circuit court with direction to make such partition.

(56 W. Va. 215)

STATE v. GOOD.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. Proof of an unlawful sale of a mixture, preparation, or liquid "which will produce intoxication" will sustain a conviction upon an indictment charging the unlawful sale of "spirituous liquors, wine, porter, ale, beer, and drinks of like nature," without a state license therefor. For the purposes of chapter 82, § 1, of the Code of 1899, such mixture, preparation, or liquid is, in law, spirituous liquor, whether it be such, in fact, or not.

2. When such mixture is sold in labeled bottles, as put up by the manufacturer, and has a commercial name or designation, the evidence of

persons who have purchased it from the defendant and drunk it, whether at the same time or on different days and occasions, as to whether it is intoxicating, is admissible both for the state and the defendant.

(Syllabus by the Court.)

Error from Circuit Court, Hancock County; H. C. Hervey, Judge.

Elmer S. Good was convicted of an unlawful sale of intoxicating liquors, and brings error. Reversed.

John R. Donehoo, for plaintiff in error. The Attorney General, for the State.

POFFENBARGER, P. Reversal of a judgment of conviction of the unlawful retailing of spirituous liquors is asked here because the indictment charges the unlawful selling of spirituous liquors, wine, porter, ale, beer, and drinks of a like nature, while the proof shows a sale of an intoxicating liquid called "Rikk"; it being urged that as the article sold was not, in fact, one of the prohibited liquors mentioned in the indictment, the charge is unsustainable by proof. In addition to the liquids named in the indictment, the law prohibits the sale of "all mixtures, preparations or liquids which will produce intoxication, whether they be patented or not," and declares that they "shall be deemed spirituous liquors within the meaning" of the statute; but the contention is that the indictment, to sustain a conviction of a sale of such mixture, preparation, or liquid, must contain a count specifically covering such mixture, preparation, or liquid. No authority directly confirming this view has been produced. The argument is one of deduction only. *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79, is referred to, and an attempt made to show that, if the indictment had charged the selling of an intoxicating mixture, preparation, or liquid, proof of sale of crab cider would have made out an offense. But that clause is referred to in the opinions, and the case made by the evidence tested by it, just as if an offense under it had been specifically charged in the indictment. Judge Wood said: "Not being a distilled liquor, neither is it a mixture known as 'bitters' or otherwise, which will produce intoxication, and therefore declared, for the purposes of the act, 'spirituous liquor.'" Judge Snyder, in his dissenting opinion, said: "The very section under which the indictment here was found uses the terms 'intoxicating drinks' and mixtures 'which will produce intoxication,' and expressly prohibits their sale without a license." He opposed a reversal of the judgment, and it was reversed by the other judges, because, in their opinion, the statute did not, by any terms used, prohibit its sale. If that decision or the views expressed by the court has any bearing upon the question, its effect is exactly the reverse of what is claimed in respect to it.

The legislative declaration that intoxicating mixtures "shall be deemed spirituous liquors" is equivalent to a declaration that they are spirituous liquors for the purposes of the act. An unlicensed sale of spirituous liquors is made an offense, and, as an intoxicating mixture, preparation, or liquid is, by force of the statute, such a liquor, an unlicensed sale thereof constitutes the offense. This is admitted, but it is said this statutory classification does not make a mixture which contains no alcohol spirituous in fact. It cannot change the nature of the preparation, and it was not the purpose of the statute to prescribe a mode of pleading, but only to create and define an offense. All of this may be true, but the courts have uniformly held that, under such statutes, a conviction may be had upon an indictment alleging the acts constituting the offense, without reciting the means by which it was committed. One court has gone so far as to say that an indictment for larceny by embezzlement must allege that the defendant "feloniously did steal, take, and carry away the property which is the subject of the indictment." *Com. v. Pratt*, 132 Mass. 246. Commencing with *Dowdy v. Com.*, 9 Grat. 727, 60 Am. Dec. 314, in 1852, the Virginia court of last resort has asserted and adhered to principles of criminal pleading which render it impossible to sustain the position taken for plaintiff in error, and they have been followed by this court. For obtaining money or other property which may be the subject of larceny by false pretense, the indictment may be in the common-law form, or it may charge the specific facts which the statute declares shall be deemed larceny. *Leftwich v. Com.*, 20 Grat. 716; *Fay v. Com.*, 23 Grat. 912. "Upon an indictment for simple larceny, the state may convict by proving either that the subject of the larceny was received with knowledge that it was stolen, or that it was obtained by a false token or false pretense." *State v. Halida*, 28 W. Va. 499; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465. The principles announced in *Dowdy v. Com.* are declared to extend to embezzlement also (*Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 887); the statute saying, if any person embezzle any money, etc., he shall be deemed guilty of the larceny thereof.

The conclusion that proof of a sale of an intoxicating mixture without a license will sustain an indictment for selling spirituous liquors, under our statute, is reached by a more direct and shorter method of reasoning. The statute does not say a sale of such mixture shall be deemed a sale of spirituous liquor, or that a person making such sale shall be deemed guilty of the offense of selling spirituous liquor. It says all such mixtures, preparations, or liquids shall be deemed spirituous liquors, and it prohibits the sale thereof as a sale of spirituous liquors. In law, whether in fact or not, it is a spirituous liq-

nor; and the Legislature, no doubt, intended to eliminate all cavil and controversy about the composition and definition of the many intoxicating drinks then existing, and thereafter to come into existence, by the classification and declaration referred to.

The state having introduced witnesses who testified to having purchased from the defendant the bottled preparation called "Rikk," and found the effect of drinking it to be stimulation such as is produced by beer or any similar liquor, the defendant offered to prove by other witnesses that they had purchased from him at other times, near the same date, bottles of the same description, and containing what was called the same kind of drink, and used it without experiencing any stimulation therefrom; and the court ruled that what they proposed to introduce as evidence was inadmissible. He was of the opinion that it must be shown that these purchases were made on the same day, and probably on the same occasion, as the purchases referred to by the witnesses for the state. This view is clearly erroneous. The identity of the liquor, as well as its effect in use, is for the jury, and not for the court, and the weight of the evidence is also for the jury. Its weight, whether great or slight—a question for the jury—is a thing entirely different from its admissibility. Owing to the difference in time and occasion, the character of the witnesses, and other circumstances, the jury may not give the evidence much force, but that is immaterial on the question of admissibility. The defendant is entitled to have it go to the jury, to have such weight as they may deem it entitled to. The admissibility of this evidence is clearly established by *Com. v. O'Donnell* (Mass.) 9 N. E. 509; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Pease*, 110 Mass. 412. "In a criminal prosecution for the sale of intoxicating liquors in violation of a local prohibitory law, the article sold being compounded by a druggist, and the bottles labeled 'Elixir Cinchona,' or 'Cinchona Bitters,' it is permissible for the prosecution to prove that it was bought and used by many persons as a beverage, the use to which it was applied being illustrative of its nature and properties; and a person who had swallowed it may state its exhilarating effect on himself, and, though not technically an expert, may testify that, 'in his opinion, it would produce intoxication.'" *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380. Evidence of this character being proper for one side, it must be for the other. The rule must work both ways. "In a prosecution for selling intoxicating liquors in violation of a local prohibitory law, a witness for the prosecution having testified that the liquor or beverage sold by the defendant produced on him effects similar to those produced by whisky, it is competent for the defendant to prove by other witnesses who had drunk it that it had no intoxicating effect on them." *Knowles v. State*, 80 Ala. 9. In

the case just quoted from, the purchases testified to by the witnesses were made at different times, and the witnesses gave the same description of the article purchased.

Certain remarks of the court on refusing to admit this evidence are excepted to. If his ruling had been correct, the remarks would have been harmless and not improper. The evidence will go in on the new trial, and we do not presume the court will nullify or impair its effect by improper comment.

An exception is grounded upon the refusal of the court to admit testimony as to what a government inspector had declared as the result of an analysis of Rikk made in his presence. The ruling of the court on this was right. It is mere hearsay.

It is urged the court should have compelled an election by the state as to the sale relied upon. As there is to be a new trial, in which the motions may be different from those made in the one which has been had, and the law on the subject is fully elucidated in *State v. Chisnell*, 36 W. Va. 659, 15 S. E. 412, it is useless to consume time on that subject.

For the error aforesaid, the judgment will be reversed, a new trial allowed, and the case remanded.

(56 W. Va. 194)

WILSON et al. v. MAXON et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

RESCISSON OF CONTRACT—PROOF OF FRAUD—OUTSTANDING TITLE—REMEDIES.

1. To rescind an executed contract in equity on the grounds of fraud, such fraud must be clearly alleged, and fully sustained by proof if denied.

2. A litigant relying on the outstanding title of a third person to sustain his action or defense must fully establish such title by competent and sufficient proof.

3. A verbal contract for the exchange of personal property may be rescinded by either party thereto for good cause, and a suit at law maintained for the restitution of the property.

4. In such cases resort should not be had to a court of equity, unless for some special reason the remedy at law is unavailing or inadequate.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County; E. S. Doolittle, Judge.

Bill by John T. Wilson and D. J. Jenkins against Elizabeth Maxon and others. Decree for plaintiffs, and defendants appeal. Reversed.

Marcum, Marcum & Sheppard, Simms & Enslow, and M. D. Phillips, for appellants. Vinson & Thompson, for appellees.

DENT, J. John T. Wilson and D. J. Jenkins instituted a suit in chancery in the circuit court of Cabell county against Elizabeth Maxon as administratrix and widow, and Oscar Maxon and Mrs. M. D. Phillips as children and heirs at law, of Thomas Maxon, deceased, including therein the husband of Mrs. M. D. Phillips, for the purpose of rescinding and canceling the sale of a cer-

tain removable house situated by permission on Ninth street, in the city of Huntington, and which the plaintiffs, on the 23d day of September, 1896, by verbal contract sold to Thomas Maxon, now deceased, for five shares of paid-up stock of the par value of \$500, in the Maxon-Miller Company. Such proceedings were had in said suit that on the 9th day of July, 1901, the circuit court entered a decree cancelling such sale, restoring the possession of such house to the plaintiffs, and awarding costs against the defendants, from which the defendants appealed.

There was no demurrer to the bill, yet on the hearing the cause should have been dismissed as to all the defendants being heirs of Thomas Maxon, deceased, with the exception of the administratrix, as the suit only involved the right of possession of a movable house. 22 American and English Enc. of Law (2d Ed.) 748. The personal estate of Thomas Maxon, deceased, alone was called in question, and the full title thereto was invested in his administratrix, and his widow and heirs had no legal interest in the controversy. So they were improperly made parties to the suit and adjudged to pay the costs thereof. To sustain this suit for possession of this house against the administratrix, the sole ground is that the deceased had obtained possession thereof by fraudulent representation as to the ownership of the patent on which the issue of the stock transferred to the plaintiff was based. The allegations of the bill in relation thereto are as follows, to wit: "Plaintiff further says: That there were issued to said Thomas Maxon in his lifetime certain letters patent for a lifting jack bearing numbers and dates as follows: No. 292,441, dated January 22, 1884; No. 298,306, dated May 6, 1884; No. 298,307, dated May 6, 1884; No. 806,341, dated October 7, 1884; No. 806,340, dated October 7, 1884; No. 812,878, dated February 24, 1885; No. 815,807, dated April 14, 1885. That afterwards—the date of which is unknown to your complainant—said Thomas Maxon, in his lifetime, transferred and assigned to one James W. Carpenter, of Dayton, Ohio, an undivided one-half interest in and to said letters patent. That afterwards, to wit, on the 26th day of January, 1887, said Thomas Maxon, in his lifetime, and James W. Carpenter, transferred and assigned unto D. E. McSherry & Co., of Dayton, Ohio, all their rights, title, and interest in and to said patents and all improvements then made, together with all improvements and patents thereafter to be gotten or owned in whole or in part by either the said Maxon or said Carpenter, to manufacture, use, and sell in the United States of America and its territories all such lifting jacks, which said transfer was recorded and registered in the Patent Office of the United States, as required by law. Plaintiffs further say that on or about the 28th day of August, 1894, said Thomas Maxon, in his lifetime, secured from the

United States letters patent for an improved lifting jack, which patent is No. 525,223, and that afterwards—the date of which is unknown to your complainant—said Thomas Maxon, in his lifetime, transferred to one George A. Miller of Dayton, Ohio, an undivided half interest in said patent improved lifting jack; and that afterwards, on or about the ——— day of September, 1895, a corporation known as the Maxon-Miller Company was organized in Huntington, West Virginia, by said Maxon and Miller, along with others, for the manufacture of the improved lifting jack, and that afterwards, to wit, on the 9th day of September, 1895, the said Thomas Maxon, in his lifetime, and George A. Miller, pretended to convey to the Maxon-Miller Company the exclusive right to manufacture, use, and sell in the United States of America and its territories lifting jacks under the letters patent above recited. That in exchange therefor the said Maxon-Miller Company was to give to the said Thomas Maxon certain paid-up shares of stock in the Maxon-Miller Company, and did issue and deliver to him said shares. The plaintiffs further say that the said Thos. Maxon was the president and general manager of said company and its affairs from the time of its organization until the time of his death in January, 1900. Plaintiffs further say: That they were the owners of a certain office building situated on the east side of Ninth street, between Fourth and Fifth avenues, in the city of Huntington, being the same building now occupied by Peyton and Perkins as a law office, on the property belonging to the city of Huntington. That by their agreement with the city they were to have the use of said ground for a yearly ground rental for \$—— per year, with the privilege of removing said building whenever they wished so to do. That on or about the 23d day of September, 1896, the said Thomas Maxon, in his lifetime, came to them, seeking to buy said building, and to give them in exchange therefor stock in the Maxon-Miller Company, which said stock he represented to them as being worth the par value thereof, or \$100 per share, and that the said company had the sole and exclusive right to manufacture said lifting jacks in the United States, and that said plaintiffs, relying on said statements, did deliver to said Maxon, in his lifetime, the possession of the building above described, and that in exchange therefor the said Maxon, in his lifetime, delivered to them five shares of stock in the Maxon-Miller Company of the pretended value of \$100 each. The plaintiffs further say that afterwards—the date of which is unknown to your complainant—the Maxon-Miller Company was notified by the D. E. McSherry & Co., of Dayton, Ohio, or its assignee, of the former transfer of the letters patent, and were prohibited and stopped from manufacturing said lifting jacks, and that afterwards, to wit, on the ——— day of ———,

1900, said company, having failed of its purpose by reason of the failure of the title of the patent sold to it, was forced to abandon the manufacture of said lifting jacks, and to have a receiver appointed to wind up its affairs."

The defendants, in their answer, positively deny these allegations of the bill in so far as they allege the nonownership of the Maxon-Miller Company of the patent involved, and attack the right of Thomas Maxon to transfer the same to such company; and they further deny that D. E. McSherry & Co., or its assignee, ever laid any claim to such patent, or ever stopped the manufacture of such lifting jacks by the Maxon-Miller Company, during the lifetime or since the death of Thomas Maxon, deceased.

There is an agreed statement of facts in the record. This does not cover the true ownership of the patent involved, nor is it admitted that the Maxon-Miller Company was prevented, either during the lifetime or after the death of Thomas Maxon, deceased, from operating fully and completely under the patent involved, and the plaintiffs are wholly without proof to sustain such latter allegations.

It is true that the McSherry manufacturing contract of the 27th day of January, 1887, includes all improvements on such lifting jacks for which patents might be thereafter obtained by Thomas Maxon. As such patents had no potential existence at the time of the contract, the sale or transfer therefore is void at law, while equity will regard the same as an executory contract, enforceable or not, in the sound discretion of a court of conscience, if not contrary to public policy and the several rights of the parties as they appear. Such an executory contract may be rescinded by the verbal agreement of the parties thereto. Proof of abandonment is sufficient evidence of the existence of such agreement, unless the contrary is shown. 24 Am. & Eng. Enc. Law (2d Ed.) 1042; 9 Cyc. 524; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Bank v. Kimberlands*, 16 W. Va. 555. To sustain their case to the satisfaction of a court of equity, it devolves upon the plaintiffs to show that D. E. McSherry & Co. are still claiming under, and have fully complied with all the important provisions of, the contract, or that their legal assignee has so done and is continuing to do so. On these important questions neither the allegations nor proof come up to the requirements of a court of equity. There is no allegation that D. E. McSherry & Co. or their assignee have fully complied with their manufacturing contract, or that they are still complying with it, and regard it as enforceable. Nor is there any proof or admission that such is the case. On the contrary, as appears from the circumstances, they had abandoned it long before the death of Thomas Maxon. At least, they never attempted to enforce it against him during his lifetime, and now that he is

dead they must make out a very clear case to have it enforced. It is admitted that neither they nor their assignee have tried to so do. The plaintiffs can take no advantage of their stale and abandoned rights. Hence their allegations and proof wholly fail to make out a case of fraud against Thomas Maxon, deceased, calling for the interference of a court of equity. The allegations and proof are insufficient to overthrow the title of the Maxon-Miller Company to the patent involved, and, as this is really the only foundation for the charge of fraud or the want of consideration, the bill should have been dismissed. Not only is this true, but the plaintiffs, if showing a good case for relief, had a good and adequate remedy at law. So far as rescission is concerned, they could have accomplished this by their own act, and then sued for the possession of the house at law. 24 Am. and Eng. Enc. of Law, 643; *Id.* 614. There were no writings between the parties, but the contract was a verbal exchange of personal property, which might be rescinded by either party for just cause, and a suit at law maintained for restitution of property. Why, then, incur a court of equity with such a suit, the only object of which is to try the right to the possession of personal property? The legal remedy is adequate and complete. *Id.* 617.

Decree reversed, and suit dismissed.

(56 W. Va. 200)

McPECK'S HEIRS v. GRAHAM'S HEIRS.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

EQUITY—PLEADING—DURESS—INSANE PERSONS
—CONTRACTS—PRESUMPTIONS—LACHES.

1. A general charge of duress or fraud in a bill, without statement of facts constituting it, is not sufficient.

2. A confirmed insane person may, in a lucid interval, make a valid contract.

3. If insanity is occasional and intermittent, the presumption of insanity at the time of making a contract does not prevail, and he who relies on insanity proven to have existed at another prior time must also prove its existence at the time of the contract.

4. The defense of laches is applicable in equity to a married woman, as to her separate estate. (Syllabus by the Court.)

Appeal from Circuit Court, Preston County; John H. Holt, Judge.

Bill by Melinda McPeck's heirs against David Graham's heirs. Decree for plaintiffs, and defendants appeal. Reversed.

Wm. G. Brown and P. J. Crogan, for appellants. R. W. Monroe, for appellees.

BRANNON, J. On 22d of May, 1888, David Graham conveyed to Melinda McPeck, wife of William McPeck, a tract of 130½ acres of land in Preston county, in consideration of land owned by William Mc-

¶ 1. See *Fraud*, vol. 23, Cent. Dig. § 37; *Pleading*, vol. 39, Cent. Dig. § 28½.

Peck, and conveyed by him to Graham. By deed dated 25th of April, 1889, in consideration of \$1,175 recited in the deed as the indebtedness of McPeck and wife to Graham, McPeck and wife conveyed back to Graham said 130 $\frac{1}{4}$ acres. Graham died in 1892. In June, 1893, a suit began in the circuit court of Preston county in the name of Melinda McPeck against the representatives of Graham to cancel the deed from herself and husband to Graham. Pending the suit Mrs. McPeck died, and it was revived in the names of her heirs. A decree was pronounced avoiding the deed. The bill alleged that Mrs. McPeck was mentally incompetent to make the deed. The representatives of Graham took an appeal.

There is some evidence intended to show that Mrs. McPeck was unwilling to sign the deed to Graham, but was forced to do so by her husband by a threat that he would take his pension and leave the family without support, he receiving a pension as a soldier; but we need not consider coercion as an independent ground of relief, on the theory of fraud or duress, because it is not a basis of relief made by the bill. No feature of the bill approaches that basis of relief, save the too general charge that "David Graham improperly procured this plaintiff to attempt to convey to him the said tract of land for a pretended consideration of \$1,175." How he improperly did so, the bill does not say. This does not specify the facts constituting fraud or duress. Zell Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611; 7 Ency. Pl. & Prac. 247. It would be pertinent to undue influence, if charged, but it is not charged.

We must treat the bill as grounded alone on the insanity of Mrs. McPeck. Was she mentally competent to make the deed? A basic rule, at the outset, is that it is a legal presumption that the grantor in a deed was sane and competent to make it at the time when made, and he who asserts the contrary must fully and clearly prove it. Dalaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; Snodgrass v. Knight, 43 W. Va. 294, 27 S. E. 233. To one reading the lengthy evidence, it must be plain that not only is this legal presumption going to sustain the deed not overthrown, but the weight of the evidence—the preponderance—goes decidedly the other way. We cannot lightly overthrow muniments of men's titles on trivial evidence, leaving the mind unwilling to do so. The depositions show seven nonexpert, nonprofessional witnesses, testifying in a general way, that, in their opinion, Mrs. McPeck was not sane. They give no defined reasons. They say she was eccentric; would stand and say nothing; would take children and wander over premises when visiting, and say nothing to people, and stand silent and apparently troubled. No violent action was shown, no raving mania. We can explain her silence and

melancholy on rational ground. In February, 1888, her son died, and she was greatly troubled over his death, as the plaintiffs proved by one of her sons. He says she was insane. The strongest manifestation of insanity which he gives, or which the record discloses, is that he says: "The first I noticed of her being rattled was about six weeks after Charley died. She was laying in bed one night, and I heard her say she could see him in Heaven—she could hear him call her." Is it to be received as even a token of insanity that this illiterate, unread, bereaved mother, while brooding on her restless bed in the stillness and solitude of the night, should seem to see her lost son and hear his call for his mother, even from Heaven? How many cultivated, educated, favored mothers, lying on soft couches under gilded canopies, stung with a like grief, see similar apparitions, and think they hear the voices of loved ones in the still watches of the night? It may argue superstition or excessive or diseased imagination, but does it prove that she knew not what she did when conveying her land? That she did know, the plaintiffs' evidence, if true, fully proves. A son says that when the deed was brought to the house his mother objected, when the father told her that she would have to sign the deed, as judgments would be rendered against him next day. This son, strange to say, does not say she was incompetent. By another son it is proven that she flatly declined to sign, and was told by his father that she would have to do so. By other evidence still the plaintiffs sought to show that she refused to sign the deed, but was induced by fear of creditors of her husband attacking the land as purchased with his means, and vested in her to cheat them, and by threat of the husband to deprive the family of the benefit of his pension and leaving home. Now, this evidence, if true—and it is claimed by the plaintiffs to be true—proves that she knew the effect of the deed, and establishes her mental capacity to execute it. It shows that at the very moment of the execution of the deed she knew its character, and that is the moment of time, above all other times, that controls in deciding upon capacity. Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788. This evidence of the plaintiffs ought alone to sustain the deed. There is evidence that Mrs. McPeck's mother, grandmother, and aunt committed suicide; evidence that some years before she was committed to a hospital in Pennsylvania. In July, 1890, she became worse, as all say, and at Christmas, 1890, was committed to the Weston Hospital as an insane person, but the next spring returned home, and seemed all right till her death. She told several persons that she had conveyed the land, and that the bargain was that she was to give possession in the spring. She told all about it. She said she was under ob-

ligations to Graham. Thus it is clear that for the bulk of the time she was sane, and her spells of insanity transient. By the great preponderance of evidence, she was not insane at the date of the deed, April, 1889, and did not become so till July, 1890. The physician and justice who later pronounced her a fit subject for the Weston Asylum so state, and from the evidence it is clear. Ellen Radabaugh, a witness for the plaintiffs, who pronounced her insane, says she first noticed her insanity in July, 1890. One of her sons says she became so in July, 1890. Margery Moser says she was insane in April, 1889, but also says she was sent to Weston the winter after this April; and as it is fixed beyond question that Mrs. McPeck went to the Weston Asylum in December, 1890, we must say that the point of time fixed by Margery Moser for her insanity was really April, 1890, not 1889. So it is clear that the insanity did not exist when the deed was made, but came on later. If she ever was insane before—and it is not clearly shown that she was—for years she was restored, and was sane again after a few months spent at Weston. Even one habitually insane has sometimes lucid intervals, and is then capable of contracting. Bishop on Contracts, § 959. The insanity of Mrs. McPeck, at utmost, was not confirmed. "If the malady is occasional or intermittent in its nature, the presumption [of continuance] does not arise, and he who relies on insanity proved at another time must prove its existence also at the time alleged." 16 Am. & Eng. Ency. L. (2d Ed.) 606. As stated above, the fact that she objected to the deed shows her capacity. And a son (Frank) swears that when he came home to dinner on the day, in the morning of which the deed was made, he found his mother crying, and she told him all about the deed; told him that they had come unexpected to her, and she told them she would not sign the deed; that the farm was her home; that she received nothing for it; that her husband said for her to sign it, and stood over her and told her she had to sign it, or he would take his pension and leave, and she told him when she signed it she was doing so against her will. This shows her full comprehension of the act. There are seven witnesses giving the opinion—the mere opinion—that Mrs. McPeck was incompetent. They state few facts to substantiate such opinions. Mere opinions of nonexpert witnesses, not supported by good reasons on facts warranting them, are entitled to little or no regard. If such reasons and facts, as in this case, are frivolous, the opinions are worth little or nothing. Jarrett v. Jarrett, 11 W. Va. 584; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668. These witnesses give no substantial facts. Two of those to sustain the suit are sons and heirs of Mrs. McPeck, deeply interested in the suit.

The defense introduced eleven witnesses, all well acquainted with Mrs. McPeck, and seeming impartial and fair, who fully sustain her competency. One of them was a justice, notary, school-teacher and farmer, of evident intelligence. He took the acknowledgment to the deed, and is clear in stating Mrs. McPeck's competency. The cases say that the evidence of the officer taking an acknowledgment is entitled to peculiar weight on the question of a grantor's capacity. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383. President Pendleton, in Beckwith v. Butler, 1 Wash. (Va.) 224, holds this rule; telling us of an early case where the evidence of such an officer overcame all other evidence before and after the deed. This witness is the same justice who afterwards committed Mrs. McPeck to the Weston Asylum. And her family physician, whose evidence afterwards sent her to Weston, gives evidence that at the date of the deed she was competent. These witnesses say her insanity did not occur till the summer of 1890, in July, more than a year after the deed.

It adds strength to the defense that Graham sold this land back to William McPeck, by title bond, 4th July, 1889, and on 4th October, 1893, Mrs. McPeck signed her name as a party to it. She thus treated Graham as owner, and thus when she was confessedly sane recognized her deed.

It appears probable from the whole case that the husband of Mrs. McPeck caused this deed to be made to Graham to protect the land from creditors, and that it was the sedate act of both husband and wife. The justice says that, when he was at their house to take the acknowledgment, McPeck and wife retired and consulted. This land had been paid for, as all admit, and the deed to Mrs. McPeck from Graham states, with the husband's property, and was thus liable to creditors; and later McPeck wanted to get back the property. He was active in the suit. The wife was not. He never sued while Graham lived to give his version and defend his right. He waited till the man who befriended him was in his grave. Several witnesses swear that he offered to bribe them to give evidence of his wife's insanity. We cannot overthrow the deed on the ground of insanity. And if duress were involved, the only undue influence was that of the husband, with which Graham could not be chargeable.

Another sufficient reason against the case of the plaintiffs is laches. It was more than seven years from the deed to the suit, and four years after Graham's death. It was more than five years from Mrs. McPeck's return from the Weston Hospital till suit. It is proven that Mrs. McPeck was sane after such return until her death. She gave an intelligent deposition. When the suit began, Graham was dead and unable to speak. Circumstances had changed. He was never

attacked until after death. How long are titles to remain in uncertainty? Diligence, not lethargy and sleep, is required. *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596. No excuse for such delay is given. A married woman, as to her separate estate or right, is subject to laches. The statute of limitation excepts her, but not as to separate estate, and she is under the bar of laches, as applied in equity. *Phillips v. Piney Co.*, 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 18 Am. & Eng. Ency. L. (2d Ed.) 107; *McKneely v. Terry* (Ark.) 33 S. W. 953.

We reverse the decree and dismiss the bill.

(56 W. Va. 183)

CIPHER v. BOWEN et al.

(Supreme Court of Appeals of West Virginia. Nov. 15, 1904.)

APPEAL—DECREE PRO CONFESSO—DISMISSAL.

1. An appeal from a decree on a bill taken for confessed will not be entertained by this court unless a motion to have such decree reversed be first made and overruled by the court or the judge thereof that rendered it.

(Syllabus by the Court.)

Appeal from Circuit Court, Pleasants County; L. N. Tavenner, Judge.

Bill by India Cipher against J. H. Bowen and others. Decree for plaintiff, and defendants appeal. Dismissed.

S. M. Noyes, for appellants. C. P. Craig, for appellee.

MILLER, J. India Cipher (plaintiff below) instituted her suit and filed her bill in the circuit court of Pleasants county against J. H. Bowen, George W. Wentz, John Schauwecker, B. F. Riggs, J. B. Parker, Robert M. Clendenning, Lora M. Clendenning, George W. Brown, Laura Brown, Susan Taggart, Rosa Welty, and C. W. Welty and F. P. Wingerter, executors of the last will and testament of Peter Welty, deceased, in which bill the plaintiff claimed dower in lot No. 12 in the town of St. Marys. The bill was filed at October rules, 1901, and decree nisi taken thereon. At November rules following, the decree nisi was confirmed, and the cause was set for hearing. On the 10th day of June, 1903, the following decree was made and entered by the court: "This cause came on this day to be heard on the bill and exhibits filed, and, summons having been accepted by J. B. Parker, and been duly served on all the other defendants, and none of the defendants appearing by pleadings or otherwise, and the cause having been submitted for final decree, and it appearing that the plaintiff elects to accept her dower in gross sum, and it further appearing that the value of the property described in these proceedings was of the value of \$2,000 at the

time of the alienation, and that the age of the said India Cipher at the time of the death of A. P. Riggs, her husband, was 47 years, and that there is now due her as her dower in said property in gross sum the sum of \$393.84, it is therefore adjudged, ordered, and decreed that the said India Cipher do recover of the defendants in this cause the same sum of \$393.84 and her costs in her behalf expended." From this decree Rosa Welty and C. W. Welty and F. P. Wingerter, executors of Peter Welty, were allowed an appeal.

The above is a decree on a bill taken for confessed. No motion has been made in the said circuit court, or before the judge thereof in vacation to have it reversed. Under section 6 of chapter 134 of the Code of 1899 the appeal was improvidently granted, and must therefore be dismissed. *Watson v. Wigginton*, 28 W. Va. 533; *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. 148; *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38.

(56 W. Va. 190)

HAMILTON v. AMMONS.

(Supreme Court of Appeals of West Virginia. Nov. 15, 1904.)

ERROR—DISMISSAL—CONTEST AS TO OFFICE.

1. Syllabus in *Elbon v. Hamrick*, 46 S. E. 1029, approved and reaffirmed.

(Syllabus by the Court.)

Error to Circuit Court, Wirt County; L. N. Tavenner, Judge.

Action by J. Y. Hamilton against Z. F. Ammons. Judgment for plaintiff. Defendant brings error. Dismissed.

C. Powell and B. L. Butcher, for plaintiff in error. C. H. Leeds, for defendant in error.

McWHORTER, J. This is a writ of error and supersedeas from the final judgment of the circuit court of Marion county, rendered on the 26th day of May, 1901, involving the title to the office of mayor of the town of Fairview, a municipal corporation in the county of Marion, for which office J. Y. Hamilton was contestant, and Z. F. Ammons was respondent or contestee. Upon submission of this case, the following stipulation was filed:

"J. Y. Hamilton, Defendant in Error, v. Z. F. Ammons, Plaintiff in Error. Writ of Error and Supersedeas. From the Circuit Court of Marion County. The undersigned, C. H. Leeds, attorney for the defendant in error, and B. L. Butcher and C. Powell, attorneys for the plaintiff in error, in the above-styled action or suit, hereby stipulate and agree that the writ of error in this suit or action involves a contest as to the office of mayor of the town of Fairview, a municipal corporation in the county of Marion, and that during the pendency of this writ of error the term of said office has ended,

and that this stipulation may be filed in the Supreme Court of Appeals in lieu of any argument or brief on the part of either of us. Dated this 26th day of May, 1904. C. H. Leeds, Attorney for J. Y. Hamilton, Defendant in Error. B. L. Butcher, O. Powell, Attorneys for Z. F. Ammons, Plaintiff in Error."

This case comes clearly within the purview of *Elbon v. Hamrick* (W. Va.) 46 S. E. 1029, and cases and authorities there cited. Therefore the writ of error will be dismissed, without costs.

(56 W. Va. 125)

CROSS v. CROSS et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

CONTINUANCE — WAIVER — DECREE — SETTING ASIDE — PARTITION — REPORT OF COMMISSIONERS.

1. When a party in a suit in equity submits the cause for hearing without asking a continuance, it is a waiver of his rights thereto.

2. Where a cause has been submitted for hearing by the parties, and a final decree entered on such submission, it is not error to refuse the motion of the defeated party to set aside such decree and grant him a continuance merely for the purpose of enabling him to take further testimony in the cause.

3. Where a report of partition made by commissioners is proper on its face, every reasonable presumption is in favor of its fairness.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Willis, Judge.

Bill by A. M. Cross against W. W. Cross and J. E. Cross. Decree for defendants, and plaintiff appeals. Affirmed.

Davis & Son, for appellant. R. S. Blair and H. B. Woods, for appellees.

McWHORTER, J. A. M. Cross, J. E. Cross, and W. W. Cross, children and only heirs at law of Nathan Cross, deceased, inherited from their father a tract of 61 acres of land in Ritchie county. A. M. Cross removed to Kansas, and while a resident of that state filed his bill in the circuit court of Ritchie county at the September rules, 1902, against W. W. Cross and J. E. Cross, praying for a partition of said tract of land, filing as an exhibit with his bill a deed dated the 18th of May, 1873, from Rose R. Harris and her mother, Ann B. Harris, to the ancestor, Nathan Cross. On the 23d of October a decree was entered in the cause appointing commissioners to make partition of said land. On the 30th of October, 1902, the commissioners made their report of partition, showing that they had assigned to the plaintiff lot No. 8, containing 12 acres and 112 poles, and lot No. 2, containing the same quantity of land, to J. E. Cross, and lot No. 1, containing 35 acres and 96 poles, to the defendant W. W. Cross; describing each

lot particularly by metes and bounds, together with a map showing the same. On the next day after the filing of said report a decree was entered confirming the same, and Thos. E. Davis was appointed a special commissioner to make partition deeds in accordance with said report of partition and the decree. At the December rules, 1902, the same plaintiff, A. M. Cross, filed his bill in equity in the same court against W. W. Cross and J. E. Cross, alleging the fact of his nonresidence here and being a resident of the state of Kansas, and that he had instituted and prosecuted the suit in which the land was partitioned, making the bill, decree, report of commissioners, and other proceedings in said cause part of his bill, and alleging that when he saw a copy of the plat filed with the commissioners' report "he was completely astounded and surprised that he should be only allowed a fraction of one-fifth of the tract of land, when he should have had at least one-third"; that lot No. 1 assigned to W. W. Cross was greater in value than the other two lots or tracts, combined, assigned to plaintiff and J. E. Cross; that the partition and decree thereon were manifestly unjust, unfair, contrary to equity and good conscience in the division, and tantamount to fraud, which was a fraud upon the rights of the plaintiff, and was surprise and mistake, and such a one that a court of equity might and would set aside, annul, and hold for naught; that S. S. Cowell, one of the commissioners who signed the report, was not present all the time said division was made, and, if present at all, was but for a few minutes, and that he signed said report simply because Cain and Douglas, the other commissioners, had signed it; that Cain acted more in the capacity of a surveyor than a commissioner; that no one was present other than the two commissioners during the whole time, except W. W. Cross; and that by reason of the conduct of said commissioners, and the making and filing of said report, he was taken by surprise, and his counsel was misled; and the court was asked to enter the decree confirming said report, which it would not have done if the facts and circumstances, as well as the fraud complained of, had been brought to its attention; and praying that the final decree entered on the 31st of October, 1902, as well as the report of partition be set aside, and the cause reinstated upon the docket, in order that said commissioners, or others appointed in their stead, might make fair partition of the land. The defendant W. W. Cross filed his demurrer and separate answer, denying the material allegations of the bill. Depositions were taken by plaintiff and by the defendant, and the cause was submitted for hearing on the 17th day of February, 1903, and on the 3d day of March, 1903, the cause was heard upon the demurrer to the bill, upon the answer of W. W. Cross, and general replica-

¶ 2. See Partition, vol. 22, Cent. Dig. § 294.

tion, and upon the depositions taken and filed in the cause. The demurrer was overruled, and upon the hearing on the merits the court was of opinion that the plaintiff was not entitled to the relief prayed for in his bill, and the same was dismissed, and the prayer denied, and judgment for costs awarded to defendant W. W. Cross. On the same day the plaintiff, A. M. Cross, by his counsel, appeared in open court, and moved that the decree theretofore entered, dismissing his bill, be set aside, and that the cause be continued, that he might take additional evidence in the case, and in support of his motion filed the affidavit of the plaintiff and the affidavit of H. Marsh; and in resistance of said motion the defendant W. W. Cross filed his affidavit and the affidavits of R. S. Blair, Jr., J. F. Russel, A. M. Lowther, and E. E. Ross; and the plaintiff tendered additional affidavits, including the affidavit of one of his attorneys, Thos. E. Davis, and also his own counter affidavit. On consideration of said motion the same was overruled, and the court refused to set aside the decree. The evidence taken in the case is very conflicting, and does not decidedly preponderate either in support of or against the commissioners' report. Several of the witnesses on the one side say that the partition is unfair and unjust, and that lot No. 1 is equal in value to both lots No. 2 and 3, while, on the other hand, quite as many witnesses testify that the partition is just and fair, while some witnesses say that the lot No. 3 is the most valuable lot in the partition. The weight of the evidence is to the effect that the quality of the land of lot No. 3 is decidedly the best part of the land, while it has more valuable timber than both the other lots. A point is attempted to be made by the plaintiff in the fact that he offered the defendant W. W. Cross \$100 to exchange lot No. 3 for lot No. 1, which the defendant declined to do; but he gave a very good reason for his action in so declining. He is the owner of lot No. 2, which was assigned to J. E. Cross, and lot No. 1 adjoins other lands belonging to defendant, and by exchanging No. 1 for No. 3 would sever his lands by having it cut in two by lot No. 1. This being the fact, it is hardly a fair argument in favor of the higher estimate being put upon lot No. 1 by the defendant W. W. Cross, because, owing to the situation of his lands, No. 1 might be of much more value to him than No. 3, although in fact No. 3 might be much more valuable than No. 1 as an independent proposition.

It is claimed by appellant that the court erred in refusing to set aside the decree entered on the 3d day of March, 1903, and granting a continuance to the plaintiff for the purpose of taking further depositions. In his affidavit contesting the motion for a continuance, R. S. Blair, one of the attorneys for the defendant, states that on the 3d day of February, 1903, the plaintiff, A.

M. Cross, was present and gave his testimony, and counsel for plaintiff, T. E. Davis, at that time gave notice to the defendants, and to affiant, as his counsel, in the presence of the plaintiff, that he would insist upon a submission of said cause on the first day of the February term, 1903, which commenced on the 17th day of February; that they had all the testimony they wanted; and that plaintiff could get ready or not, as he chose. He further stated in said affidavit: "That on the day the depositions on behalf of the plaintiff were closed, which was on the 16th day of February, 1903, the counsel for defendant W. W. Cross requested the counsel for the plaintiff to consent to an adjournment of the said depositions to a day during the present term of court, in order that he (the defendant) could have an opportunity to examine other witnesses he had summoned, but that counsel stated he would not agree to any such thing; that his client was anxious to dispose of the case, was ready to dispose of it; and that he would insist upon submission of the said case on the first day of the term of this court." This affidavit was made on the 23d day of February, 1903. On said motion to set aside the decree and continue the cause the plaintiff filed several affidavits, among which was an affidavit of his counsel, Thos. E. Davis, sworn to on the 27th day of February, 1903, four days after the said affidavit of Blair, in which affidavit he makes no denial of the statement above quoted from Blair's affidavit, showing that plaintiff and his counsel refused defendant further time to take depositions and insisted on a submission of the cause at that time. "Where a party appears and goes to trial without asking a continuance, it is a waiver of his rights thereto." 9 Cyc. 156, and authorities there cited. In *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821 (Syl., point 5): "The question of continuance is one addressed to the sound discretion of the court, and, unless it is plainly apparent that such discretion has been abused, this court will not interfere therewith." See, also, *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Marmet Company v. Archibald*, 87 W. Va. 778, 17 S. E. 299; *Buster v. Holland*, 27 W. Va. 511; *Logie v. Black*, 24 W. Va. 21; *Riddle v. McGinnis*, 22 W. Va. 253. It would certainly be very unusual practice, and very irregular, after the submission and decision of the cause, the submission and hearing of the same having been pressed and insisted upon by the party defeated in the decision, especially where no grounds are set up except the mere fact that he wanted to take further depositions when the defendant closed his depositions, only because he had no time to take further depositions which he desired to take, and which plaintiff refused to grant the further time and announced himself ready for the hearing. If, under such circumstances, the decree could be set

aside for the purpose of allowing the plaintiff to go into the country to seek further testimony to make his case, there would be no end to litigation.

The appellant in this cause occupies rather an anomalous position. He is seeking at the hands of the court to relieve himself against what he claims to be a mistake tantamount to fraud. He brought his suit for partition; had commissioners appointed to make the partition, who were duly sworn, and acted in pursuance of the decree appointing them, neither of the other parties interested in the partition appeared in the cause. The plaintiff sought and procured a decree confirming the report of partition, and had a commissioner appointed to execute deeds of partition. He then comes to the conclusion that a mistake has been made, and files his bill asking the court to correct his mistake, claiming that "equity relieves against a material mistake of facts as well as against fraud in a deed or contract in writing"; citing *Allen v. Yeater*, 17 W. Va. 128; *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808. The only fraud attempted to be proved is the fact that Commissioner Cowell was not present with the commissioners all the time they were together carrying out the decree of partition. This fact, as relied upon, is proved by the testimony of Commissioner Cowell himself. He merely states that he was sworn as commissioner, and was present but a short time, and looked over the work that had been done by the other commissioners, but did not know much about it, and stated that he was depending upon the other commissioners to make the partition; that his wife was sick with typhoid fever, and had no nurse, and he had to be with her. His name was signed to the report by his son, in his presence, and at his direction. There is no attempt to show that the commissioners, or any of them, attempted any unfairness between the parties, or were guilty of any improper conduct. It seems to be well settled, as held in *Graham v. Bank*, 45 W. Va. 701, 32 S. E. 245 (Syl., point 5): "Jurors will not be heard to impeach their verdict except in a few instances. They are heard more readily to sustain their verdict;" and this rule would apply as well to arbitrators or commissioners. 3 Cyc. 808: "An arbitrator is not a competent witness to prove his own fraud or misconduct, or the misconduct of a party involving also the misconduct of the arbitrator," and the authorities there cited; and on the same page: "Where objection is taken to an award proper on its face, every reasonable presumption will be indulged in its favor." Admitting the testimony of Cowell to be all true, it is not sufficient to impeach the report of the commissioners.

The plaintiff and appellant having failed to support the allegations of his bill, the decree of the circuit court will be affirmed.

(56 W. Va. 192)

FLAHERTY v. STEPHENSON et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

WILLS—LIFE TENANCY—PAYMENT OF DEBTS—
FRAUDULENT CONVEYANCE—LIABILITY
OF GRANTEE.

1. A provision in a will creating a life tenancy in the following language, to wit: "I give and bequeath to my son, James for life after the death of his mother, all that part of Oakland that lies North of the Northwestern road containing one hundred and eleven acres, more or less, reversion of the same in fee to his children, but the express condition of this bequest is upon the penalty of forfeiture, that the said land is not at any time to be subject to any liens or incumbrances of any kind by the reversioners. I trust that the devisees of this property will not permit the land with the residence to go out of the family"—does not relieve such life tenancy from the payment of the life tenant's debts.

2. A deed conveying property in consideration of the support of the grantor and his family is voidable at the instance of existing creditors.

3. The grantee in such voidable deed is not personally liable for the grantor's existing debts, nor for the rents, issues, and profits of the property until the same have been sequestered.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County; L. N. Tavenner, Judge.

Bill by W. P. Flaherty against J. H. Stephenson and E. G. Stephenson. Decree for plaintiff, and defendant E. G. Stephenson appeals. Affirmed.

J. S. Wade, T. O. Bullock, and J. S. Johnson, for appellant. Smith D. Turner, for appellee.

DENT, J. E. G. Stephenson appeals from a decree of the circuit court of Wood county subjecting the life estate of his father, J. M. Stephenson, in a certain tract of 111 acres, to the payment of the debts of M. Campbell, plaintiff, now deceased; such life estate having been conveyed to appellant by his father after the contraction of such indebtedness for the nominal consideration of \$5 and the future support of himself and family. By this appeal, three propositions are presented:

1. Does the provision of the will creating the life estate operate to prevent the same from being subject to the payment of the life tenant's debts? It is in these words: "I give and bequeath to my son, James for life after the death of his mother, all that part of Oakland that lies North of the Northwestern road containing one hundred and eleven acres, more or less, reversion of the same in fee to his children, but the express condition of this bequest is upon the penalty of forfeiture, that the said land is not at any time to be subject to any liens or incumbrances of any kind by the reversioners. I trust that the devisees of this property will not permit the land with the residence to go out of the family." The object of this provision was undoubtedly to take away from the devisees the power of incumbering the fee of

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 206, 354.

the land by liens of any kind, but it is not broad enough to prevent the life tenant's interest therein from being subject to the payment of his debts against his will. Nor is the life tenant thereby forbidden to sell or dispose of his interest in any manner he may see fit. The use of the words "reversion" and "reversioners" plainly refers to the remainder in fee, and not to the life tenancy. The life tenant's control and disposal is in no wise limited. Hence it is liable to the payment of his debts. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *Hughes v. Hamilton*, 19 W. Va. 389; *Hutchinson v. Maxwell* (Va.) 40 S. E. 655, 57 L. R. A. 384; 2 *American & English Dec. Eq.* 633.

2. Is the deed from J. M. Stephenson to E. G. Stephenson, his son, void as to the existing debts of the grantor? This question is answered in the affirmative by the case of *Hanna v. Bank* (W. Va.) 46 S. E. 920. The consideration mentioned in the deed is as follows: "For and in consideration of five dollars paid by the party of the second part to the party of the first part the receipt of which is hereby acknowledged and for the further consideration that the party of the second part shall support the party of the first part and his family furnishing to them proper clothing and provisions during the natural life of the party of the first part." This, while it is a valuable consideration as between the parties, is a conveyance of the property for the use and benefit of the grantor himself, and, as to existing creditors, renders the deed void. The law permits no debtor to secure his estate to himself or family at the expense of his existing creditors. It treats all such conveyances as void at the instance of such creditors, as being without proper legal consideration in so far as their debts are concerned.

3. Should there be any personal decree against the grantee in such deed, as a participator in the fraud of the grantor? While the conveyance is void as to existing debts, it is good between the parties, and until it is avoided it is valid, and the grantee is entitled to the benefit thereof, as fully as the grantor would have been, had the deed not been made. Hence the grantee is entitled to the rents and profits of the life estate until they are sequestered by a court of chancery, and they are not liable in his hands to the creditors of the grantor, and no personal decree can be had against him by reason thereof, until such sequestration takes place. The grantee is not guilty of fraud in receiving the same, but they are legally his property until the creditors have subjected the life estate to the payment of the life tenant's debts. It would be therefore improper to render a personal decree against the grantee for any such rents and profits prior to their sequestration.

There is no error in the decree of the circuit court, and it is affirmed.

(56 W. Va. 174)

HILL, Sheriff, v. CRONIN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)EQUITY—APPEAL—DECREE—APPEALABLE
ORDER.

1. A decree in a chancery cause, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy—all the requisites of the case—though there may remain a reference to be had, or the adjustment of some incidental or dependent matter.

2. Point 1 in syllabus of *Wood v. Harrison*, 23 S. E. 560, 41 W. Va. 376, approved and applied.

3. An order of reference founded on the expressed opinion of the judge, not followed by the sentence of the law thereon, is not appealable.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Willis, Judge.

Bill by B. F. Hill, sheriff, against J. B. Cronin and others. Decree for plaintiff, and defendants appeal. Dismissed.

Duty & Fidler, for appellants. H. Adams, H. B. Woods, and M. L. Barron, for appellee.

MILLER, J. The first question which confronts us is one of jurisdiction. Have we the right to hear and determine the alleged errors of the circuit court appearing in the record? Is the decree complained of an appealable decree? Code 1899, c. 135, § 1, gives the right to an appeal for error in a case where the matter in controversy, exclusive of costs, is of greater value or amount than \$100, wherein there is a final decree or order; or, in any case in chancery, wherein there is a decree or order adjudicating the principles of the cause. The courts have given to this language of the statute a certain and definite legal meaning, and many times have applied the rules thus established to particular cases. It is suggested that the decree complained of is neither a final decree, nor a decree adjudicating the principles of the cause.

B. F. Hill, sheriff of Ritchie county, and, as such, administrator of Andrew Cronin, deceased, filed his bill in equity in the circuit court of that county against J. B. Cronin, A. W. Cronin, Mathias Cronin, and John Cronin, defendants, in which he alleges that said Andrew Cronin died intestate, leaving surviving him Rebecca Cronin, his widow, and the defendants and other children, his only heirs at law; that said Andrew Cronin was a pensioner of the United States government; that with the proceeds of back pay and pension received by him he bought, for the consideration of \$300, a tract of 50 acres of land, which was conveyed to him by Jamison and wife by their deed bearing date on the 19th day of April, 1886; that on the 29th day of March, 1893, said Andrew

Cronin and wife, for the recited consideration of \$25, and a "life lease reserved in the premises," conveyed said land to his son said A. W. Cronin; that on the 29th day of November, 1892, said Andrew Cronin, for the consideration of \$300, bought a tract of 54 acres of land of one Cain and wife, which was, by Cronin's direction, conveyed by them to his son J. B. Cronin; that on the 1st day of October, 1894, said Andrew Cronin, for the consideration of \$300, bought of said Cain, and took from him a conveyance for, another tract of 54 $\frac{1}{4}$ acres, which said Andrew Cronin and wife in 1895 conveyed to J. B. Cronin; and that in 1902 the said A. W. Cronin exchanged his said 50 acres with said J. B. Cronin for said two tracts of 54 and 54 $\frac{1}{4}$ acres, respectively. Plaintiff, on information and belief, charged that the said A. W. Cronin and J. B. Cronin, in consideration of the conveyances to them as above stated, agreed to and with the said Andrew Cronin to keep, support, and maintain him and his said wife, Rebecca, in a comfortable and proper manner during the remainder of their natural lives. It is further alleged in the bill that in the year 1897, after the said conveyances had been made as aforesaid, Andrew Cronin was stricken with paralysis, whereby he was rendered mentally incapable of transacting his ordinary business affairs during the remainder of his life; that, at the time he was so stricken and became mentally incapable of transacting any business, he had and possessed \$1,000 of pension money, and also horses, cattle, sheep, farming implements, and household and kitchen furniture, amounting in value to \$800; that afterwards his pension was increased by the government to \$72 per month, which he was entitled to receive up to the time of his death, and which at the time of his death, in June, 1902, amounted to \$3,700. It is then charged by plaintiff that said A. W. Cronin and J. B. Cronin disregarded their said contract with their father to keep, support, and maintain him and their mother in a comfortable and proper manner, and failed to do so; that said A. W. Cronin and J. B. Cronin took advantage of the mental incapacity of their father, and illegally assumed to act, and did illegally act, as his committee, and as such illegal committee, or committee de son tort, received and took into their possession the whole of said pension money and other personal property belonging to their father, which they and each of them have since that time wholly failed, neglected, and refused to pay over or account for to plaintiff, as administrator as aforesaid. The plaintiff further charges that, out of the said money and other personal property so obtained by said A. W. Cronin and J. B. Cronin, the said J. B. Cronin has built a dwelling house upon his said land of the value of \$1,500; that with the said money said A. W. Cronin has erected a dwelling house on his said land of the value of \$1,000;

that said A. W. Cronin and J. B. Cronin turned over to defendant Mathias Cronin a portion of said money so received by them, with which said Mathias Cronin has built a dwelling house of the value of \$1,000 on lands belonging to him; and that some of said money may have been turned over to said John Cronin. The bill further alleges that said A. W. Cronin lived with said Andrew Cronin up to the time of his death; that said J. B. Cronin also lived with his father almost to the time of his death; that said Andrew Cronin did not dispose of, and could not legally dispose of, said pension money and other personal property by reason of his mental incapacity so to do, and that he was the legal owner thereof at the time of his death; that the said A. W. Cronin and J. B. Cronin illegally, wrongfully, and fraudulently converted the whole of said money and other personal property to their own use; that said A. W. Cronin and J. B. Cronin in their own wrong, assuming to act as a committee for said Andrew Cronin, took charge of said money and other property of said Andrew Cronin; and that there exists, in favor of plaintiff and the estate of Andrew Cronin, deceased, the right to charge said lands with the amount of money so expended in the erection of buildings, and the making of other improvements thereon, to the extent of the money belonging to said Andrew Cronin, used thereon, as aforesaid, and to have the amount of said money so used declared and decreed a lien on said property. The bill then prays that, "if necessary, this cause be referred to a master commissioner in chancery of this court to ascertain and report what money and other personal property belonging to the said Andrew Cronin or his estate have been received by the defendants and each of them, and how they have disposed of the same; that the plaintiff may have a personal decree against the defendants for the amount so received by them and found to be due the estate of the said decedent; that the same may be decreed to be a charge and lien upon the real estate of the defendants J. B. Cronin, A. W. Cronin, and Mathias Cronin to the extent that the funds belonging to the said decedent or his estate have been used in the erection of dwelling houses and other buildings and making improvements on said real estate, and that the said real estate, or so much thereof as is necessary, may be sold to satisfy the same; and that plaintiff may have all such other and further relief, both general and special, as the nature of the case may require and the court may see fit to grant."

To the bill the defendants J. B. Cronin, A. W. Cronin, Mathias Cronin, and John Cronin filed their general demurrer, which was overruled. Whereupon the defendants answered, admitting the allegations of the bill as to said conveyances, but denying that their father was ever mentally incapable of transacting business. They aver that all of the

money received by said Andrew Cronin, as a pensioner or otherwise, was in fact received by him personally, and was expended, in the manner directed by himself; and that if respondents, or any of them, received any part of said money, they received it direct from their father, Andrew Cronin, with instructions as to what was to be done with the same, and that it was a gift to them to be used as their own. The defendants A. W. and J. B. Cronin deny that they acted as committee de son tort of their father. Respondents aver that said conveyances of real estate and gifts of personal property were made in consideration of the work of defendants for their father and mother and for their maintenance and support, and with the understanding and agreement between the said Andrew Cronin and respondents that whatever personal property should remain at the death of said Andrew Cronin should become and be the property of respondents.

Many depositions were taken and filed in the cause, on behalf of both plaintiff and defendants.

Upon the pleadings and proofs the court made and entered the following decree, which is the one appealed from: "On consideration whereof, the court is of opinion that during the remainder of the life, from and after the — day of November, 1897, the date at which, as shown by the proceedings and testimony in this cause, Andrew Cronin was stricken with apoplexy or paralysis, up until the time of his death he, the said Andrew Cronin, was mentally incapable of transacting business or disposing of his property and effects; and it is therefore adjudged, ordered, and decreed that from and after the said — day of November, 1897, the date of which the said Andrew Cronin was stricken with apoplexy as aforesaid, until the time of his death, the said Andrew Cronin was mentally incapable of transacting business, or of making any valid or legal disposition of his property and estate. And the court is further of opinion that the defendants J. B. Cronin and A. W. Cronin should be compelled to account to the plaintiffs and to the estate of Andrew Cronin, deceased, for the property and estate owned by and belonging to the said Andrew Cronin at the time he was so stricken with apoplexy as aforesaid, and for all moneys and other property received by the said Andrew Cronin, or by them or either of them, belonging to the said Andrew Cronin after the date at which the said Andrew Cronin was stricken with apoplexy as aforesaid; against which, however, they are entitled, by way of offsets, to credit for keeping, supporting, and maintaining the said Andrew Cronin, and any other just claim, if any, which they may have against the estate of the said Andrew Cronin; and that this cause should be referred to a commissioner in chancery of this court. It is therefore further adjudged, or-

dered, and decreed that this cause be and it is referred to H. Marsh, one of the master commissioners of this court, who is directed to ascertain and report the following: First, what money and other effects, real and personal, were owned by Andrew Cronin at the time he was stricken with apoplexy on the — day of November, 1897, and the value thereof. Second, what money and other property and effects were received by the said Andrew Cronin, or by the said J. B. Cronin and A. W. Cronin, or either of them, belonging to the said Andrew Cronin, from and after the date at which the said Andrew Cronin was stricken with apoplexy as aforesaid, the nature and value thereof, and how the said J. B. Cronin and A. W. Cronin have disposed of the same. Third, any just and legal offsets against the items above directed to be ascertained and reported which the said J. B. Cronin and A. W. Cronin, or either of them, may have, and for which they may be entitled to credit, either for support and maintenance of the said Andrew Cronin or otherwise. Fourth, any other matter deemed pertinent by the commissioner, or which may be required by any party in interest."

In drawing the distinction between final and interlocutory adjudications, the greatest difficulty has been experienced in cases of decrees in equity. The confusion has been occasioned principally from the peculiar nature of these decisions, and the wide range of means which chancery possesses both for informing the mind of the judge and for acting upon the parties concerned. In *Walker v. Crawford*, 70 Ala. 567, it is held that: "A final decree in a chancery cause, such as will support an appeal, is not necessarily the last decree rendered by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy—all the equities of the case—though there may remain a reference to be had, or the adjustment of some incidental or dependent matter." Black on Judg. vol. 1, § 41, says: "The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be that, if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in execution of the decree as it stands." Freeman on Judgments, vol. 1 (4th Ed.) § 22, says: "That if, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree

is final; otherwise it is interlocutory." In *Sturm v. Fleming*, 26 W. Va. 54, this court held that: "When a decree appealed from consists in part of an order of reference for a report upon certain specified matters, and for such other matters as the commissioner may deem pertinent or be required by any party, if such order is justified by the pleadings and proofs as to the matters specified, this court will not, before such report is made and acted upon by the court below, reverse or consider the order because some party under said general clause may require irrelevant or improper matter to be reported to the court." In the case of *Desvergers v. Parsons*, 60 Fed. 143, 8 C. C. A. 526, it is held that a decree will be considered as final where the issues raised by the pleadings were all submitted for final adjudication, and, as entered, it shows that the court passed upon and adjudicated all the merits of the case, leaving nothing to be further disposed of except to carry it into effect. In *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560, it is held that: "An interlocutory decree that is appealable as one adjudicating the principles of the cause is one which adjudicates, not some, but all the questions raised in the pleadings or otherwise, and so far adjudicates that it determines the principles and rules by which relief is to be administered to the parties, so that it is only necessary to apply such principles and rules to the facts in order to decree the relative rights of the parties in the subject-matter of the suit." Brannon, J., in discussing the clause of the statute allowing an appeal from a decree adjudicating the principles of the cause, on page 380, 41 W. Va., and page 561, 23 S. E., says: "Not every decree that adjudicates principles of the cause is ground for appeal. It might warrant one as falling under some specified character giving a right of appeal, as, for instance, that it dissolved or refused to dissolve an injunction, or required money to be paid, or the possession or title of property to be changed, or real estate to be sold; but if coming under no other head, and seeking shelter under the clause quoted, it must still have a certain character, as adjudicating the principles of the cause—not part of them, but all of them, as it was not intended that a dozen decrees, disposing of the matters in controversy by piecemeal, should each be appealed. In *Shirey v. Musgrave*, 29 W. Va. 131, 11 S. E. 914, it was held that this statute authorizes an appeal under this clause only when the decree adjudicates all questions raised in the cause by pleading or otherwise, and that, if any one of a number of questions involved is left undetermined, it is not appealable. That case does not settle this case, however. It was not appealable, because it left some questions undisposed of, while in this case the question is whether, though the decree does not pass on all the questions in controversy, does it

so far pass upon them as to enable us to say that it adjudicates the principles of the case? This decree ascertains no certain debts, decrees none against the property, sells no property, settles no accounts of administrators, but leaves those matters for the future, upon the return of the commissioner's report. Clearly, that deprives it of the character of a final decree; but does it still sufficiently decide the principles involved in the case to call for an appeal? I think it does, because it holds the conveyance to Mrs. Harmison from her husband void as to creditors with debts established by the record, and holds the land liable in her hands to their payment. The cardinal questions in the suit are whether the deeds are void as to certain debts, and the land liable therefor, and whether Mrs. Harmison is personally liable, and they are adjudicated, and all other matters are but subsidiary or sequential to those matters. It only remains to apply the principles so adjudicated, and the case is ended. The decree lays out the way for further adjudication." See, also, *Hogg's Eq. Proc.* p. 648, et seq.; *Hill v. Als*, 27 W. Va. 215. The decree under consideration adjudicates only one question raised by the pleadings. It determines that from and after the ——— day of November, 1897, the date on which said Andrew Cronin was stricken with apoplexy, until the time of his death, he was mentally incapable of transacting business, or of making any valid or legal disposition of his property and estate. The decree then says that "the court is further of opinion that the defendants J. B. Cronin and A. W. Cronin should be compelled to account to the plaintiff and to the estate of Andrew Cronin, deceased," etc.; but this is an expression of opinion only, and is not carried into judgment. It is the finding of the court from the facts upon that part of the case, but is not followed by the sentence or order of the court, the conclusion of the law, which would make it binding and obligatory upon the parties. In *Corley v. Corley*, 53 W. Va. 142, 145, 44 S. E. 132, 47 S. E. 145, Judge Poffenbarger, speaking of the requisites of a valid judgment, says: "There must be a declaration by the court of the consequences which the law attaches to the facts, in order to determine the subject-matter of the controversy between the parties. Until there be such declaration, there is no judgment." In the case of *Armstrong v. Ross* (decided by this court at its last term) 48 S. E. 745, it is held that an order of reference, founded on the expressed opinion of the judge, without adjudicating the principles involved, is not appealable. Thereupon the court says: "The expression of the opinion of the court is not such an adjudication, although an order of reference, properly or improperly, is entered in furtherance of such opinion. The matter is still in the breast of the court, and the judge may change his opinion before entering an appealable de-

crea." *Hannah v. Bank*, 53 W. Va. 82, 84, 44 S. E. 152; 2 Cyc. 614, 616; 2 Encyc. Pl. & Pr. 62, 65.

One of the questions presented to the court is the liability of A. W. Cronin and J. B. Cronin to the plaintiff, and another is the right to charge the money which went into buildings and other improvements on the lands of said defendants as a lien on said property, and to declare a resulting trust therefor in favor of said estate. If the decision of these matters be delayed until the incoming of the commissioner's report, another appeal may follow—a result which the statute was designed to avoid. Besides, if the court should hereafter hold that there is no right in the plaintiff to charge said property with said money so expended thereon, the suit must fail, because plaintiff has a complete and adequate remedy at law. The court had the case before it, with the evidence, on all of the questions involved therein. It was the right of the litigants to have the principles of the cause settled before incurring loss of time and expense before the commissioner. If the case was not properly made out, it was error to direct a reference to a commissioner. In *Bank v. Parsons*, 42 W. Va. 139, 24 S. E. 554, it is held that: "An order of reference should not be made solely to enable the parties to take depositions. The cause should be so far developed by the pleadings and proofs as to show the propriety of an order of account, and the extent to which it should go."

In the light of the foregoing cases, we are of opinion that the decree complained of is neither a final decree, nor a decree adjudicating the principles of the cause. The appeal is therefore dismissed as improvidently allowed.

(56 W. Va. 205)

CROSTON v. MALE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1904.)

**PARTITION—SALE OF REALTY—WHEN ALLOWED
—INTEREST OF PARTIES—INFANTS—DOWER IN-
TEREST—ADJUDICATION OF SHARES.**

1. But for the statute authorizing it, a sale of real estate could not be decreed in a suit for partition thereof.

2. This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate.

3. Before decreeing a sale in such case without the consent of the parties interested, the court must ascertain two things: First, that partition cannot be conveniently made; and, second, that the interests of the parties will be promoted by a sale of the property.

4. Inconvenience of partition, as one of the circumstances authorizing such sale, does not contemplate physical impossibility of division, but the requirement is not satisfied by anything short of a real and substantial obstacle of some kind to a division in kind, such as would make

it injurious to the owners. Meagerness of area in some or all of the shares, due to the necessity of dividing a small tract of land among a number of people, and the existence of dower and curtesy estates in the land, do not per se make partition inconvenient, within the meaning of the statute.

5. To warrant compulsory sale in such case, it must appear that the interests of all the owners will be promoted by it.

6. Whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among, and held in severalty by, the different parties, be materially less than the value of the same property if owned by one person, is a fair test by which to determine whether the interests of the parties will be promoted by a sale.

7. When a subdivision of one parcellary share is to be made among infants, their shares may be laid off together at the election of their guardians, or, for want of such election, by direction of the court, in the enforcement of equity and justice in the partition, and, without such election or direction, the commissioners appointed to make partition may so lay them off; and, if such shares are subject to a dower interest, it may be made contiguous to such shares, when the part assigned for dower is not divided subject thereto.

8. When an entire share goes to heirs, subject to an estate by the curtesy, it cannot be compulsorily partitioned until after the expiration of the life estate.

9. Commissioners ought not to be appointed, and no sale ought to be decreed, without a prior or contemporaneous adjudication as to the interests of the parties, fixing the shares or other interests to which they are entitled; and it is reversible error to decree a sale without such adjudication if there is any uncertainty as to the interests of the parties.

10. Upon a bill alleging facts sufficient to show a right to have partition and praying general relief, the court may decree a division in kind, although there is no specific prayer for it in the bill.

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County;
John H. Holt, Judge.

Bill by Martha J. Croston against Ruth Male and others. Decree for plaintiff, and defendants appeal. Reversed.

Warren B. Kittle, for appellants. Ira E. Robinson, for appellee.

POFFENBARGER, P. This case presents the question whether it was error for the court, upon the facts shown by the pleadings, and the report of commissioners appointed to make partition of certain lands, to decree a sale thereof, instead of a division in kind; the plaintiff having favored such sale, while, with a single exception, the adult defendants, having only life estates, opposed it. One third of the land, about 240 acres in all, belonged to one set of infants, subject to the dower of their mother, another third to another set of infants, subject to an estate therein by the curtesy belonging to their father, while the residue belonged to the plaintiff, and the whole estate was subject to dower of the widow of the decedent.

Hiram Male, being the owner of said 241 acres of land, unincumbered by any indebtedness, and also of considerable personal property, all in Taylor county, died, leaving surviving him his widow, Ruth Male, a son

¶ 3. See *Partition*, vol. 33, Cent. Dig. §§ 216, 217, 219, 223.

Boyer Male, a daughter, Amanda Minor, the wife of Charles Minor, and another daughter, Martha J. Croston, the wife of Charles Croston. Subsequently Boyer Male died, leaving his children Rosa Bell, Eugenius, Hiram, and Benjamin, and his wife, Berthena Male, surviving him. Amanda Minor also died, leaving her husband, and her children, Aldine, Sarah, and Ruth, surviving her. Martha J. Croston instituted this suit for partition of the land. The bill alleges that there are three tracts—one of 77 acres, another of 58½ acres, and a third of 106½ acres. These lands are all contiguous, but form an irregular body, the average length of which is more than three times the average breadth, with a narrow place near the center. The bill does not pray a division in kind, but alleges that the land cannot be so divided conveniently, and that the interests of those entitled will be promoted by a sale of the same, and a sale thereof is accordingly asked for; and there is also a prayer for general relief.

An answer for the infant defendants by guardian ad litem was filed in the usual form. Berthena Male answered the bill, denying that the land was not susceptible of partition without injury, alleging that it could be conveniently divided, denying that the interests of the parties would be promoted by a sale thereof, and praying a division in kind. Charles Minor filed an answer of the same kind. Thereupon the court appointed commissioners to go upon the land and make partition thereof, if it could be conveniently divided, and "assign to each heir of their descendant's per stirpes an equal one-third interest in said estate, quantity and quality considered, and return a plat and report of their proceedings," and, if they should find it inconvenient to make partition, report that fact to the court. Their report recommended a sale, and set forth certain facts in support of the recommendation. They considered the land as lying in two tracts—one of 135½ acres, and the other of 106½ acres. Of the former, they said about 30 acres was rough, situated on the bank of a river, almost destitute of good timber, and comparatively worthless for farming or grazing purposes, and that the residue was ordinary land, worth about \$20 per acre, with ordinary frame buildings and other outbuildings on it, had but little good timber on it, the timber having been culled by former owners, and had grown up in briars, broom sedge, and other filth; that there was scarcely any fencing on it; and that the standing timber was inaccessible to most of the farm. Concerning the other tract, they said it was situated about two miles from the village of Webster, and about the same distance from the Valley river and a railroad; that it was the home farm, and better land than the other tract, and in better repair, having a good frame dwelling and outbuildings; that it had no timber ex-

cept a small tract on the northeast corner; that the fencing was out of repair, and the land grown up in briars and filth; and that it was worth about \$25 an acre as a whole. They further said there was a tract of bottom land in it, containing about 9 acres, of much greater value than the hill land, and that the two tracts lie on opposite sides of a high river hill, adjoining each other near the top of the hill. Considering these facts and the interests of all the parties, the dower of the widow, the infant children, their number, the dower of the widowed daughter, and courtesy of the son-in-law, the lack of uniformity of value by reason of locality and improvements, the commissioners thought the lands were not susceptible of partition in kind. They therefore assigned to the widow, Ruth Male, dower in the land, 25 acres in the 106-acre tract, including the mansion house, and 29 acres and 3 rods in the other tract, and recommended a sale of the lands subject to the dower thus assigned. To this report the defendants Charles Minor and Berthena Male excepted. Ruth Male, the widow, to whom dower had been assigned, filed an answer waiving her right to dower in the land, and agreeing to take a gross sum in lieu thereof; and thereupon the court overruled the exceptions and decreed a sale of the land, reciting, among other things, that it was "impossible to assign dower to the said Berthena Male in the one-half interest of said real estate." How she happened to be entitled to dower in such portion does not appear.

The general rule governing the determination of the question whether a sale of land shall be made upon a bill for partition is stated in *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482, as follows: "Joint owners of land are entitled to have partition in kind, each to have his share allotted to him in severalty, unless such right be waived. A sale cannot be decreed in a partition suit unless it appears, by report of commissioner or otherwise by the record, that partition cannot be conveniently made, and also that the interests of those interested in the land or its proceeds will be promoted by a sale." In any case such sale may be made if the parties are all adults and consent thereto. But the court has no right to decree a sale without their consent unless it finds, first, that partition in kind cannot be conveniently made; and, second, that the interests of the parties owning the land will be promoted by a sale. These two requisites are conditions imposed by the statute which alone confers upon a court of equity the power to make a sale at all. They are important and indispensable conditions. The statute is an innovation upon the common law, taking away from the owner the right to keep his freehold, and converting his home into money. That must not be done except in cases of imperious necessity. It is a legislative alteration of a canon of the

law which forms part of the substructure of our jurisprudence. Forcible conversion of property into money is avoided wherever possible. To prevent this, the possessory writs such as detinue and replevin, etc., for recovery of the property itself, instead of turning the injured owner away to sue for its value as damages, are given; and, where the property is of such nature that the remedies of the law courts are inadequate to its recovery, equity supplies the defect by the use of its more diverse and flexible processes. Therefore it would be at variance with fundamental and basic principles to say the Legislature intended to authorize a sale, instead of a division, for any light or trivial cause. So sacred is the right of property, that to take it from one man and give it to another for private use is beyond the power of the state itself, even upon payment of full compensation. The *jus publicum* alone authorizes the conversion of the citizen's property into money without his consent.

An adjudication by the trial court that the conditions are such as to call for a sale on a bill for partition is entitled to great weight, and will not be overthrown by the appellate court unless it can clearly see that the trial court has erred in its conclusion, for it is presumed, in the absence of anything to the contrary, that a solemn recital in a decree of a court of record and of general jurisdiction has not been entered without mature consideration and upon sufficient evidence. But if it appears that by reason of inadvertence or failure, for the time being, owing to haste in disposing of a large docket, to appreciate the spirit, purpose, and controlling influence of these limitations upon the power of sale, land has been decreed to be sold without sufficient cause, it is the duty of the appellate court to reverse the decree. *Roberts v. Coleman*, cited; *Clason v. Clason*, 6 Paige (N. Y.) 541.

What are the rules and principles which ought to govern the court in determining whether division in kind is inconvenient, and whether the interests of the owners will be promoted by a sale? Chancellor Walworth, in *Clason v. Clason*, cited, has given this question fuller discussion than is usual in the opinions of the courts. He says: "The question is not, as supposed by the master, whether it would be for the benefit of the infants to have their shares of the estate converted into money, instead of remaining in land producing a less income. For, if it is for their interest to sell their shares for the purpose of a better investment, it may be done afterwards under the general law relative to the sale of infants' estates, and when they will not run the risk of having their interest in a large property sacrificed for want of funds to compete with their adult tenant in common at the sale. The true question to be decided by the master, under the statute, is whether the whole property, taken together, will be greatly in-

jured or diminished in value if separated into three parts, in the hands of three different persons, according to their several rights or interests in the whole—in other words, whether the aggregate value of the several parts, when held by different individuals in severalty, would be materially less than the whole value of the property if owned by one person. In this case, if the value of the land in different parts of the tract is nearly the same, the complainant would have a farm of about 250 acres for his share, and worth \$50,000, and each of the infant defendants would have a little more than 60 acres, and worth about one-fourth of that sum. And if some portions of the land are much more valuable than others, a greater quantity of that which is least valuable might be set off for the shares of the defendants, so as to increase the size of their farms. But if a sale is to take place under a decree in partition, as the guardian *ad litem* has no funds to enable him to bid upon the property for the infants, this property, which is stated by the master to be worth \$75,000, may be sacrificed for half that amount, unless the decree should contain special directions to the master not to sell it below a certain specified amount." It will be observed that in coming to a conclusion he considered the quantity of land, the number of shares into which it was to be divided, the status of the parties with reference to disability and ability to protect their interests at the sale, the extent of their respective interests in the land, and the relative value of the land when divided and the sum which might be realized by a sale of it undivided. Looking at the situation of the land and the owners in this case, it is to be noticed that the quantity is about 240 acres. One-third of this the widow is entitled to hold as her dower, leaving 160 acres, to the immediate possession of which the heirs are entitled. Of this residue, the plaintiff is entitled to one-third, unless since the commencement of the suit some changes have been effected by purchase or otherwise. This would give her immediately more than 50 acres, assuming that the land is of equal value. In another one-third of it—over 50 acres—Charles Minor has a life estate, and his children the remainder in fee. These children are dependent upon him for their support, and 50 acres of land, affording him a home for himself and them, may be much more valuable to them than its proceeds in money. The other third belongs to the children of the deceased son, Boyer Male, subject to the dower therein of their mother, their natural guardian. There is no reason why the shares of these children may not be laid off together. The statute provides that two or more parties may have their shares laid off together when partition can be conveniently made in that way. Code 1899, c. 79, § 2. The court has in its keeping the protection of infant parties, and the power of electing for them, and

should exercise it, if it be apparent that their interests require it. Upon partition this one-third can be thrown together, giving the widow her dower, as one tract or parcel adjacent to the parts, to the possession of which her children are entitled, and thus a home for the mother and children may be provided. Nothing in this record indicates that the money which may be realized from a sale of their interests will be more to their advantage than a home so provided. On the contrary, she, on behalf of herself and children, protests against the sale, as does Charles Minor on behalf of himself and his children. Formerly the method of partition seems to have been to divide the land into equal parts, when the shares were equal, and then determine by lot the distribution of them. But now they may be assigned by the commissioners to avoid the risk of an unfortunate allotment. They may distribute them upon principles of equity and justice, and, of course, in this their action is under the control of the court. *Cox v. McMullin*, 14 Grat. 82.

Nobody insists upon a sale except the plaintiff, who is an adult, having a living husband, and better able to take care of herself than any of the other parties, so far as can be ascertained from this record. If, as indicated by the last decree, Berthena Male has in some way acquired the title of one-half of the land since the commencement of the suit, this circumstance only strengthens her opposition to the sale. What peculiar circumstance makes it to the interest of the plaintiff to have a sale, rather than a division in kind, the court cannot know. She may have a good home elsewhere. If so, she can live upon it, and take her interest in these lands, and then convert them into money at private sale. But a sale cannot be made merely to advance her interests. Before selling, the court must ascertain that the interests of all will be promoted. One test by which this is determined is declared to be "whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among the different parties and held in severalty, be materially less than the value of the same property if it be owned by one person." *Clason v. Clason*, cited. The commissioners do not report that a division in kind will make the aggregate value of the several parcels less than the value of the property as a whole. The court must have inferred it from the facts reported. The report shows that this land is not located in the wilds of the mountain regions, far from human habitation, but, on the contrary, that it is about two miles from the railroad, and about the same distance from a village, and is improved agricultural land. It is perfectly apparent that small parcels of land thus situated bring better prices per acre at judicial sales than large ones. There are more people able to buy small tracts than large ones. A small tract

near a railroad and village better answers the purposes of a home, and affords greater aid in supplying the wants of a family, than one situated far from markets, or not within easy access of them. In view of these circumstances, it seems clear that the court has erred in its conclusion with reference to the inconvenience of making partition and promotion of the interests of the parties. Though the bill does not specifically pray for it, partition may be had upon it, as the allegations are sufficient and there is a prayer for general relief. *Furbee v. Furbee*, 49 W. Va. 191, 38 S. E. 511.

The interlocutory decree appointing commissioners makes no reference to the dower interest of the widow of the decedent, to the estate by the curtesy of the husband of the deceased daughter, nor to the dower interest of the widow of the deceased son, nor does it ascertain and fix the interests of the other parties. Under some circumstances the failure to do these things is error, when carried into the final decree, prejudicing the rights of the parties, and works a reversal of it. *Stevens v. McCormick* (Va.) 19 S. E. 743; *Childers v. Loudin*, 51 W. Va. 559, 42 S. E. 637. In the latter case this court said, "It is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the co-tenants in the land, and failure to do so is ordinarily reversible error." Manifestly it is more important in the case of a sale than in that of a division in kind, for the parties interested ought to know their rights, so as to be able to protect them at the sale, as in the case of creditors interested in property about to be sold. But even where partition is to be made it ought to be done. *Freem. on Co-T. & Par.* § 518, says the interlocutory decree, determining the interests of the parties, furnishes the basis upon which the commissioners are to proceed. Manifestly much inconvenience and useless cost might result from proceeding without having made an adjudication as to the interests of the parties. Suppose a partition to be made upon a wrong basis, in consequence of which the commissioners would have to go back and make a new division of the land. Dower and curtesy must be set apart, and it is for the court, not the commissioners, to determine who is entitled to these estates, and in what lands, and to what extent. Good practice, at least, requires a settlement of all these questions in advance of the appointment of commissioners.

It is clear that the children of Charles Minor are not entitled to immediate possession of any part of the lands. Under the principles laid down in *Merritt v. Hughes*, 36 W. Va. 856, 15 S. E. 56, there can be no subdivision of this one-third among them until the expiration of their father's life estate, without his consent. It belongs to them subject to his life estate, however.

For the error aforesaid in directing the

sale, the decree complained of will be reversed, and the cause remanded for further proceedings according to the principles herein announced, and, further, according to the rules and principles governing courts of equity.

(56 W. Va. 293)

BARRETT v. ARMSTRONG.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

ASSUMPSIT—MONEY PAID FOR ANOTHER'S USE.

1. Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment and a promise to repay—and the obligation thus created may be enforced by assumpsit.

(Syllabus by the Court.)

Error to Circuit Court, Taylor County;
John Homer Holt, Judge.

Action by J. M. Barrett against Adolphus Armstrong. Decree for plaintiff. Defendant brings error. Affirmed.

John L. Hechmer, for plaintiff in error.
Ira E. Robinson, for defendant in error.

MILLER, J. J. B. Newlon, John W. Barrett, and A. Armstrong, the plaintiff in error, made their certain promissory note for \$650, bearing date on the 23d day of June, 1885, payable by them jointly and severally to the First National Bank of Grafton, W. Va., 120 days after its date. The proof shows that Barrett and Armstrong were in fact sureties for Newlon. Barrett died intestate before any part of this debt had been paid. J. M. Barrett, his son, and plaintiff in this action, qualified as his administrator. Afterwards, at the suit of Barrett, administrator, Newlon's property was sold, and, from the proceeds of the sale, applied thereto by the administrator, the note was reduced to \$363.72, as of the date of October 20, 1896. On that day J. M. Barrett and A. Armstrong made and delivered to the bank their joint and several promissory note for said \$363.72, payable to it 120 days thereafter, in settlement of the balance due on the first-mentioned note. The last note, not being paid at its maturity, was renewed by the makers thereof; the discount on the renewal note being equally paid by Barrett and Armstrong. The renewal was not paid when due. Some time after it became due it was charged to the bank account of Barrett by the payee bank. Barrett then charged it to the estate of his intestate, John W. Barrett, deceased. Armstrong having failed to pay any part of the sum thus settled, an action in assumpsit was brought by Barrett in the circuit court of Taylor county, in his individual name, against Armstrong, to recover one-half of said sum, for which their note had been given to the bank. There was a trial, a verdict of a jury for \$392.25 in favor

of the plaintiff, a motion by defendant to set the same aside, which was overruled, and a judgment thereon against the defendant, who excepted thereto, and obtained a writ of error to this court.

The court instructed the jury "that if they believed from the evidence that the plaintiff, Barrett, and defendant, Armstrong, jointly and severally agreed to pay to the First National Bank the remaining balance of the original Newlon debt, and that the same was afterwards paid by plaintiff, then plaintiff has the right to recover from defendant one-half of such amount paid by him by reason of such joint and several obligation." This instruction was objected to by Armstrong, who contends that it was and is erroneous and misleading, because, as claimed by him, the transaction, as to him, was, in substance, with J. M. Barrett as administrator of John W. Barrett, and not with him individually; that the plaintiff, by bringing his suit in his individual capacity, and not as administrator, prevented defendant from showing the true relationship which existed between John W. Barrett and Newlon as to the first note for \$650; that, if there was any liability on defendant by reason of the original note, he was prevented from having a settlement with the estate of Barrett, deceased, and from having allowed to him any claims or demands which he might have against the estate as an offset to this liability; and that, the transaction being one in fact with the estate, defendant will not be protected by the judgment thereon in favor of plaintiff in his individual capacity. We are of opinion that these contentions by plaintiff in error are not tenable. Had he paid the money to J. M. Barrett before suit, he would have been discharged from liability to John W. Barrett's estate. He did not choose to do so, but requested the substitution of J. M. Barrett in the place of John W. Barrett, deceased, in the liability with himself. Barrett and Armstrong thus became jointly liable to the bank for the balance of the original debt, for all of which Armstrong was up to that time legally liable. If the bank had recovered a joint judgment against Barrett and Armstrong on this note, and the judgment had been paid by Armstrong, he could have maintained his suit for contribution against Barrett individually. The personal representative of John W. Barrett would not have been a necessary party to such suit. The note for \$363.72 was a new contract with the bank by Barrett and Armstrong, enforceable against them. So far as appears on the face thereof, they are equally liable thereon. There is evidence tending to prove that Armstrong requested Barrett to pay the note in question, and that, after the settlement thereof by Barrett as aforesaid, Armstrong promised to repay him his proper part thereof. Armstrong swears that he is not indebted in any sum to Barrett, and that he made no con

tract with Barrett whereby he agreed to pay him any money. It seems to be conceded, however, that the Newlon estate was exhausted and insolvent before the \$363.72 note was made and delivered to the bank by Barrett and Armstrong for the purpose aforesaid. "Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment and a promise to repay—and the obligation thus created may be enforced by assumpsit." Clark on Con. 760; Hammon on Con. 772. Armstrong was bound jointly and severally with Newlon and John W. Barrett to the bank for the \$650 debt evidenced by the first note. Barrett died, and the liability thereon devolved upon his survivors, Newlon and Armstrong. Newlon became insolvent before the debt was fully discharged. Afterwards Armstrong not only allowed, but requested, the plaintiff to sign with him the new note and its renewal, and thus assume such a position that he could by law be compelled to discharge the whole of the remaining liability of Armstrong.

We find no error in the judgment, and therefore affirm it.

(56 W. Va. 296)

WAMSLEY et al. v. MILL CREEK COAL & LUMBER CO. et al.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

PARTITION—REPORT OF COMMISSIONERS—NOTICE.

1. Although the statute does not in terms require notice to be given by commissioners in partition to the parties, yet the necessity of such notice must be implied, and an exception to the report for failure to give such notice will be sustained and the report set aside.

2. It is not required that such commissioners should report the money value of the lands partitioned, or of any share or lot thereof assigned by them.

3. In partitioning timber and coal lands, commissioners are not required to report the extent of coal deposits, and the acreage, quantity, and quality of timber, considered by them in arriving at their conclusion as to the relative value of the several parcels and shares assigned by them to the parties entitled thereto.

Miller and Brannon, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Harriet S. Wamsley and others against the Mill Creek Coal & Lumber Company and others. Decree for defendants, and plaintiffs appeal. Reversed.

Melville Peck and W. B. Maxwell, for appellants. C. W. Dailey and Talbott & Hoover, for appellees.

McWHORTER, J. Hamilton Stalnaker departed this life, intestate, in 1892, leaving surviving him 12 children and the children

of one deceased. He died seised of several tracts of land, among which were two tracts of wild lands, containing in the aggregate 2,387 acres. In 1894 Martha D. Yokum, one of the heirs at law of said Stalnaker, filed her bill in the circuit court of Randolph county, alleging that the said lands could not be partitioned in kind, and praying that the same might be sold under a decree of the court, and the proceeds divided among those entitled thereto. Benjamin C. Stalnaker and nine other of the heirs of the said decedent filed their answer to Mrs. Yokum's bill, denying that the land was not susceptible of partition in kind, and praying that said interest of the plaintiff, Mrs. Yokum, in the wild lands might be run off to her, and that the remainder might remain undivided. On the 24th of October, 1899, "it appearing to the court from the deed of conveyance of Martha D. Yokum, the plaintiff, and her husband, to Shelton L. Reger, trustee, that he has become the owner of her undivided interest in the land situate in this county, on Mill creek, and described in the bill of the plaintiff, it is therefore ordered, on motion of the said Reger, trustee, that this suit proceed to final decree in his name, and at his proper costs." And it being shown that said Reger, trustee, had acquired nine other interests in said lands, a decree of partition was made, appointing commissioners to go upon the lands in the bill and proceedings mentioned, and partition the same; assigning to said Reger, trustee, for the purposes of his trust, ten-thirteenths thereof, and to the defendants, Boston Stalnaker, Harriet S. Wamsley, and Caroline H. Dilley, each one-thirteenth interest thereof, taking into consideration quantity, quality, and value of lands so assigned; providing that, if it could be conveniently done, they should assign the said Reger, trustee, his interest in one body, and to the other owners their interest separately, unless they should elect otherwise. On the 6th day of May, 1902, a decree was entered filing a petition by the Mill Creek Coal & Lumber Company, showing that it had become the owner of eleven undivided thirteenths of the said 2,387 acres, and praying that the partition suit might proceed in its name, and that commissioners be appointed to partition the said land between it and Boston Stalnaker and Harriet S. Wamsley in accordance with their respective interests, laying off to petitioner its eleven-thirteenths in one body adjoining other lands belonging to it, and the other two-thirteenths be laid off separately to the said Boston Stalnaker and Harriet S. Wamsley, unless they should elect to have their interests laid off together in one body. The said decree of May 6, 1902, recited the fact that the said Mill Creek Coal & Lumber Company had shown itself entitled to eleven undivided thirteenths, and the said Stalnaker and Wamsley were each entitled to one undivided thirteenth, of the said

lands, and that the conditions as to the ownership of the said lands had been changed since the entry of the decree of, October, 1899, and that no action had been taken under said decree. All proceedings under said decree were ordered stayed, and another decree of partition was entered in lieu thereof, directing James Coberly, as surveyor, and F. M. White and K. B. Crawford, commissioners appointed for that purpose, to go upon the said two tracts of land situate upon Mill creek and its branches, and, treating them as one tract, partition the same between the parties entitled thereto; assigning to the Mill Creek Coal & Lumber Company eleven-thirteenths, and to Stalnaker and Wamsley each one-thirteenth, taking into consideration quality and value of the land so assigned. On the 13th of July, 1903, the defendant Harriet S. Wamsley, one of the heirs of Hamilton Stalnaker, and C. S. Wamsley, her husband, filed in the circuit court of Randolph county their bill of complaint against the Mill Creek Coal & Lumber Company, the Tygart's River Lumber Company, W. S. Tolbard, and Boston Stalnaker, alleging that the Mill Creek Coal & Lumber Company had acquired the fee-simple title to the undivided eleven-thirteenths of the said 2,387 acres of land by purchasing the interests of all the heirs except those of the plaintiff and her brother Boston Stalnaker; that said 2,387 acres was very valuable on account of the timber; that a large part of it was underlaid with one or more very valuable veins of coal, and the timber upon and the coal under said lands constituted almost its entire value; that the Mill Creek Coal & Lumber Company had sold the timber on its undivided eleven-thirteenths to the defendant Tygart's River Lumber Company at the price of \$30 per acre for the timber alone; that the Tygart's River Lumber Company and W. S. Tolbard, acting under the rights acquired from the Mill Creek Coal & Lumber Company, had entered upon the said 2,387 acres of land, and had built a railroad thereon, which had greatly damaged the premises, and established a large lumber camp, which they were occupying with a large force of employes and laborers, etc., and had made log roads, built log ways thereon, and had removed and cut thousands of feet of very valuable timber, and were still continuing to cut and remove timber, without the permission or consent of the plaintiff or Boston Stalnaker; that, in the case of the said Yokum against Stalnaker and others for partition, the commissioners appointed had acted, laying off and assigning to the Mill Creek Coal & Lumber Company, for its eleven-thirteenths therein, 1,637 acres, but that an exception to said report by the Mill Creek Coal & Lumber Company was sustained by the court, and commissioners were again directed to go upon the land and partition the same; that partition on the last order had not yet been made; that

plaintiffs were not familiar with the boundaries of the said 2,387 acres of land, neither were they informed as to what part was underlaid with coal, nor how many merchantable veins of coal there were on said land; and that all of said facts should be definitely ascertained before a partition of said land should be made; and prayed that the defendants Tygart's River Lumber Company and W. S. Tolbard be enjoined from cutting any timber on said 2,387 acres until such time as the rights of the parties should be ascertained and fixed, and their interests assigned to them, and that they be restrained and enjoined from operating any part of said railroad which was upon the lands assigned to plaintiff and defendant Stalnaker; that an accounting be had of timber cut upon the said 2,387 acres of land, and the same be ascertained and the value fixed, and a decree in favor of plaintiff Harriet S. Wamsley against said Tygart's River Lumber Company be rendered for the full, fair one-thirteenth part of the value of the timber so cut, and the damage to the said tract of land by reason of building of said railroad thereon and the erection of said lumber camp be ascertained, and a decree rendered for her one-thirteenth part of such damages; that the true boundaries of the said 2,387 acres of land underlaid with coal, and the character, amount, and quality of the said coal, be ascertained, and the land partitioned with reference thereto; and praying that the cause of Yokum against Stalnaker and others, together with all the papers and proceedings thereon, be taken and read as part of her bill, and for general relief. The Mill Creek Coal & Lumber Company filed its answer to said bill, admitting that it had sold the timber on its eleven-thirteenths of the said tract of land to the Tygart's River Lumber Company, as well as the timber on over 3,000 acres adjoining said tract, and that, in its contract of sale of timber to said Tygart's River Lumber Company, it undertook to authorize the said company to put down on said tract a tram or other railroad over which to haul the timber which it should cut upon said tract, as well as the timber it should cut upon the other lands adjoining the same, as the respondent claimed it had a right to do; that respondent was not advised specifically as to what timber the said Tygart's River Lumber Company had cut upon the said 2,387 acres, but was informed that it had cut but a very small quantity of said timber, and that what cutting it had done upon said land had in no way interfered with the partition thereof by the owners according to their respective rights; that under the decree in the circuit court entered at its May term, 1903, commissioners were then proceeding to partition said land among said owners, which partition respondent had no doubt would be reported in a very few days; that whatever timber had been cut upon said land by the Tygart's River Lum-

ber Company had been cut upon that portion which would, according to the rules governing courts of equity, be assigned or allotted to respondent, as it adjoins other large boundaries of land belonging to respondent. Respondent denied that the logging railroad would be of any damage to said property, and claimed that, if plaintiff had any right to or against the Tygart's River Lumber Company for damages or for relief of any kind, it was not by the extraordinary remedy of injunction; that any damage that could possibly result therefrom to the plaintiffs was susceptible of compensation in damages; and prayed for the dissolution of the injunction, or, in any event, the dissolution of that part of it which restrained the use of the logging road by the defendant the Tygart's River Lumber Company or defendant Tolbard.

The defendants the Tygart's River Lumber Company and W. S. Tolbard filed their separate answers, respectively, and admitted building the logging railroad upon a part of said 2,387 acres of land, and the cutting of timber on 200 or 300 acres of said land, but denied that it would in any way interfere with a fair partition of the land; that the cutting upon said land was upon that part assigned by the commissioners to the Mill Creek Coal & Lumber Company, and which respondents supposed would be confirmed by the court; and denied all the material allegations of the bill not admitted to be true; and asked that the injunction be dissolved, especially so far as to permit the use of the logging railroad. On the 11th of July, 1903, the injunction was so modified as to permit the defendants to operate the railroad constructed over said 2,387 acres of land. On the 8th day of August the commissioners filed their report of partition, allotting and assigning to Harriet S. Wamsley 250 acres, and to Boston Stalnaker 250 acres, and to the Mill Creek Coal & Lumber Company two lots, numbered 3 and 4, containing, respectively, 578½ acres and 1,813½ acres, making together 1,887 acres; describing said several lots or parcels so assigned to each of the several parties by metes and bounds. Harriet S. Wamsley and Boston Stalnaker filed their four exceptions to said report of partition: "(1) Because they had no notice of the time of executing the said order of partition; (2) because said commissioners do not show the acreage of coal on the said lots of land so assigned to the different parcels; (3) because said commissioners report nothing as to the value of the timber on the different lots of land so assigned by them; (4) because said commissioners do not report the value of any of the parcels of land." On the 19th of October, 1903, the cause was heard upon the papers and proceedings and upon said report and upon said exceptions. The court overruled the exceptions and confirmed the report and the said partition, from which decree overruling the exceptions and confirming the report and

partition the said Harriet S. Wamsley, C. S. Wamsley, and Boston Stalnaker appealed.

The important question to be decided in this case, and which seems never to have been passed upon in this state, is raised by the first exception to the report of the commissioners, that no notice was given to Wamsley and Stalnaker of the time of executing the order of partition. Section 1, c. 79, Code 1899, gives jurisdiction to the circuit courts in cases of partition, and provides that, "in the exercise of such jurisdiction, may take cognizance of all questions of law affecting the legal title that may arise in any proceedings." The usual mode of exercising such jurisdiction is by suit in equity. All tenants in common, joint tenants, and coparceners interested in the real estate to be partitioned are necessary parties to such suit or proceeding, and must be summoned, or brought into court by order of publication if nonresidents or unknown, as in any other case. The statute does not prescribe the mode of procedure, and makes no provision for notice to be given to parties interested of the time of executing the decree or order of partition by the commissioners. In 15 Ency. Pl. & Pr. 827, it is said: "Such commissioners are usually required by statute to give notice of the time of their meeting to make partition." It seems a little singular that this question of notice to the parties of the time of executing the decree directing the partition by the commissioners has never been brought to the appellate court of this state. It is, however, probably accounted for in the fact that it is the general practice in most of the circuit courts, at least in the state, for the commissioners appointed to partition, either under the direction of the court, or from an innate sense of justice, as well as adhering to the immemorial custom, to give notice either to the parties in person or to their attorneys. This notice is usually informal, either by letter or word of mouth, informing the parties that on a day mentioned the commissioners will proceed to execute the decree of the court; and usually the parties are present, either in person or by agent or attorney, to look after their respective interests in the matter. The common-law proceeding in partition required notice. "The former statutes of Virginia contemplated the writ of partition (*de partitione facienda*) as the proper and regular proceeding to coerce partition between joint tenants and tenants in common; being founded in that particular, as in most others, on the statutes of 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, which, again, had derived the writ in question from the common law in respect to coparceners." 2 Minor, 482. And Freeman on Co-T. & Par. § 520, speaking of partition by proceedings at law, says: "In proceedings at law, after the entry of the first judgment in partition, the writ *de partitione facienda* was issued to the sheriff. By this writ he was commanded, with twelve good and law-

ful men of the neighborhood, to go to the manors and tenements, and there in the presence of the parties (who are to be forewarned), if they be willing to be present, by the oath of said twelve men, respect being had to the true value of the property, to cause the same to be divided." And in section 522: "The statutes usually require the commissioners to be sworn before entering upon the discharge of their duties, and also to give notice to the parties interested of the time and place when and where they will make the partition." And in 17 A. & E. E. L. 769 (1st Ed.): "Notice of the time and place of their meetings should be given to the interested parties, and usually they are all required to be present and deliberate together." And authorities there cited. Statutes in some of the states specifically require that such notice shall be given, while many of them make no such provision. The authorities differ somewhat in regard to the necessity of requiring notice of the time when the commissioners will meet to execute the decree of partition, in the absence of a statute to that effect; some of the best authorities holding that, when the statute is silent as to such notice, the requirement in such notice is always implied. In *Doubleday v. Newton*, 9 How. Prac. 71, it is held: "Although the statute does not in terms require notice of the proceedings to be given to the parties in partition (*Row v. Row*, 4 How. Prac. 133), yet the necessity of such notice must be implied. For it is one of those adjudications of a judicial nature affecting the rights and interests of the parties, in which they have a right to substantial and beneficial notice, and without it the report of the commissioners will be set aside." And in *Simpson v. Simpson*, 59 Mich. 71, 26 N. W. 285, the case was taken up, among other things, on the exceptions to the report of the commissioners, because the exceptants were not notified of the meeting or meetings, and neither of them attended said meeting or meetings of the commissioners, nor any one in their behalf. It was there held that notice "to the defendants of the meetings of the commissioners is essential to the validity of their action. The requirement of such notice is always implied when not expressed in the statute." In *Row v. Row*, 4 How. Prac. 133, it is held: "Notice of commissioners' proceedings in partition is not required by statute to be given to the parties. It would be proper, however, that the parties should have an opportunity to be heard before the commissioners, before making partition." Our statute has not repealed the common law in the matter of notice. It simply confers jurisdiction upon the circuit court, but does not give any directions as to the mode of procedure, and, being silent on the question of notice, the requirement of giving notice must be implied. The propriety of such notice is well expressed

in the case of *Doubleday v. Newton*, supra: "It is one of those adjudications of a judicial nature, affecting the rights and interests of the parties, in which they have a right to substantial and beneficial notice."

Upon the question of notice by the commissioners of partition, to the parties, of the time of executing the decree of partition, appellees rely strongly upon the case of *McClanahan v. Hockman* (Va.) 31 S. E. 516, where it is held that such notice is not required. The only reason for the opinion of the court on this point seems to be the fact that the statute does not, in terms, require that notice should be given. It simply says: "It is not necessary, under our statute of partition, that the commissioners should give notice, though it is frequently done. The parties interested have their day in court when the report of the commissioners is made, and it comes before the court for approval or rejection." Only this and nothing more, and this is carried into the syllabus. It is true, as a rule, a party once summoned in a cause is in court for all purposes; but in a cause for partition, as in a cause referred to a commissioner for account and report, many things are to be done in the case which are not done in open court, and in which the parties interested should have notice that they may protect their interests in such proceedings. Parties in interest might be able to call to the attention of partition commissioners such facts and conditions as add materially to the value of particular portions of the real estate to be divided, or detract from such value, as the case may be—such facts and conditions as might not be discovered or noticed by the commissioners, who are entitled to have all the light possible in relation to the property to be partitioned, in order to enable them to make a fair and equitable partition. If parties interested have no notice of the action of commissioners until the same is brought into court, they are placed at a great disadvantage, when they have nothing to guide them except the map and report, in making exceptions thereto, in case exceptions should be necessary, while, if on the ground with the commissioners, they could view the premises, and not only see just wherein the commissioners were at fault, but aid them in arriving at just conclusions.

It is claimed that the report of the commissioners, on its face, shows the injustice to the parties, and especially on the face of the map, in the shape of the parcels set apart to Wamsley and Stalnaker. The portions allotted to the appellants do not seem to be laid off with a view especially to symmetry of proportions, being nearly 3 miles long and only 37 rods wide, but no exception was taken to the report on this ground. However, as the cause will have to be again recommitted to the same or other commis-

sioners, this defect in the report, as well as others complained of, if they exist, can be then corrected.

The remaining exceptions after that of want of notice are the failure of the commissioners to show the acreage of coal on the several lots of land assigned to the different parties, and the value of the timber on the several lots, and that they do not report the value of any of the parcels of land. We hardly see the object of reporting the value of the parcels, or any of them, nor of the acreage of coal and timber. The commissioners go upon the land and view the same, taking into consideration everything whatever that may be known that gives value to each and every part of it, whether of coal, minerals, timber, or the surface for agricultural purposes; and these various elements of value are taken into consideration by the commissioners in arriving at their conclusions, and they equalize the value of the shares of the various parties entitled thereto by increasing the acreage of those shares which contain less of the elements of value, or decreasing the quantity, as the case may be. It is very evident from the report of the commissioners that they observed, or at least tried to observe, these principles, in allotting to the appellants their shares, as they increased their acreage from $185\frac{6}{13}$ acres to 250 acres each, making an excess of $64\frac{1}{2}$ acres of the quantity they would be respectively entitled to if each and every acre of the premises was of the same value. In *McClanahan v. Hockman*, supra (Syl., point 4), it is held, "A report of commissioners in partition is not defective for failure to place a money valuation on all or a portion of the lands." In *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67 (Syl., point 2), it is held, "When the action and report of the commissioners is excepted to on the ground that they have not set apart and assigned to any one his just and full share, unless it appear that the commissioners misunderstood or failed to perform some duty, or acted on a wrong principle, the court will not sustain such exception, unless it be shown by a clear and decided preponderance of evidence that the commissioners have made an unequal and unfair partition." See, also, *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. And in *Supervisors v. Stout*, 9 W. Va. 703 (Syl., point 4), it is held, "In the absence of evidence clearly showing that the damages are insufficient, the inquest taken on the ground is conclusive." The evidence taken in case at bar is by no means sufficient to warrant the court in disturbing the report of the commissioners on the grounds constituting the last-named exceptions.

For the reasons herein stated, the decree complained of is reversed, the report of partition set aside, and the cause remanded for further proceedings to be had therein as

indicated in this opinion, and according to the rules governing courts of equity.

MILLER and BRANNON, JJ. We dissent from the decree of reversal in this case, which is based on want of notice by the commissioners of partition of the time fixed for making the partition. We do not think that notice is essential. The statute of partition makes no mention of such notice. It is not required by that statute in any of its provisions. The notice which the decision in this case requires will be regarded as formal legal notice, and, carried out to its logical conclusion, would require publication of such notice as to a nonresident owner or party in interest, for it is a legal notice—one required by law—under the holding of this court; and how such publication can be dispensed with, we do not see. The nonresident is just as much entitled to notice as the resident owner or party in interest, and Code 1899, c. 121, § 2, provides that a legal notice to a nonresident may be published in a newspaper, and no other mode of notice to him is provided by law, except by service outside the state. This will be exceedingly inconvenient and costly, and we do not see any law requiring such notice. The parties have been brought before the court, and they must watch the proceedings therein, including the proceedings of the commissioners. Besides, they have their day in court upon the coming in of the report. They must be present when it comes in, and do what is necessary to protect their interests by exception or otherwise. If they desire to be present on the ground, they can ascertain from the commissioners the time when they will go upon the land to view it in order to make the partition. They must know that a decree for partition has been made, and they must exercise some diligence to be present when it is to be executed. The court simply employs the commissioners to view the land, instead of doing so itself, and they must attend, if they desire. Such a notice is neither original nor mesne process. It is simply a step of the court in the proceedings in the case preparatory to a final decree. In this view we are supported by the Supreme Court of Virginia in *McClanahan v. Hockman*, 31 S. E. 516, holding that "commissioner in partition need not give notice. The parties have their day in court when the report comes before it for approval or rejection." We cannot see any office to be performed by notice. True, the parties might be present before the commissioners to make their claim; but we can see no other office that the notice could perform, and we do not see that it is a right given by law to make any argument before the commissioners. We say "right." The commissioners go upon the premises, view them, and form their own estimate of the value of the whole tract, and the relative

value of the parcels set apart to the different heirs. We do not suppose that the parties have right to summon witnesses and have their evidence heard by the commissioners. Under our practice, that is never done. Such evidence is to be heard in court when the report shall come in. No facilities, under our practice, enable evidence to be taken in the field. Who reduces it to writing? If not reduced to writing, how can incompetent evidence be eliminated? How can exception be taken and noted against the incompetent evidence? We do not suppose, in short, that there can be any trial before the commissioners in the country. Then what function does the notice perform?

(56 W. Va. 246)

FURST v. GALLOWAY.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

DEED—CONSIDERATION—EVIDENCE—PREPONDERANCE.

1. When the consideration mentioned in a deed is merely nominal, and not contractual or of the essence of the contract, the true consideration for such deed may be shown by parol testimony.

2. If the evidence of the appellant, sustained by the undisputed facts and circumstances, plainly preponderates over that of the appellee, as shown by the records, this court will reverse the decree in favor of appellee, and direct a decree in favor of the appellant.

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County; John Homer Holt, Judge.

Bill by John H. Furst against George L. Galloway. Decree for defendant, and plaintiff appeals. Reversed.

R. W. Monroe, for appellant. P. J. Crogan, for appellee.

DENT, J. John H. Furst instituted a suit in the circuit court of Preston county to set aside and cancel a deed made by him to George L. Galloway on the 15th day of March, 1897, on the grounds that the same was obtained from him by fraudulent promises on the part of Galloway. The circuit court refused him the relief sought, and dismissed his bill, and he appeals to this court.

The bill alleges that the true consideration for the deed, recited therein to be \$150 cash in hand, was the payment of plaintiff's debts, amounting to about \$70, and the support and maintenance of his two aged maiden sisters and himself during life, and their decent burial after death; that the subject-matter of the deed was a tract of 70 acres of land, for which plaintiff paid the sum of \$1,050; that plaintiff executed a clear deed to the defendant, at his instance, to enable him to borrow the money to pay off such indebtedness; that defendant obtained the sum of \$110 by executing a deed of trust forthwith upon the land, part of which he

expended on such indebtedness, and the residue he kept, paid no portion of the recited purchase price to plaintiff, and refused to support plaintiff and his sisters, but drove them from the farm. The defendant in his answer maintains that he purchased the land for the sum of \$150, all of which, and more, he had paid on the indebtedness of plaintiff. The plaintiff sustains his bill by the evidence of himself and sister, and the corroborating evidence of several other witnesses as to admissions made by the defendant. Defendant relies upon his deed, the evidence of himself and wife, and certain corroborating statements and conduct of the plaintiff.

The recital of the deed as to the consideration can have very little weight in this controversy, for the reason that this is a direct attack upon it, and it is admitted that it nominally states the consideration to be \$150 cash in hand paid. *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581. The recital of the consideration not being of the essence of the contract, but nominal in form, the true consideration may be shown. 6 Am. & Eng. Enc. Law (2d Ed.) 767.

The defendant is unable to show to whom he paid this \$150, and for what purpose, and makes certain false statements as to payments made by him about which he is positively contradicted. His wife's evidence is of a negative character, and is, in effect, that she did not hear her husband agree to support and maintain the plaintiff and his sisters. The evidence of defendant's other witnesses relate to vague and uncertain admissions made by plaintiff susceptible of easy explanation under the circumstances, and add very little weight to defendant's otherwise discredited testimony. The strongest evidence against plaintiff is his own conduct in delaying to personally assert his rights promptly. This is easily accounted for by his age and disposition, being in the neighborhood of 70, affected with that simple childishness that overcomes so many on the approach of this age limit of the allotted time of man. Neither the defendant nor others are shown to have been in any manner injured by this delay and reticence on the part of the plaintiff. On the contrary, by reason thereof the defendant has had the enjoyment and use of the farm without other expense than the small amount of money he secured upon its credit. There is no sufficient evidence that he ever put a dollar of his own money into it. The money he used was obtained, not upon his own, but the credit of the land, and still rests on it unpaid. The consideration recited in the deed is shown to be, and is admitted to have been, wholly inadequate. The land was and is worth not less than \$750 in actual value. While a person has a right to waste and give away his property if he wishes to do so, and, so long as he is of disposing memory, courts will not inter-

fere with the disposition thereof, yet the inadequacy of the consideration tends strongly to corroborate the testimony of the plaintiff, and to disparage that of the defendant. There is no good reason shown why plaintiff should give his property to the defendant, while there are the most substantial reasons why he should so dispose of it as to secure the support of himself and sisters.

Taking all the circumstances into consideration, the plain and decided preponderance of the testimony is with the plaintiff, and the circuit court should have so held. There is no question but that the defendant deceived and misled the plaintiff, and thereby obtained a clear deed for his land on a nominal consideration expressed, and then refused to furnish to the plaintiff the true consideration that he (the plaintiff) believed that he was to receive therefor. Although the defendant may have been perfectly clear in his dealings, yet if the plaintiff was laboring under the mistaken belief that he was to receive the support of himself and sisters as a part consideration for the land at the instance of the plaintiff, a court of equity will cancel the deed, for the reason that the minds of the contracting parties never met, and there was no contract between them to which they mutually acceded. 7 Am. & Eng. Enc. Law (2d Ed.) 110. In this case, however, the evidence tends to establish the allegation that the defendant knowingly took advantage of the plaintiff, hence the court cannot do otherwise than reverse the decree, cancel the deed, except as to the deed of trust given on the land the day of the deed, and remand the case to the circuit court with directions to place the parties in statu quo as near as possible, and to further proceed in the case according to the rules and principles of courts of equity.

(56 W. Va. 244)

CATON v. RABER et ux.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

EQUITY — VARIANCE — DISMISSAL OF BILL— EXECUTION OF DEED—MISTAKE.

1. If there is a material variance between the allegations of the bill and the evidence to sustain the same, unless the bill is amended to correspond with such evidence, it should be dismissed on the hearing of the case.

2. The allegation in a bill that the grantor in a certain deed failed to retain a certain reservation set forth in a written contract authorizing such deed is not sustained by proof that such reservation was omitted by reason of an agreement between the parties that the grantee in such deed should make a separate deed for such reservation.

3. Where there is a material variance between the allegations of the bill and the evidence, and the evidence fails to clearly show that the plaintiff is entitled to relief, the bill will be dismissed.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Willis, Judge.

Bill by A. C. Caton against Jacob Raber and Sarah Raber. Decree for plaintiff, and defendants appeal. Reversed.

Davis & Son, for appellants. B. F. Ayres, for appellee.

DENT, J. Jacob and Rebecca Raber, his wife, appeal from a decree of the circuit court of Ritchie county entered in the chancery suit of Alex C. Caton against them. The bill alleges that the plaintiff and defendant Jacob Raber, acting as agent for his wife, entered into a written contract for the sale of a certain tract of land by Caton to Rebecca Raber, retaining the one-fourth interest in the gas, oil, and mineral; the deed to be made by Creed Collins, the holder of the legal title, from whom Caton purchased; that Collins, on request, executed a deed according to such contract, but "wholly failed to reserve the one-fourth interest in the oil and gas in favor of this plaintiff, A. C. Caton, as he was required to do under the contract of sale." The prayer of the bill is that the defendants be required to execute to the plaintiff a deed for the one-fourth interest in the gas, oil, and mineral, in accordance with the contract, and not that the deed be reformed to correspond therewith. The defendants, answering, in substance, deny that the one-fourth interest aforesaid was omitted by neglect of Collins, but insist that it was purposely done, because Mrs. Raber refused to take the land subject to the reservation, and that by reason thereof it was left out of the deed by direction of Caton. Caton entered a general replication to the answers. In his evidence, he admits that the omission was made by his direction under an agreement between himself and Jacob Raber that Raber would make him a separate deed therefor.

The bill contains no allegation of any such arrangement or agreement, and the proof is a clear departure therefrom, and presents an entirely different case, not justified by the allegations. If the plaintiff relied on any such understanding or agreement, it should have been set out in the bill, so that the defendants would have had the opportunity to properly plead thereto. The Rabers, in their evidence, dispute the making of any such agreement, and Mrs. Raber is, by the plaintiff's evidence, in no wise connected therewith, except through the alleged agency of her husband. If he fraudulently obtained a deed to her for this property, she being innocent thereof, equity might rescind the sale in toto and restore the parties to their former condition,—but it would not compel her to keep the property and make a deed for the undivided one-fourth oil, gas, and mineral interest claimed to have been reserved. A wife is not bound by the unauthorized acts of her husband in relation to her real estate, unless he is guilty of fraud.

of which she reaps and retains the benefits after notice thereof, and thereby ratifies such fraud. Code 1899, c. 66, § 3; *Dewing v. Hutton*, 48 W. Va. 576, 37 S. E. 670. In the present case there is no allegation of fraud, and no sufficient proof thereof if there had been.

The omission of the reservation was the voluntary act of the plaintiff, without any binding agreement on the part of Mrs. Raber to make him a separate conveyance therefor. He, to secure the consideration of the sale, according to his own evidence, took the risk of obtaining a separate deed for the reservation. Mrs. Raber says that she refused to purchase subject to such reservation, and her deed sustains her contention. As against her, the plaintiff has shown no right to equitable relief. Hence the decree must be reversed, and the bill dismissed.

(56 W. Va. 251)

POLING v. BOARD OF EDUCATION OF PHILIPPI INDEPENDENT DIST.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

PUBLIC SCHOOLS—CONTRACT WITH BOARD OF EDUCATION—VALIDITY.

1. A contract of sale to a board of education of articles for use in a free school, made by a member of a board of education, is void, and not enforceable, because it violates section 57, c. 45, Code 1899.

2. A contract in violation of a statute made to protect the general public against corrupt action, moved by self-interest and pecuniary gain in public officers, and against their bribery, and to protect the public treasury against corrupt action and wasteful expenditure, moved by self-interest in public officers, and to promote the public good, is void, and will not be enforced in the courts.

3. In an action to recover the price of goods under a sale that is void, because in contravention of a statute, a plea setting up its illegality need not aver that prejudice came to the purchaser.

(Syllabus by the Court.)

Error to Circuit Court, Barbour County; John Homer Holt, Judge.

Action by John W. Poling against the board of education of Philippi Independent District. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Hop Woods, for plaintiff in error. Sam V. Woods, for defendant in error.

BRANNON, J. In an action of assumpsit in the circuit court of Barbour county by Poling, to use of Paul, against the board of education of Philippi Independent District to recover the price of maps and historical charts sold by Poling, by written contract signed by Poling as agent, to said board. The defendant was allowed to file a special plea, along with its plea of the general issue, setting up that when Poling sold the goods he was interested in such sale, and was a member of the board of education of Philippi Independent District, in Barbour

county, and forbidden by law to act as agent for the introduction or sale of said articles. There was no evidence on either side, and the jury found for the defendant, the court gave judgment for it, and the plaintiff obtained a writ of error.

The case turns upon the question whether the special plea presented a defense to the action. Code 1899, c. 45, § 57, enacts: "No school officer, or teacher of any free school, shall act as agent for any author, publisher, bookseller, or other person, to introduce or recommend the use of any book, apparatus, furniture or other article, in the free schools of this state, or any one or more of them, or directly or indirectly contract for or receive any gift or reward for so introducing or recommending the same, nor shall such person be otherwise interested in the sale, proceeds or profits of any book or other thing used, or to be used, in said schools." Section 59 imposes a fine for the act of not less than \$3 nor more than \$10. We start with the rule of law that contracts violating positive law or against public policy are void. 9 Cyc. 464. "Courts will not aid parties to illegal contracts, which are executory only, to recover thereon." *Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779. The legislation given above is plainly designed to answer a high and healthful public policy; that is, to protect the public from loss in corrupt and extravagant sale and purchase of articles for schools made by school officers instigated to make contracts under motive of self-interest; to prevent speculation by them in paying undue prices under such bribing motive, to prevent their being bribed to buy unnecessary school equipment at corrupt and exorbitant prices, to protect taxpayers and the public treasury, and to promote official purity and honesty in the administration of the public school system, which, whilst the most noble, valuable, and beneficent department of the state government, involves annually the expenditure of great sums of money, and offers many opportunities for corruption, there being so many teachers and officers connected with it.

We must so construe the statute as not to emasculate it of its force and defeat its purpose. The very person who violated the statute seeks the enforcement of a sale in violation of it. Of what avail is the statute, if the very person at whom it is aimed takes the fruit of its violation? If we say that such a contract is good in law, then we encourage such contracts, promote the vice which the law condemns, and offer a premium for it. The law books say that it is a good test of the validity or invalidity of a contract whether its enforcement would encourage the mischief, condemned. If it would do so, the contract is void. We must carefully regard the nature of the contract and the purpose of the statute. Impartiality, honesty, purity in public officers, is a demand of public policy by common law; and

this statute only applies that policy in this instance. "If a court should enforce such an agreement, it would employ its functions in undoing what it was created to do." 9 Cyc. 481. It is there said that public policy is that principle which holds that no one can lawfully do what is injurious to the public or against the public good. "Where a contract belongs to this class, it will be declared void, though in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time; and if this is opposed to the interests of the public, it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case." 9 Cyc. 481. "Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead the judgment of those to whom high trust is confided is condemned by the courts." 9 Cyc. 485.

Long ago it was announced by Lord Holt that, if a statute prohibit an act and impose a penalty for doing it, every contract made in violation of the statute is void, though the statute do not say it shall be void. We cannot say that such is the hard and fast rule of our days. It is still the *prima facie* rule, the guiding star. It does not, in our day, inevitably follow from such prohibition and penalty that a contract banned by the statute is void; but we "look to the language of the statute, the subject-matter, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished, and if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold." 9 Cyc. 477. If we say that the Legislature meant to merely prohibit, and rely only on the penalty for the enforcement of the law, and in the nature of the case that will fairly accomplish the object of the statute, then the statute goes no further. But it ought to be plain that the penalty will accomplish the object. The courts ought, before giving such construction, to be able to say that by giving the contractor the fruit of the contract they do not deny the statute practical usefulness. Can we think that the imposition of the petty penalty of \$10 at most was the only means in the legislative mind for the enforcement of this statute? Can one think the Legislature, when it both pronounced the act unlawful and penalized it, intended to legalize the contract?

There is a wilderness of differing cases on this subject. It is useless to try to analyze them. We are cited by the plaintiff to *Ober v. Stephens*, 54 W. Va. 354, 46 S. E. 195, holding that the act prohibiting a stockbroker from doing business without license and imposing a penalty did not forbid his recovery for service; the court being of the opinion that it seemed that the penalty

would sufficiently answer the aim of the statute. That concerned only revenue, and it is there held that where it concerns only revenue, and the act was not designed for the public welfare in general, it is likely the legislation was only designed to inflict the penalty. *Toledo Co. v. Thomas*, 33 W. Va. 568, 11 S. E. 37, 25 Am. St. Rep. 925, is cited for the plaintiff. It holds that the act providing that foreign corporations may do business in the state by complying with certain requirements, and not otherwise, and imposes a penalty, does not avoid a contract, but that the penalty can alone be resorted to to enforce the statute. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, holds that such a bank can enforce a deed of trust given to secure a note assigned to it. The act of Congress simply prohibited it from holding real estate under mortgage. There was no penalty. It was held not to come under the prohibition. The case is inapt here. *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720, involves whether a seller of fertilizers could recover their price under a statute saying that fertilizers should be labeled, and imposing a penalty for selling those not so labeled. The court said the general rule is that a statute containing a prohibition and penalty makes the act unlawful, but that it did not follow that it made a contract void. It admitted that when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. Conceding this general rule, the court said that "the mere imposition of a penalty does not itself, in every case, necessarily imply an intention by the Legislature that every such contract in contravention of the statute should be void in the sense that it is not to be enforced in a court." The court allowed a recovery. I mention as a case along this line *Middleton v. Arnolds*, 13 Grat. 489, holding that bonds given for land sold under pretense title can be collected by law. The statute prohibited sale of pretense title and imposed a penalty.

I draw a marked line of demarcation between those cases and our case. The statutes which they passed upon did not so deeply and vitally concern the public weal, pure official conduct, protection against bribery of school officers, bribery of public officials, misuse and waste of public money, as does the section of the Code governing this case. The old case of *Wilson v. Spencer*, 1 Rand. 76, 10 Am. Dec. 491, lays down the true rule in such a case as this in holding that neither a court of equity nor law will enforce a contract in violation of laws "enacted for the public good." "A contract in violation of a law which seeks only collection of revenue is not void. It is otherwise when the design of the lawmaking power is to protect the public from fraud in the contract or for the promotion of some object of public policy." *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539,

51 Am. St. Rep. 478. It may be that the distinction is not sound, and also that contracts against laws made only to protect revenue are void. Story on Contr. (5th Ed.) § 758. Many cases, however, make the distinction. 2 Mechem on Sales, §§ 1045, 1046; Benj. on Sales (7th Ed., by Bennett) § 531; Hammon, Contracts, p. 339. The Supreme Court has twice said that if the statute prohibits and penalizes an act, and is silent as to whether the contract is void, and contains nothing from which the contrary may be inferred, a contract in contravention of it is void. *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. Tested by these cases this contract is void.

It is mentioned, but not urged in argument, that Polling, who as agent made the contract, was a member of a board of education of another district. The statute makes no such exception. It prohibits all school officers from acting as agents or being interested in sales to schools. True, we see that, if he were one of the board of the district buying, it would be a plainer wrong against law; but, though of another district, he might collude with other school officers. He might have, from his office, undue influence in selling articles not needed, or for excessive price, to other districts. As a school officer he should do no act to the harm of any district, nor be induced to do so by self-interest.

It is merely suggested that the plea should set out that the district was prejudiced, and offer to return the goods sold. If the statute makes the sale void, it does not matter whether the district was prejudiced, as authority cited above from Cyc. shows. The law implies prejudice. Offer to return goods is not a condition precedent to this defense. No law is cited to support this suggestion.

It is suggested that the plea should be under Code 1899, c. 128, § 5. It is simply a plea of illegality of the contract, not of fraud in its procurement, or breach of warranty, or failure of consideration. The statutory provision above quoted was made to execute section 9, art. 12, of the Constitution, reading thus: "No person connected with the free school system of the state, or with any educational institution of any name or grade under the state control, shall be interested in the sale, proceeds or profits of any book or other thing used, or to be used therein, under such penalties as may be prescribed by law: provided, that nothing herein shall be construed to apply to any work written, or thing invented, by such person." This seems broader than the statute words. It is very comprehensive and sweeping in words and purpose, and the statute words should, in view of that section of the Constitution, be given broad remedial meaning. But the Constitution itself would make this contract void. It would apply to the party making this contract, though he was not an officer of the district buying the articles, because of the words

"no person connected with the free school system."

Objection is made to the affidavit to the plea. Where is the law that requires such a plea to be sworn? None is cited.

Judgment affirmed.

(56 W. Va. 289)

REASE v. KITTLE et al.

(Supreme Court of Appeals of West Virginia.

Nov. 22, 1904.)

VENDOR AND PURCHASER—CONTRACT TO SELL—
REVOCATION—ASSIGNMENT OF RIGHTS—
TITLE ACQUIRED.

1. A contract in writing, by which one party for a valuable consideration agrees to sell and convey to the other a tract of land for a specified price within a certain time thereafter, the whole amount of the purchase money to be paid in cash within such time, and, on failure to take and pay for the land within the time stipulated, the contract to be void, is a continuing offer to sell, and not revocable within the time limited.

2. Before payment or tender of the purchase money within the time stipulated, such contract does not vest in the person to whom the offer of sale is made any title to the land, either legal or equitable, and his assignment of his rights under the contract passes no title to the assignee.

3. When such offer is made to a particular person, and not to the party and his assigns, it can be accepted and enforced by him alone, and an assignment thereof to a third party bestows no right upon the assignee to convert the offer into a contract of sale by tender or payment of the purchase money.

4. Verbal acceptance of such contract, without payment or tender of the purchase money, within the time limited, is not sufficient to convert the offer into a contract of sale.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Action by F. P. Rease against C. B. Kittle and others. Decree for plaintiff, and defendant O. C. Womelsdorf appeals. Reversed.

W. B. Maxwell, for appellant. J. B. Ware and Fred O. Blue, for appellee.

POFFENBARGER, P. The principal inquiry in this case is whether a continuing offer in writing under seal to sell land, irrevocable because based upon a valuable consideration and made to a particular person, vests in that person an equitable title to the land, which he can convey to a third person, or is capable of assignment to such third person.

C. B. Kittle executed and delivered to J. E. Howell such a contract, which reads as follows, omitting formal parts and description of the land: "That the aforesaid C. B. Kittle has this day agreed to give the aforesaid J. E. Howell an option on a certain tract of land, hereinafter described and bounded, containing 50 acres, for the sum of \$47.50 per acre, of which \$1 cash in hand is paid, the receipt of which is hereby acknowledged. Now, if the aforesaid J. E.

Howell pays the aforesaid C. B. Kittle the aforesaid sum of money before the expiration of five years from this date, the aforesaid C. B. Kittle binds himself to make the aforesaid J. E. Howell a general warranty deed for the aforesaid tract of land herein-after described. And it is further agreed that, in case the aforesaid J. E. Howell fail to pay the aforesaid C. B. Kittle the aforesaid sum of money before the expiration of five years from this date, then this contract is to be void."

Before the expiration of the time limit fixed by this paper, Kittle conveyed the land to O. C. Womelsdorf by deed dated September 2, 1899, reciting a cash consideration of \$1,000. On the 12th day of February, 1900, Howell executed and delivered to F. P. Rease a paper purporting to assign all his right to purchase said land, and all rights pertaining to said option, and further stipulating that, whenever Howell should settle with Kittle, the amount due Kittle, about \$90, should be paid Howell by Rease. On or about the 16th of November, 1900, Rease sent his agent to Kittle to close the option and pay the purchase price of the land; but the latter refused to accept the money or to make a deed, and Rease caused a written notice of his claim under the assignment from Howell, his own acceptance of the option according to its terms, and his readiness and willingness to make payment of the purchase money, to be served on Kittle on the 16th day of November, 1900. Immediately afterwards Rease brought this suit in equity to compel specific performance of the alleged contract, making Kittle, Womelsdorf, Howell, and certain creditors of Kittle defendants, and the court granted the relief prayed for.

Some other features of the case, based upon facts not yet stated, will be noticed later on, as upon mature consideration they are considered insufficient to change the case as stated. They are postponed to avoid possibility of confusion in the discussion of the main question, which is one of great importance in this state, where so much valuable property is constantly changing hands under instruments similar in character and form to the one above described.

That this contract, if such it may be termed, without acceptance in the manner therein prescribed, namely, payment of the whole amount of purchase money within the time limited, for it expressly says that, if full payment is not made within that time, it shall be void, is a unilateral contract, binding only one party, and giving him no right of action in any event against the other party, seems to admit of no doubt. It is a mere offer on the part of Kittle to sell at a certain price at any time within five years, and it does not bind him to convey, except upon payment of the entire purchase money. It contains no covenant on the part of Howell to take the land within the period

of five years, or at any other time. His failure to do so gives no right of action for damages, nor can the contract be enforced against him in equity. It is well settled that ordinarily a court of equity will not compel specific performance of a contract when the agreement is of such nature that an action at law will not lie for damages for a breach of it. 5 Vern. Abr. 537.

There are some exceptions to this rule in favor of contracts peculiar in their nature. Where the option is founded upon a valuable consideration, the holder of it may compel performance of the offer, although there is no covenant on his part to take and pay for the property. Illustrations of this are found where a lease is taken which contains a stipulation providing that at any time during the lease, or at its expiration, the lessee shall have the right to purchase the property at a price named. By this he is not bound to purchase, and only has the privilege of doing so; but he may enforce specific performance of it by the lessor. And a purchaser of the land so leased must take notice of this right of purchase in the option, for his possession is sufficient notice to put a stranger upon inquiry, and he is held to have knowledge of all rights on the part of the tenant which reasonable inquiry would have disclosed. *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526, citing numerous English and American cases. "It is now well settled that an optional agreement to convey or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Backhouse v. Mohun*, 3 Swanst. 434; *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Ves. 351; *Western v. Russell*, 3 Ves. & B. 192; *Aormand v. Anderson*, 2 Ball & B. 350; *Olason v. Bailey*, 14 Johns. 484; *Street Railway Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22; *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Souffrain v. McDonald*, 27 Ind. 269; *Stansbury v. Fringer* (Md.) 11 Gill & J. 149; *Maughlin v. Perry*, 35 Md. 353.

This apparent exception to the rule harmonizes with other principles of the law concerning rights founded upon consideration. Thus a license coupled with an interest is irrevocable, while one unconnected with any interest on the part of the licensee is always revocable. An agency coupled with an interest is also irrevocable, but if the agent has no interest in the business his powers may be cut off at any time. A man may be willing to take a lease with the privilege of the purchase of the property or a renewal of the lease, but unwilling to accept it in any other way. The option of purchase inserted in the lease is the induce-

ment to the contract on both sides. Without it the owner is unable to procure a contract of lease, and but for it the lessee would not take the property. His purpose may be to build up a mercantile or other kind of business, with a view to permanent location if he succeeds, and with the intention to purchase if he does succeed, and the wish to be free to abandon the property at the end of his term if his experiment should prove to be unsuccessful. It is a partially executed contract so far as he is concerned, for by taking the lease he has paid for that right of purchase, and, having secured it, may exercise it or abandon it at his pleasure.

In *Stansbury v. Fringer*, 11 Gill & J. 149, the court say: "When a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor; and no one stipulation can be supposed to result from or compensate for the consideration, or any portion of it, exclusive of other stipulations, unless the parties have expressly so declared."

In *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, Chancellor Kent said: "It has been ruled in several cases (*Armiger v. Clarke*, Bunb. 111; *Bromley v. Jeffries*, 2 Vern. 415) that a bill for specific performance will not be sustained, if the remedy be not mutual, or where one party only is bound by the agreement. This doctrine received a very clear illustration and an explicit sanction in a late decision by Lord Redesdale. *Lawrenson v. Butler*, 1 Schoale & Lefroy, 13. Though there are other cases in which an agreement has not been deemed within the statute of frauds, and specific performance has been decreed, when the contract was signed only by the party sought to be charged (*Seton v. Slade*, 7 Ves. 285; *Fowle v. Freeman*, 9 Ves. 351), yet the contrary opinion appears, from the most recent decisions, to be now prevailing (*Champion v. Plummer*, 5 Esp. N. P. 240; *Huddleston v. Briscoe*, 11 Ves. 592)."

The peculiarity of contracts of this class, which makes them anomalous and sometimes difficult to construe, is the want of mutuality of remedy. The distinction, however, between want of mutuality of remedy and lack of mutuality in the contract must not be overlooked. The privilege of purchase is bought and paid for. The contract of purchase of the privilege, the option, not the contract of purchase of the land, is fully performed by the optionee. It is executed on his side, and needs no remedy for its enforcement. It is executory and unperformed on the other side, and may be enforced. Here, again, it is to be observed, in cases of this kind, the court does not, strictly speaking, enforce the option. What it really enforces performance of is a con-

tract of sale that grows out of the option, and to which the plaintiff has been able to bind the defendant by reason of the option. The defendant has made an offer, which he cannot withdraw. The plaintiff accepts it by tender of the money. This makes a complete contract of sale, enforceable in equity. The defendant needs no remedy against the plaintiff, because the offer is so drawn that the latter must perform or tender performance of every duty to be performed by him in the premises, before any contract of sale is effected. It comes to life by full antecedent performance of all requirements on the part of the plaintiff. This vests in him an equitable title. The defendant then, and not until then, becomes a trustee, holding the legal title for the use of the plaintiff. Equity is without power to give any aid until the parties are in this situation. So it is the contract of sale, growing out of the option, that is enforceable in equity.

Some decisions of reputable courts hold contracts like the one under consideration to be of the same class. Thus, *Ross v. Parks*, 93 Ala. 153, 8 South. 308, 11 L. R. A. 148, 30 Am. St. Rep. 47, decides that "a writing signed by the owner of a tract of land, promising to sell and convey to another on payment of a specified sum by a named day, and reciting the payment of a nominal sum as its consideration, is a valid contract, though not signed by the other party, and a court of equity will enforce it, at his instance, not only against the owner of the land, but also against a subsequent purchaser from him with notice; nor is it necessary to the maintenance of such bill that the complainant should be in possession of the land." That contract concluded with this clause: "We acknowledge the receipt of 50 cents on this contract, as an advance payment thereon; and, should the balance herein agreed to be paid at the [time] agreed on, we hereby agree to accept said advance payment as a consideration for the cancellation and annulment of this contract, and said contract shall be so treated and held for naught." *Johnston v. Trippe* (C. C.) 33 Fed. 530, enforces a similar contract. It gave the period of one year in which to purchase at the price of \$1,000, \$50 was paid on it, and it provided that, if the balance should not be within the year, the contract, which the parties termed an "option bond," should be null and void. In these two cases the agreements were termed unilateral contracts, because there was a remedy on one side only. But there was no want of mutuality in the contract for the privilege of purchase. That was paid for just as in the case of a lease with privilege to purchase. In the first of these two cases, the consideration was only 50 cents; but it was held to be sufficient for the privilege. In the other, it was \$50; and the contract said that it should be forfeited in case of failure to complete. In both of

the cases the consideration might be said to have been inadequate, because the 50 cents in one was merely nominal, and it appears that in the other case the optionee was offered \$1,500 for his land before the expiration of the year in which the optionor had the right to take it at \$1,000.

A peculiarity of these two contracts is that in no event could the optionor have any remedy against the optionee. He could not sue within the time limited for performance, for all that time was accorded to the optionee in which to perform or not as he might elect. The contract provided that, upon the expiration of that time, it should be null and void, so that neither party could then have any remedy against the other. That is one of the peculiarities of the contract in this case. There was no time when Kittle could sue Howell. He could not sue within the five years, nor after the expiration of that period. However, there is mutuality in the contract, for a consideration has been paid, although it is insignificant in amount. In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 590, upon a contract somewhat similar, in which the consideration was \$1, for the privilege of purchase within about a year, with a stipulation that, by the payment of \$50 on or before the expiration of that time, it should be extended for another year, which sum was paid, and the option thus kept alive, the court said the rule requiring mutuality had no application to an option contract like the one here under consideration. "There is here an optional sale upon a fair consideration. The consideration named in the written agreement is \$1. As the parties agree to sell an option to buy for the sum of \$1, there is no reason why such an expression of consideration is not an adequate one." No reference is made to the cash payment of \$50 for the extension of time.

A case involving a question somewhat similar to the case last above mentioned is *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, in which an oil lease was given upon a recited consideration of \$1, providing that, in the event of failure to complete a well within two years, the grant should become void, unless kept alive by the payment of an annual rent. Judge Dent, speaking for the court, said: "While one dollar is a small consideration, yet it is a valuable consideration, and the court cannot say that it was inadequate under the circumstances, as the lessors did not consider it so. It was only intended to hold the grant for two years, and after that time a further consideration to prevent forfeiture was provided. During the two years the lessors did not object to the inadequacy of the consideration, and it is too late to do so now." For this he cites certain similar cases, as will be seen by reference to the opinion.

Courts of law, as a rule, will not enter upon any inquiry as to the adequacy of a

consideration in a contract. They presume this to have been determined by the parties to the contract, if they are capable of contracting. *Duffy v. Shockey* (Ind.) 71 Am. Dec. 348; *Bell v. Hewitt*, 24 Ind. 282; *Hind v. Holdship* (Pa.) 28 Am. Dec. 107; *Woolfolk v. Blount* (Tenn.) 9 Am. Dec. 786. "A different rule would in every case impose upon the court the necessity of inquiring into and of determining the value of the property received by the party giving the promise. Such a course is obviously impracticable. In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise had been deliberately made, the law looks no further than to see that the obligation rests upon a consideration; that is, one recognized as legal and of some value. But the reason of the rule ceases, and hence the rule ceases, when applied to contracts to pay money and founded solely upon a money consideration." *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573. After noting some apparent exceptions to this rule, the court proceeds as follows: "Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding, and in such cases courts may and do inquire into the equality of the contract; for its subject-matter, upon both sides, has not only a fixed value, but is itself the standard of all values; and so for the difference of value there is no consideration." Courts of equity, however, will refuse to enforce the specific performance of contracts because of inadequacy of the consideration, for the exercise of the power to compel specific performance rests in the sound discretion of the court; but in the case of a contract for the sale of land the inadequacy, to stay the hand of the court, must be so gross as to be evidence of fraud. *Seymour v. Delancy* (N. Y.) 3 Cow. 445, 15 Am. Dec. 270. A note to this case, in 15 Am. Dec., citing a large number of authorities, says that the rule as settled by Lord Eldon and Sir William Grant is "that inadequacy of consideration is no ground for refusing to enforce a contract specifically, unless it is so gross as to amount to conclusive, or at least satisfactory, evidence of fraud, or unless accompanied by other circumstances going to show fraud." Whether, under this rule, a court ought to refuse specific performance of an optional contract of sale for five years, based upon a consideration of \$1, by which a man deprives himself of the power to dispose of his land for so long a time, is a question we are not called upon to decide, for the reason that another principle of law, applicable to contracts of this kind, effectually precludes the granting of the relief sought.

A contract of this kind is in no sense a sale

of the land, and vests no equitable title in the optionee. It amounts at the most to an irrevocable privilege of purchase. It is unlike an accepted offer of sale, which constitutes a contract of sale, giving mutuality of remedy to both parties, by which either may enforce the specific performance of it. "An option contract to purchase is but a continuing offer to sell, and conveys no interest in the property." *Caldwell v. Frazier* (Kan.) 68 Pac. 1076. This was the case of a lease with an option of purchase, which, as above shown, is in all respects similar to the contract involved here. Between the offer and acceptance, the improvements on the property were destroyed by fire, and the plaintiff sought performance of the contract, with the improvements restored, or with an abatement in price equal to the value of the lost improvements. The court held that he had no interest in the property at the time of the fire, and, having accepted the contract after the loss, he must pay the full price. Upon a similar contract in *Gilbert v. Port*, 28 Ohio St. 276, the court held that the optionee had no title to the land. There was a loss by fire of property on the premises covered by insurance. After the loss, the optionee made his election to take the property, and endeavored to hold the insurance money, but was not permitted to do so. A similar case is that of *Edwards v. Vest*, 7 Ch. Div. 858. The court held as follows: "Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase. Held, that under the circumstances the tenant had no claim to the insurance money."

Although based upon a consideration, it is but an offer, a privilege extended, differing from an ordinary offer only in this: that it is not revocable, because based upon a valuable consideration. An assignment of it, therefore, passes no interest in the property to which it relates. Hence Howell's assignment to Rease could carry nothing except the continuing offer of purchase. That he had no right to pass to another. The offer was limited to him. It was not made to the world at large, nor does the contract say it was made to J. E. Howell and his assigns. Whether, if it did, he might turn it over to another, there is no occasion to say. The offer is personal to him. As this is coal land, it may be said that it is immaterial to whom the sale is made, and that the reasons for limiting an offer to sell to a particular person in the case of property near, or adjacent to, a man's residence, or to the residence of a relative, a friend, or a neighbor, do not apply. But there is no rule countenancing

any such exception. The authorities say that an offer made to a particular person can be turned into a contract by him alone. "When an offer is made to a particular person, it can be accepted by him alone, and is not assignable to another." 9 Cyc. 255. In *Newton v. Newton*, 11 R. I. 390, 23 Am. Rep. 476, the court held as follows: "Defendant gave J. S. a bond conditioned that J. S. might, at his own option, within a certain time, purchase certain real estate belonging to defendant upon paying a sum named. J. S. dying before the expiration of the time without having availed himself of the option, held, that the option was neither a chose in action nor a transmissible right of property, but a personal privilege in J. S., and that upon his death the bond lapsed."

This accords with a general principle of the law of contracts. "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party." *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9. The nature of that contract will appear from the headnote of the case, which reads as follows: "A., who had purchased ice from B. under a contract, becoming dissatisfied, terminated that contract, and made a new contract for ice with C. B. afterwards bought C.'s business and delivered ice to A., who had no notice or knowledge of the purchase until after the ice was delivered and used. Held, that B. could not recover for the ice from A." In *Wilder v. Wheeler*, 60 N. H. 351, the defendant had, in consideration of \$1 and an annual rent of \$6, granted to a cotton factory the right to lay down an aqueduct upon his land and draw water therefrom for the use of the factory, and the court held that he did not thereby have an assignable interest, as the contract used no words of inheritance, and it could not be inferred from the language of the whole deed that there was any intent of the parties that the right should be assignable. The company, after making the connection and using water for a long time, conveyed its buildings to a third party, who subsequently conveyed to the plaintiff. In *Pearson v. Hartman*, 100 Pa. 84, the owner of a lot of ground conveyed it to trustees, to be used as a graveyard, reserving the right, to and for himself, and every member of his family or other offspring, to mark off within the lot one square perch of ground, wherever they might think proper, for their own and separate use, forever, for the burial of the dead; and the court held that the privilege thus reserved

was personal to the grantor and his family, and was incapable of assignment to a stranger.

Reliance is placed upon an alleged payment by Howell of \$90 to Kittle on account of the purchase money, in 1898, and verbal acceptances of the option by Howell prior to the sale to Womelsdorf. As to the payment, Howell says he took up two notes for him, and let him have hay enough to make the total of \$90, and it was agreed between them that this sum should be treated as part payment for the land. But Howell admits that he took Kittle's note for that money, and, having lost the note, had brought an action before a justice to recover said sum of \$90, which was still pending on appeal at the time his deposition was taken. He endeavors to explain away this inconsistency by saying Kittle had refused to admit the credit without production of the lost note, and that the suit was brought to establish the right to credit for said sum. This, again, is inconsistent; for no action can be maintained for money which the plaintiff admits has been paid to the defendant on account of a debt or contract, unless in the latter case he proceeds upon the basis of a rescission. If such part payment, accepted by the optioner, would convert the contract into one of sale, this evidence cannot be regarded as establishing such payment. Its inconsistencies condemn it. Substantial rights cannot be taken away in such manner. If Howell's conduct does not overthrow his statements, it weighs fully as much as they do, and the burden is on him.

For the reasons given, the decree complained of must be reversed, the demurrer sustained, the bill dismissed, and the appellee must pay to the appellant his costs about his defense expended in the court below, as well as his costs in this court.

(56 W. Va. 281)

GILBERT BROS. & CO. v. LAWRENCE BROS. et al.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

BONA FIDE PURCHASERS—TRUST DEED—CONSIDERATION—FRAUD—RESULTING TRUST—CREDITORS' SUIT—PROVING LIEN.

1. Trustees and cestuis que trust are, in this state, always treated as purchasers for value.

2. A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security, which deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustee or to the beneficiaries therein, will be valid against all prior secret liens and equities, and all subsequent alienations of and incumbrances on the trust property.

3. To establish a resulting trust in land by parol, the evidence must be full, clear, and satisfactory.

4. C. obtained a judgment against L. and others, which became a lien on several separate tracts of land owned by L. A creditors' suit was brought against L. and others to enforce their liens against some of said tracts of land. There was a reference, and the notice to lien-

holders was published and posted. The lands proceeded against were sold, and the proceeds of the sale distributed among the several lienholders who appeared and proved their liens. C. did not present or prove his lien in that suit. He received no part of the proceeds of the sale made therein. Another creditors' suit was brought against L. and others, in which the other lands, not proceeded against in the first suit, were sold. *Held*, that the failure of C. to present and prove his lien in the first suit does not bar him from proving and having it allowed in its proper order in the second suit.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by Gilbert Bros. & Co. against Lawrence Bros. and others. Decree for plaintiff, and Daniel Cooper, Sr., and others appeal. Reversed.

Talbott & Hoover and Strader & Strader, for appellants. W. B. Maxwell, A. Jay Valentine, Harding & Harding, Jones & Heiner, Cunningham & Stallings, and Samuel V. Woods, for appellees.

MILLER, J. J. N. B. Crim on the 22d day of May, 1890, recovered a judgment against G. W. Gall, Jr., Shelton L. Reger, S. L. Lambert, J. H. Lambert, H. C. Lambert, and N. Pennington for the sum of \$576.29, with interest thereon from its date, and \$17.50, the costs thereof. Crim caused an abstract of this judgment to be duly docketed in the judgment docket in the office of the clerk of the county court of Pendleton county on the 25th day of January, 1891, in the names of all of said parties thereto, both plaintiff and defendants. On the 19th day of October, 1892, Homan S. Nelson and wife, by their deed of that date, conveyed to said J. H. Lambert a tract of land containing 262 acres, situate in the county of Pendleton, which deed was duly recorded in that county on the 14th day of November, 1893. By deed bearing date on the 9th day of April, 1895, duly recorded in said county on the 25th day of May, 1895, J. H. Lambert and his wife conveyed this tract of land to R. B. Lawrence, G. W. Lawrence, and W. C. Lawrence jointly for the consideration of \$6,000 cash, the payment of which is acknowledged in the deed. The last-named grantees, by their deed dated May 4, 1895, duly recorded in the county last aforesaid, on the 14th day of November, 1895, conveyed said land to Daniel Cooper, Sr., in trust to secure the payment of the joint promissory note of R. B. Lawrence, G. W. Lawrence, and W. C. Lawrence for \$1,045.88, bearing even date with the trust deed, and payable to Daniel Cooper, Jr., one day after its date. By their second deed of trust, bearing date on the 9th day of May, 1895, duly recorded in Pendleton county on the 31st day of May, 1895, said R. B., G. W., and W. C. Lawrence conveyed this land to one Sol W. Phares, trustee, to secure to R. M. Sutton & Co. the payment of \$664, in monthly installments. On the 23d day of August, 1895, Gilbert Bros. & Co., appellees, com-

menced their suit in chancery in the circuit court of Randolph county, and at the September rules, thereafter, filed their creditors' bill against R. B. Lawrence, G. W. Lawrence, and W. C. Lawrence, partners trading as Lawrence Bros., and also against certain other persons and firms as judgment creditors of Lawrence Bros. At August rules, 1903, the plaintiffs filed in the cause an amended bill, making parties defendant thereto certain other judgment creditors of Lawrence Bros., and, in addition to the lands specifically mentioned in the original bill, alleged the ownership of the 262 acres in fee in Lawrence Bros. By their deed bearing date on the 24th day of October, 1896, R. B. Lawrence, G. W. Lawrence, and W. C. Lawrence, with their wives, in consideration of \$1, conveyed the 262 acres of land to one Bessie L. Teter, née Bessie L. Phares, who was the ward of W. C. Lawrence, which deed was also placed on the record. It also appears from the record that the Kenneweg Company, a corporation, had also instituted a chancery suit and filed a creditors' bill against Lawrence Bros. and others in the circuit court of Pendleton county, which suit was removed to, and on the 15th day of May, 1897, docketed in, the circuit court of Randolph county, wherein it was ordered to be joined, proceeded in, and heard with the cause of Gilbert Bros. About this time Bessie L. Teter, née Phares, by H. C. Teter, her husband and next friend, filed her petition in these suits, wherein she, among other things, alleges that by the last will and testament of her mother she was entitled to the sum of \$1,800; that said W. C. Lawrence was duly appointed, qualified, and acted as her guardian; that as such guardian he received \$1,800 of her money and estate; that he did not loan out said money, taking bond with good security, as he should have done, but used it in his business, and that said money was used by him to pay for said 262 acres of land conveyed to himself, R. B. Lawrence, and G. W. Lawrence as aforesaid, and afterwards by them conveyed to her as hereinbefore stated; that the reason said land was conveyed to her by them was and is that her money was used to purchase it, and that said Lawrences desired to reimburse her. She further alleges that her guardian, W. C. Lawrence, had squandered her money; that her said guardian and R. B. Lawrence, his surety, are both insolvent, and that neither of them have any real estate, except their interest in said tract of land. She also says that she is entitled to hold said real estate under said deed to her; that her title thereto is superior to any judgment obtained against W. C. Lawrence and docketed after her said deed was placed on record; and that if said real estate is sold, and any money be left after payment of judgments obtained and docketed against her guardian before said deed was recorded, she is en-

titled to such money. Petitioner was made a defendant to said causes at the October rules, 1898. She then filed an amended and supplemental petition, in which she says that W. C. Lawrence, shortly after his qualification as her guardian, received, in his capacity as such, a large sum of her money, derived from her mother's estate, to wit, the sum of \$1,800; that, instead of placing said sum of money at legal interest and securing the same for the benefit of petitioner, her said guardian invested the whole thereof for her in certain real estate lying in Pendleton county, which the said R. B. Lawrence, G. W. Lawrence, and W. C. Lawrence purchased from J. H. Lambert, and had the same conveyed to them by deed bearing date on the 9th day of April, 1895; that, while the said sum of \$1,800 was actually the money of petitioner at the time of the purchase of the land, and was then and there invested in said real estate for her by her guardian, yet, by some omission of duty on his part, he failed to have her name inserted in the deed therefor as one of the grantees therein; and that, to repair the unintentional wrong done her as aforesaid, her said guardian procured the deed of October 24, 1896, to be executed to her as aforesaid for the whole of said land in fee simple, the actual and only consideration therefor being said sum of \$1,800 and its accrued interest, which her guardian, W. C. Lawrence, had used in the purchase thereof. Various orders and decrees were made in said causes. Nine several reports of commissioners were made and filed therein at different times. Sales were made of the land described in the papers and proceedings of the causes aforesaid. By consent of all the parties in interest, sale of the 262-acre tract was made on the 30th day of June, 1899. The land brought the sum of \$4,920, and the sale thereof was confirmed by the court on the 5th day of July, 1899; but the decree of confirmation directs the special commissioner who made the sale to retain in his hands, to abide the future order of the court in relation thereto, the net proceeds of sale, after paying costs and expenses thereof. Some time in 1902 Bessie L. Teter died intestate, and H. C. Teter qualified as her administrator. The suits were then revived in his name as such administrator.

On the 12th day of October, 1903, Commissioner Baker, to whom the causes had been referred, filed his report therein, from which the following excerpts are taken:

"As to the liens existing and unpaid against the funds arising from the sale of the 262 acres of land, your commissioner has ascertained and reports as follows:

"First in order of priority as a lien thereon is due to Nelson Bros, the vendor's lien which is prior to the other debts, the amount of which was \$745.33 as of May 5, 1903, when A. M. Cunningham, special commis-

sioner, paid the same to himself as attorney for said Nelson Bros.

"Next in order your commissioner reports that he finds in respect to the rights of Bessie Teter, deceased, and her personal representative, in respect to the 262 acres of land in Pendleton county conveyed on the 9th day of April, 1895, by James H. Lambert and wife to Robert B. Lawrence, George W. Lawrence, and William Clarke Lawrence, that in the purchase thereof William Clarke Lawrence, who was the guardian of Bessie Teter, his infant ward, invested in the said land the sum of \$1,800 then in his hands, of the separate and distinct funds belonging to Bessie L. Teter, which she derived under the will of her mother, the late Martha S. Phares; said will bearing date on the 2d day of February, 1899, which is established before me by the said will and the depositions of W. Clarke Lawrence, H. C. Teter, Bessie L. Teter, and others, filed on the 23d day of January, 1899, in this cause. I further find that, to the extent of said investment of the funds of Bessie L. Teter in said farm in the name of her guardian, a resulting trust exists in her favor, and that she is entitled to have the amount thereof decreed to her, without abatement for any credits on account of her guardian, or for any of the costs incurred by any of the parties to this procedure; and I further find that her interest in this land is not abated or reduced by any of the liens suffered by the said Lawrences, or required by any of the other creditors, which are sought to be charged thereon. And I find that the amount due to the administrator of said Bessie L. Teter out of the proceeds of said fund standing to the credit of this cause, and treated as land, amounts to \$2,718, including the interest to October 10, 1903, and that she ought to be allowed her costs incurred in the cause, which I also find to be \$3.05, being the costs of her petition and her depositions and her exhibits filed before me. * * *

"Third in order of priority, as a lien thereon, there is due to—

R. M. Sutton & Co. the amount of their deed of trust debt, for the sum of....	\$664 00
Interest on same to October 10, 1903.....	287 40

Total due October 10, 1903..... \$951 40

"Next in order of priority as a lien thereon there is due to—

Daniel Cooper, Sr., his deed of trust debt for the sum of.....	\$1,045 85
Interest to October 10, 1903.....	457 08

Total due October 10, 1903..... \$1,502 91

"As to the third requirement under said decree hereinbefore spoken of, your commissioner reports that the Lawrence Bros. purchased jointly said 262 acres of land, at the price of \$6,000; W. Clarke Lawrence purchasing with his two brothers, as guardian of Bessie L. Teter, and invested therein \$1,800 of her separate funds which she de-

rived under the will of her mother, hereinbefore mentioned, as shown by the depositions of W. Clarke Lawrence, H. C. Teter, Bessie L. Teter, and James H. Lambert. * * *

"As to the seventh requirement under said decree, your commissioner reports that he finds that there arose out of said sale of said land purchased with the funds or estate of Bessie L. Teter \$1,800, with interest thereon from April 9, 1895, to October 19, 1903, making a total of \$2,718.00.

"As to the judgment set out in the petition of J. N. B. Crim, filed in this cause, your commissioner does not report said judgment, for the following reasons: (1) Because he finds that in the chancery suit pending in Pendleton county, of Geo. W. Adamsou against James H. Lambert and others, there was an order of reference to a commissioner, and a notice to lienholders published and posted by said commissioner, in which the defendant Crim failed to prove his said judgment; and in the said suit James H. Lambert and wife, by deed dated on the 1st day of November, 1898, a copy of which is appended to the amended answer of Robert B. Lawrence and others, filed herein, conveyed to Benjamin H. Hiner several tracts of land, containing 148 acres, for the price of \$1,400, out of which the said Hiner agreed to pay the liens reported and found in the said chancery cause to exist thereon, in which county the judgment of said Crim was then docketed. Your commissioner therefore reports that, under section 7 of chapter 139 of the Code of 1899, he is barred of his rights to prove the said debt herein. (2) Because I find the said Crim's judgment was docketed in Tucker county on the 26th day of July, 1899, and that at that time H. Clay Lambert, one of said judgment debtors, owned a farm composed of four tracts, containing 240 acres, on Sapling Ridge, which by memorandum in writing dated June 5, 1899, and made a part of the deed filed before me, directed W. B. Maxwell and A. Jay Valentine, special commissioners, to convey to J. S. Teter said land, which was done by deed dated on the 4th day of December, 1899, a copy of which is made a part of this report, of the said memorandum thereto attached. Further, the said H. C. Lambert was also the owner of a lot in the town of Davis, which he conveyed on the 23d day of October, 1900, to R. D. Roberts, in consideration of \$250.

"Considering the facts hereinbefore set out relative to said Crim judgment, your commissioner refuses to report said judgment as a lien upon the 262 acres of land conveyed by James H. Lambert, and for those reasons, in addition to the fact that said judgment against Gall, Reger, and others, when docketed in Randolph county, was not docketed as to James H. Lambert, his name being omitted therefrom."

This report was excepted to by Crim and

the other creditors, as will hereinafter appear.

On the 21st day of October, 1903, said causes came on to be finally heard together upon the papers and proceedings therein, including the settlement of the accounts of W. C. Lawrence as guardian of Bessie L. Teter, and the report of Commissioner Baker, with exceptions thereto by Crim, Daniel Cooper, Sr., and other creditors of Lawrence Bros., whereupon the court overruled all of said exceptions, save exception No. 1, indorsed by Crim, which is hereinafter referred to, and confirmed the report; and then, proceeding to adjudicate and fix the rights of the parties with respect to the sum of \$4,005.89 standing to the credit of these causes, the court adjudged, ordered, and decreed that there should be paid therefrom to Henry C. Teter, administrator of Bessie L. Teter, the aggregate sum of \$2,718, with interest thereon from October 10, 1903. It was further adjudged, ordered, and decreed that William Clarke Lawrence, guardian for his infant ward, Bessie L. Teter, having on the 9th day of December, 1895, invested in the said land \$1,800 of the separate estate of the said infant ward, derived by her under the will of her deceased mother, held the said land, to the extent of the said investment, in trust for the said Bessie L. Teter, and that none of the creditors of Lawrence Bros. had any right to charge or diminish the said funds, or the proceeds thereof, with any of their debts against the said firm or any member thereof, and that "in lien of the said land, which, by consent decree heretofore entered, was converted into money, the administrator of said infant is therefore entitled to have and receive the said sum of \$2,718, with interest thereon from the 10th day of October, 1903, and the costs of her said petition herein, including a docket fee, and her costs incurred before the commissioner, to the extent of \$3.95. It is therefore further adjudged, ordered, and decreed that the West Virginia Trust Company, general receiver of this court, do pay to H. Clay Teter, administrator as aforesaid, the said sum of \$2,718, with interest from October 10, 1903, as aforesaid, and the said costs. It is further adjudged, ordered, and decreed that the rights of other creditors in respect to the residue of the said funds, and their priorities thereon, are as follows: Next in priority and next entitled to be paid is the trust lien in favor of R. M. Sutton & Co., aggregating on the 10th of October, 1903, \$951.40. Next in order of priority is the lien thereon of Daniel Cooper, Sr., for his trust debt, aggregating \$1,502.91. * * * But the exception first indorsed by defendant Crim, because of the failure of Commissioner Baker to report his judgment for \$576.92, with interest thereon from May 24, 1890, is sustained; and no decree is made therefor allowing defendant Crim to participate for payment thereof out of the proceeds of the lands of Lawrence Bros., for the

reason that it appears to the court, from the record of this cause, that all of said real estate was sold under a consent decree herein, and realized a sum insufficient to pay the prior liens fixed thereon." From this decree, Crim and Daniel Cooper, Sr., obtained an appeal, and have assigned various grounds of error, not necessary to be here specifically set out.

It is contended on behalf of the deed of trust creditors of Lawrence Bros. that they are purchasers of the said 262-acre tract of land for value, and without notice of the alleged resulting trust thereon in favor of Bessie L. Teter; and also, for all of the creditors, that said alleged resulting trust has not been established. Crim insists that his judgment against J. H. Lambert and others was and is a valid and subsisting lien on the said 262 acres, subject only to the vendor's lien thereon in favor of Nelson, the grantor of Lambert, and that it is also a lien on said funds in the same order and priority. The questions relating to the rights of the deed of trust creditors to the aforesaid funds will be first considered and determined.

It is not claimed that the trustees or cestuis que trust in the deeds of trust, or either of them, had notice or knowledge of the alleged demand of Bessie L. Teter at the time of the execution or delivery of the trust deeds. Trustees and trust creditors in deeds of trust are treated in this state as purchasers for value. *Fidelity Co. v. Railroad Co.*, 32 W. Va. 244, 259, 9 S. E. 180; *Duncan v. Custard*, 24 W. Va. 730; *Wickham v. Martin*, 13 Grat. 427; *Douglass Mfse. Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188; *McClaskey v. O'Brien*, 16 W. Va. 794; *W. M. M. Co. v. Peytona C. C. Co.*, 8 W. Va. 409; *Evans v. Greenhow*, 15 Grat. 157. In the last-mentioned case the court says: "A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security, which deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustee or the beneficiaries therein, will be valid against all prior secret liens and equities, and all subsequent alienations and incumbrances. * * * I think it has been the constant course of the courts of this state to regard the creditors in a deed of trust made by their debtor, bona fide for their indemnity, in the light of purchasers for value." In *Wilcox v. Calloway*, 1 Wash. (Va.) 42, the court says: "A purchaser of the legal title is not to be affected by any latent equity, whether founded on trust, fraud, or otherwise, of which he has no actual notice, or which does not appear in some deed necessary in the deduction of the title, so as to amount to constructive notice." *Hooe v. Pierce*, 1 Wash. (Va.) 212. In *Marshall's Ex'r v. Hall*, 42 W. Va. 644, 26 S. E. 301, the court says: "Whenever a trust fund has been converted into another species of property, if its identity can be traced, it will be held, in the new form, liable to the rights

of the cestui que trust. So long as it can be identified either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for valuable consideration, without notice." 1 Perry on Trusts, § 218 et seq. Further citation of authorities is not necessary. It is plain that, if Bessie L. Teter had any money invested in the 262 acres of land by her guardian, her claim cannot prevail against the said trust deeds and the debts of Lawrence Bros., mentioned therein and secured thereby. To establish her alleged claim against the 262 acres of land, Bessie L. Teter, proved by W. C. Lawrence, her guardian, that he qualified as such in 1893; that he received as such guardian about \$1,813 of the money belonging to his ward—\$1,013 thereof in March, 1893, and the residue in November, 1894; that he paid \$1,800 of said money on the purchase of said 262 acres of land; that before the said purchase he had put the money into cattle and sheep, and paid the money arising from the sales thereof into the land; that he paid the money for Bessie L. Teter, née Phares. Lawrence further testifies that he put the money into cattle and sheep some time after he got it; that he could not tell exactly from whom he bought all of the stock; that he put all of the money used by him into stock; that he generally kept the stock from one to two years after its purchase; that a part of the guardianship money was handled by his brother; that he handled about \$1,200, and his brother R. B. Lawrence the balance of it; that his brother also put the money which he handled into stock; that the first purchase of stock was about \$400 in value, and was made by him in 1893; that the next purchase, about \$800 in value, was made in 1894; that this stock was bought with his ward's money; that at the time of the purchase of the Lambert 262 acres of land he had on hand stock so purchased, of about the value above given; that he paid out the \$1,800 of his ward's money by taking up the paper and notes of J. H. Lambert; and that he and his brother R. B. Lawrence took up this paper. J. H. Lambert, grantor of the land to Lawrence Bros., testifies that, as part of the \$6,000 consideration for the land, he bought of Lawrence Bros. their store at Herman for \$3,300, and another house and lot at \$1,200, and that for the balance they paid him money, and assumed and paid debts for him, one of which debts was \$1,400. The settlement of said W. C. Lawrence as guardian for Bessie L. Teter, voluntarily made by him before the commissioner of accounts for Pendleton county, hereinbefore mentioned, is for the years 1893, 1894, 1895, 1896, 1897, and 1898. It charges the guardian with \$1,013 of money belonging to his ward for 1894, \$1,709.96 for 1895, \$1,862.87 for 1896, \$1,804.56 for 1897, and \$1,855.42 for 1898. For all of said years it gives

credit to the guardian for taxes paid by him on said money, and for other items expended by him for his ward. In addition to this evidence, W. C. Lawrence joined in both of said deeds of trust, and was and is a joint maker of the note executed to Daniel Cooper, Sr., as aforesaid, after he had taken the title to the land to himself and brothers; thus allowing innocent purchasers for a valuable consideration, without notice of the said claim of his ward, to become interested in the land. He says in his evidence: "I meant to purchase the land for her. When I purchased this land I didn't know there was anything to amount to anything against me." Bessie L. Teter was a witness on behalf of herself. She says nothing as to the purchase of the land for her by her guardian. Asked what money she had received from her mother, and who has had it since, she answered: "Something over \$1,800, and W. C. Lawrence has had the money ever since."

The facts in all cases in which resulting trusts are sought to be established must be proved with great clearness and certainty. 1 Perry on Trusts, § 187. Bright v. Knight, 35 W. Va. 40, 13 S. E. 63, holds that such proof must be full, clear, and satisfactory. Troll v. Carter, 15 W. Va. 567; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46; 6 Hurst's Dig. 742. The trust must arise at the time the title is taken. No subsequent oral agreement or payment will create it. Smith v. Turley, supra. In Myers v. Myers, 47 W. Va. 487, 35 S. E. 868, it is held that, to create a resulting trust in favor of a ward in a tract of land purchased by his guardian, the trust funds must either have been paid at the time of, or entered into the consideration for, the contract of purchase, though afterwards paid. 27 Am. & Eng. Enc. Law, 250 et seq. The proof in this case does not establish a single necessary element of the alleged resulting trust in favor of Bessie L. Teter.

It is insisted that no error was committed in barring Crim from participation in the proceeds of the sale of said 262 acres of land. His judgment is properly proved. There is no evidence that it has ever been paid or released. It was a lien on all of the lands of which J. H. Lambert was possessed, or to which he was entitled, at or after the date thereof. Code 1899, c. 139, § 5. The judgment was a lien on said 262 acres at the time of the alienation thereof by Lambert to Lawrence Bros. Before and at the date of said conveyance the judgment was docketed in Pendleton county. Crim's lien was prior to all other judgment liens on the land. Lawrence Bros. took the land with legal notice of, and subject to, this lien. Id. § 6. Crim could have enforced his lien in a suit in equity against this, or any other land upon which his judgment was a lien. Id. § 7. In the said cause of Adamson v. Lambert et al. Crim was not made a formal party. The 262 acres was not proceeded against or involved therein. No liens thereon were as

certained or reported in that cause. Crim had the right, under the statute cited, to enforce his judgment lien against the lands described in that suit, or against the 262 acres in the suit against Lawrence Bros. We are therefore unable to see how his lien could be discharged in the last-named suit by his failure to present and prove his judgment in the first-mentioned cause. We are of opinion that he did not, by his omission to prove his judgment in the first-mentioned suit, lose the benefit of his lien on said 262 acres of land, or upon the proceeds of the sale thereof in the last-mentioned cause, but that he is entitled to have the same reported and allowed therein in its proper order and priority.

For the reasons stated, we are also of opinion that there is error in the decree complained of. The same must therefore be reversed and annulled, the exceptions to Commissioner Baker's report sustained, and the cause remanded to the circuit court for further proceedings to be had therein according to the views herein expressed, and further according to the rules and principles governing courts of equity.

(56 W. Va. 249)

**JAMES CLARK DISTILLING CO. v.
BAUER et al.**

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

1. A verdict of recovery by a plaintiff bearing the burden of proof, when the evidence is plainly insufficient to warrant it, should be set aside. (Syllabus by the Court.)

Error to Circuit Court, Randolph County; John Homer Holt, Judge.

Action by the James Clark Distilling Company against B. F. Bauer and another. Verdict for plaintiff. From an order granting a new trial, it brings error. Affirmed.

Talbott & Hoover, A. Jay Valentine and J. P. Scott, for plaintiff in error. C. H. Scott, for defendants in error.

BRANNON, J. Action by James Clark Distilling Company against Bauer and Boyd, partners in trade as B. F. Bauer, begun before a justice, and appealed to the circuit court of Randolph. Service was had on Boyd, but not on Bauer. The case resulted in a verdict for the plaintiff, and from the action of the court in setting this verdict aside the distilling company has obtained a writ of error.

The only question in the case is whether the evidence shows that Boyd was a partner with Bauer. The business was a saloon. The account is for liquors sold for saloon use. The only evidence to charge Boyd is that of the traveling salesman who sold the liquors. When asked what con-

nection Boyd had with Bauer, he answered, "Partners;" and, when asked to say how he knew Boyd was a partner, he answered: "Mr. Boyd's own words. He stated that he did not want the goods shipped to B. F. Bauer & Co., fearing that it would interfere with his merchandise business. Q. Then, as I understand you, R. C. Boyd represented himself to be a member of the firm of B. F. Bauer, and it was at his suggestion that the goods were shipped in the name of Mr. Bauer. Please state if I am correct in this. A. Yes, sir." He does not say how Boyd represented himself to be a partner—what he said—and we may say that, under the inspiration of the suggestive question by the attorney, he gave a mere conclusion of his own. This is short and unsatisfactory evidence to charge Boyd, who was dead at the trial, and could not make a defense. Bauer sold out and left, and is not produced as a witness. The business was in the name of Bauer alone. The license in his name. The plaintiff sold six bills at different times, all in Bauer's name alone. Not a paper is in a partnership name or has a partnership earmark. The salesman makes on cross-examination a statement strongly against plaintiff. He was asked if, when at Bauer's place when he sold the first bill, the time when Boyd made the statement to which the salesman refers, he did not refuse to send the goods without Bauer got Boyd's "recommendation." He answered, "Yes." This shows that Boyd only recommended. When that first bill was ordered, before it was sent, a telegram warned the distilling company to ship only a part, not all that had been ordered. It is charged, on the statement of a letter of Bauer's to the plaintiff, but not proven, that Boyd sent that telegram, and thence it is urged that this shows Boyd a partner; else why would he send the telegram? If he had only gone security verbally, or even recommended, he might do so in justice to the plaintiff and himself. The telegram is signed, "B. F. Bauer." It is not claimed that Boyd represented himself as a partner, except on the occasion when the saloon began and the first bill was ordered. That first bill was paid. It is a subsequent bill of liquors that is sued for. In that letter we find Bauer opening thus, "Mr. Boyd, who went my security for stock, is the cause of the countermand of order," and added that Boyd became alarmed, and Bauer assured the company that everything was right, and he would do all in his power "to make a success of the business in order that it may be a benefit to us both." He asked the plaintiff to send on goods, assuring them he would pay, and added, "I will control the orders in future." This letter indicates a sole business, not a partnership. He tells the plaintiff that Boyd had gone his security for the first bill. That word "security" alone is a declaration of Bauer that Boyd was only a

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 3222.

security, and a warning to the plaintiff that he was not a partner. And if he had been, why did the plaintiff after that letter sell Bauer the goods now sued for? There is a receipt from Boyd to Bauer, just before the last bill, while the alleged partnership was going on, for payment for ice. If it was a firm, it is not likely the receipt would be given. It was likely for ice in the saloon. It is a circumstance against the partnership.

We agree with the circuit judge that the evidence falls short of sustaining the verdict. When evidence, plainly, clearly, decidedly, is not sufficient, the verdict should be set aside. *Limer v. Traders' Co.*, 44 W. Va. 175, 28 S. E. 730.

Order affirmed.

(137 N. C. 295)

COBB v. RHEA.

(Supreme Court of North Carolina. Dec. 17, 1904.)

REFERENCE—FEES OF REFEREE—APPORTIONMENT—STATUS—DECEDENTS' ESTATES—PREFERRED CLAIMS—APPEAL—TITLE OF CAUSE.

1. A motion by a referee for the payment of reference fees in consolidated causes is not an action, and an appeal from the decision rendered should be entitled by the name of the first action in which the motion was made.

2. Under Clark's Code (3d Ed.) § 533, providing that the fees of a referee shall be fixed by the court and taxed against either party, or apportioned as seems right to the court, the apportionment of referee's fees is a final judgment both as to the amount and the apportionment.

3. Under Clark's Code (3d Ed.) § 533, providing that the fees of a referee shall be fixed by the court and taxed against either party, or apportioned as seems right to the court, the apportionment of referee's fees rests in the discretion of the judge making the allowance, subject to exception and review by appeal, but his order cannot be changed by a subsequent co-ordinate judge.

4. Under Clark's Code (3d Ed.) § 533, providing that the fees of a referee shall be fixed by the court and taxed as seems right to the court, referee's fees are simply a part of the costs, and, when not paid in advance by an administratrix, judgments therefor, including the part of the referee's fees adjudged against the estate, not being enumerated as preferred debts by Code, § 1416, take no greater pro rata than the judgment of which they are a part; nor does the fact that funds derived from a sale of realty to make assets in another proceeding are in the hands of the clerk authorize the court to order the payment of such fees out of those funds as a preferred debt.

Appeal from Superior Court, Buncombe County; Long, Judge.

Motion by T. H. Cobb, referee in certain consolidated actions, for the payment by H. E. Rhea, administratrix, of reference fees as a preferred debt. From a judgment for the movant, the administratrix appeals. Reversed.

Geo. A. Shuford and W. J. Peele, for appellant. Davidson, Bourne & Parker, for appellee.

CLARK, C. J. There were three actions pending in the name of H. E. Rhea, Adm'x,

v. R. R. Rawls et al. These were consolidated into one action. There were three other actions—*Buchanan v. Rhea, Adm'x, Asheville Tobacco Warehouse Co. v. H. E. Rhea, Adm'x, et al.*, and *Summey, Adm'x, v. Rhea, Adm'x, et al.* The plaintiff, Cobb, having been allowed fees as referee and as arbitrator in said several causes years ago, and the settlement of the estate having been unaccountably delayed, made a motion in each of said four actions that the administratrix, Rhea, pay his reference fees as a preferred debt. The four motions were consolidated, and from the judgment thereon the administratrix appeals.

This not being an action, but a motion in the cause, the appeal should regularly have been entitled by the name of the first action in which the motion was made, as is the practice in taxing a prosecutor with costs (*State v. Hamilton*, 106 N. C. 660, 10 S. E. 854) or judgment in a cause against a witness or other person for contempt, though the practice has not always been observed in the latter class of cases. In the case of *Buchanan v. Rhea, Adm'x*, there was judgment at fall term, 1893, that plaintiff recover of the administratrix \$3,018.60, with interest, etc., "and the costs of this action, in which costs shall be included the sum of one hundred dollars allowed to T. H. Cobb for his services as such herein rendered." In *Asheville Tobacco v. Rhea, Adm'x*, a similar judgment for recovery of a debt, with interest and costs, was rendered, adding, as above, a recovery by plaintiff of "the costs of this action, including the sum of one hundred dollars to T. H. Cobb, referee." In *Summey v. Rhea, Adm'x*, judgment was rendered at December term, 1895: "By consent T. H. Cobb, referee herein, is hereby allowed \$300 for his services as such referee, and to be paid out of the assets of H. K. Rhea, deceased, and as part of the costs of this action, and to be taxed therein." The three actions pending in name of H. E. Rhea, Adm'x, v. Rawls et al., having been consolidated, at December term, 1895, the judgment included an allowance of \$1,000 to T. H. Cobb as arbitrator, subject to a credit of \$300, already paid, "leaving due him \$700 in this judgment, and as between H. E. Rhea, administratrix of H. K. Rhea, H. E. Rhea individually, and R. A. Rawls, said \$700 shall be adjusted in the proportions in said award directed." The award thus made a part of the judgment in paragraph 13 thereof adjudged the \$700 to be paid as follows: "\$350 by H. E. Rhea individually; R. R. Rawls \$350, to be credited with \$150, leaving \$200 due by him; and \$300 by H. E. Rhea, administratrix of H. K. Rhea, of which \$150 has been paid, leaving balance of \$150 due by her as administratrix."

Originally, under Code, § 533, referees' fees were taxed, like other costs, against the losing party; but by amendment (Laws 1889, p. 59, c. 37) the court was authorized to ap-

portion them, in its discretion (Clark's Code [3d Ed.] § 533). A practice has grown up, owing to such delays as this, of granting judgment for referee's fees, whether awarded against one party or divided between them, and issuing execution at once. There is nothing to be said against this, and frequently a similar order is rendered for other costs, especially when a continuance is granted upon payment of costs. The question is not of ordering payment, but whether such order can be made a preferred debt against an estate.

By the above summary it will be seen there are judgments against the administratrix for \$100 each as part of plaintiff's recovery of costs in first two cases, *Buchanan v. Rhea*, Adm'x, and *Asheville Tobacco Co. v. Rhea*, Adm'x; also in *Summey v. Rhea*, Adm'x, \$300, "to be paid out of assets of H. K. Rhea, deceased, and as part of the costs of this action, and to be taxed therein"; and, finally, in the consolidated cases of *Rhea, Adm'x, v. Rawls*, a "balance of \$150 due by her as administratrix"—making a total of \$650 adjudged against the administratrix as cost. The apportionment of referee's fees is a final judgment both as to the amount and the apportionment, and rests in the discretion of the judge making the allowance, subject to exception and review by appeal in case of abuse. Such order cannot be changed by a subsequent co-ordinate judge. "There is no appeal from one superior court judge to another." *May v. Lumber Co.*, 119 N. C. 98, 25 S. E. 721; *Alexander v. Alexander*, 120 N. C. 474, 27 S. E. 121; *Henry v. Hilliard*, 120 N. C. 487, 27 S. E. 180; *Scroggs v. Stevenson*, 100 N. C. 358, 6 S. E. 111; *Cowles v. Cowles*, 121 N. C. 276, 28 S. E. 476.

The only remaining question is whether such judgment for referee's fees is a preferred debt. Referee's fees, by the statute, and also the decisions—*Wall v. Covington*, 76 N. C. 152, *Young v. Connelly*, 112 N. C. 650, 17 S. E. 424—are simply "a part of the costs," and of no higher dignity than any other costs, nor than the debt to whose recovery they are a mere incident, and, as against the administratrix, must take the pro rata allowed the judgment. It is true the clerk and other officers may demand their fees in advance as the case progresses, and so may the referee, and, if paid by the personal representative, they may be allowed by the clerk as "necessary disbursements and expenses" in managing the estate; but not so as to costs recovered by the opposite party. And when administratrix's costs are not paid in advance, judgments for such costs, including the part of referee's fees adjudged against the estate, which are a part of the costs, have no greater dignity and take no greater pro rata than the judgment of which they are a part, or any other judgment. The fact that funds derived from a sale of realty of H. K. Rhea to make assets in another proceeding is in the hands of the clerk gives the court no author-

ity to order the costs in these cases, nor the referee's fees as part of such costs, to be paid out of such fund as a preferred debt. They are not preferred by Code, § 1416, which determines the order of priority of indebtedness in the settlement of estates nor by any other statute. The proceeds of sale of realty to make assets, so far as necessary to pay debts, will in due course be paid the administratrix, and will be disbursed by her in accordance with law.

Error.

(126 N. C. 568)

STATE v. DAVIS et al.

(Supreme Court of North Carolina. Dec. 17, 1904.)

ASSAULT WITH DEADLY WEAPON—REMARK OF COURT—INSTRUCTION.

1. Where, on a criminal trial, an expert on handwriting testified as to the similarity of defendant's handwriting with that of a writing in question, and was asked to explain to the jury the similarity, whereupon the court declined to allow the witness to testify further, saying that he had fully explained for an hour, and "to the satisfaction of the court," the similarity of the writing, it was prejudicial error, as expressing the effect the evidence had produced on the mind of the court.

2. The court charged that the state insisted on the facts detailed by the witnesses, pointing to the guilt of the defendants; that the state had shown that a crime was committed under such circumstances that no eyewitness could be had; that the jury had been shown a motive; that all the defendants were living on the land of one defendant, and connected with him by blood or marriage; that the number of persons engaged in the crime were from six to ten, or more than enough to include all the defendants; and that, while it was impossible to get all the guilty ones, there was no danger of getting too many. *Held*, that the omission to caution the jury to convict neither of the defendants until his guilt had been shown beyond a reasonable doubt rendered the charge erroneous.

Appeal from Superior Court, Bladen County; Peebles, Judge.

E. J. Davis and others were convicted of assault with a deadly weapon, and they appeal. Reversed.

McLean, McLean & McCormick, for appellants. The Attorney General, for the State.

MONTGOMERY, J. The bill of indictment against the defendants for an assault with a deadly weapon upon D. A. Singletary seems to be, from certain parts of the evidence offered by the state, a very mild charge of the real offense committed against the peace of the state. In the nighttime several persons were discovered on or in the road at the prosecutor's premises, and, on his opening his door to learn what he could of the matter, he was fired at by one or two of these persons and wounded so as to lose the sight of one of his eyes. There was evidence tending to connect the defendants with the crime, but, for errors which occurred in the trial below, and which will be presently pointed out, there must be a new trial. The new tri-

al is granted to the defendant Freeman because of certain remarks made by his honor upon the examination of the witness Kerr, and to the other defendants because of error in his instructions to the jury.

It seems that, on the morning next after the wounding of Singletary, there was found stuck up on Singletary's stables an unsigned writing in these words: "Mr. Singletary—You better put up fence as soon as you can, and if have to come after any more hogs, you will find yourself in hell some morning." The evidence had disclosed that Singletary had impounded, under the stock law in force in that section, some hogs of the other defendants than Freeman; that Freeman lived with the Davises, and that Freeman and E. J. Davis on the day before the night of the shooting had demanded of Singletary the release of the hogs, and had gone off saying they did not intend to pay damages; and that on the night of Singletary's injury his hogpen had been torn down, and Davis' hogs carried off. The state insisted on the trial below that the paper writing found posted near the hogpen was in the handwriting of Freeman, and, to prove that fact, it offered as a standard of comparison a certain affidavit which he had made before a registrar of election in his county in order that he might be enrolled as a permanent voter under Acts 1901, p. 756, c. 550. The contention of the state was that, as that affidavit had been found in the office of the clerk of the superior court, witnessed by the registrar of election, it was therefore equivalent to, and of the same dignity as, an affidavit made in the trial of a civil action, and, in law, furnished a sufficient standard of comparison. That insistence of the state raises a most important question of evidence, and, as the state on the next trial may prove the handwriting of Freeman by other means, it is not necessary to decide it here.

Kerr, an expert witness on handwriting, was being examined as a witness for the state, and, after he had been examined and cross-examined at length, was asked by the defendants' counsel to explain to the jury the similarity in the handwriting of these papers. The witness said, "I will not go over to the jury and point this similarity unless his honor instructs me to do so." It is stated in the record that just then his honor, declining to allow the witness to further testify as to this matter, said in the presence and hearing of the jury that "the witness had fully explained for at least an hour to the jury, and the *satisfaction of the court* [italics ours], the similarity of the writing in these papers." No doubt the judge and the witness were tired out with the protracted cross-examination of the witness, but his honor ought not to have expressed himself in the presence of the jury as to the effect the evidence of the witness had produced on his mind. What he said was equivalent to instructing the jury that the witness had prov-

ed the similarity of the writings to his satisfaction. That he had no right to say.

His honor, in giving the contention of the state, and to which the eighteenth exception was filed, was in error. Instead of presenting it as he did, it seems to us that he should have cautioned the jury against the spirit of its conclusion. The language of his honor was as follows: "The state further insists that the circumstances and facts detailed by the witnesses point to the guilt of the defendants; that the state has shown that a crime was committed under such circumstances that no eyewitness could be had; that it has shown you a motive for the crime; that all the defendants were living on the land of E. J. Davis, whose hogs were shut up, and connected with him by blood or marriage; that the number of persons engaged in the crime were from 6 to 10—more than enough to include all the defendants; that only one other man lived in the locality where the tracks were traced; and that, while it was impossible to get all the guilty ones, there is no danger of getting too many." As long as he saw fit to present the argument of the solicitor, he should have cautioned the jury to have convicted neither one of the defendants until his guilt had been shown beyond a reasonable doubt.

New trial.

(136 N. C. 674)

STATE v. BELL et al.

(Supreme Court of North Carolina. Dec. 18, 1904.)

LANDLORD AND TENANT—CROPS—REMOVAL BY TENANT—PROSECUTION—DEFENSES—INDEBTEDNESS OF LANDLORD—NOTICE OF REMOVAL—STARE DECISIS.

1. Code, § 1759, provides that any tenant removing crops without the consent of the lessor, and without giving him five days' notice of such intended removal, and before satisfying all liens, shall be guilty of a misdemeanor. Other portions of the statute declare that the crop shall remain on the land until the landlord and tenant come to a settlement of accounts, and that, if the landlord unjustly refuses to settle, the tenant may sell a part of the crop, by giving five days' notice, and, if a settlement cannot be made, either party may apply to a court having jurisdiction to compel a settlement. *Held* that, on a prosecution for removing crops without having satisfied liens or having given five days' notice of such removal, it is no defense that defendant had been damaged by a failure of the landlord to comply with the contract, and that such damage amounted to more than the rents and advancements.

2. Where the Supreme Court reverses the law as laid down in a prior decision, and defendant in a criminal case may have acted on advice of counsel based on the law as declared in the first opinion, a new trial will be ordered, that the defendant may establish his defense in accordance with the former ruling, if he is entitled to do so, but the new construction put upon the statute will be applied to all future cases.

Douglas, J., dissenting.

Appeal from Superior Court, Lenoir County; Ferguson, Judge.

Josiah Bell and another were convicted of removing crops made by them as tenants,

in violation of Code, § 1759, and they appeal. Affirmed.

Wooten & Wooten and Land & Cowper, for appellants. The Attorney General, for the State.

CONNOR, J. The defendants were indicted for removing and selling tobacco made by them as tenants on the lands of the prosecutor, without having satisfied the liens thereon, or giving five days' notice of such removal and sale, as required by section 1759 of the Code. There was no controversy in regard to the terms of the lease. The defendants admitted the removal and sale of the tobacco. The defense is set forth in the exceptions. From a judgment based upon a verdict of guilty, they appealed.

There was evidence tending to show that before the removal of any part of the crop the prosecutor consented to the sale of several loads of tobacco to get money to save the balance. Thereafter the defendants removed and sold the balance of the crop, and retained the proceeds.

The defendants offered to show that they had sustained damage by reason of the failure of the landlord to comply with the contract; that such damage amounted to more than the rents and advancements. The court, upon objection by the state, excluded the testimony so far as it affected the rents. Defendants excepted. The counsel for defendants insist that the testimony was competent, as settled by this court in *State v. Neal*, 129 N. C. 692, 40 S. E. 205. In that case the defendant, being on trial for the same offense, was permitted to show that he had sustained damage by reason of the failure of the landlord to repair the house on the premises as he had contracted to do; that he contracted for the use of 25 acres, and was permitted to cultivate only 15 acres. It is not easy to distinguish the two cases. It is evident that the majority of the court were impressed with the hardship of the statute construed as contended for by the state. Mr. Justice Douglas, in a concurring opinion, speaks of "the hardship which might result to the tenant" by permitting him to be convicted, when he might be able to show that he did not owe the landlord. The statute is very explicit in prohibiting the removal of any part of the crop until the liens are satisfied, or "before satisfying all liens," unless the tenant shall give five days' notice. The language of the statute would seem to be capable of a construction prohibiting such removal, without regard to the satisfaction of the liens, unless the notice was given. This court has construed it otherwise. *State v. Crowder*, 97 N. C. 432, 1 S. E. 690. While we should always avoid giving to a criminal statute a construction, in case of doubt, which makes its operation harsh or oppressive, we may not disregard the plain expression of the legislative will

because we may think it harsh or even unjust. We do not think that the words used are open to reasonable doubt. The tenant owes the rent or advancements. The landlord has a lien on the crops, the product of the land of one and labor of the other. The statute declares that the crop shall remain on the land, unless otherwise agreed, until the landlord and tenant come to a settlement of the accounts and dealings, and the liens are satisfied. If the landlord will unduly or unjustly refuse to come to a settlement, the tenant may, by giving the five days' notice, sell a part of the crop without subjecting himself to a criminal prosecution. This gives to the landlord a reasonable time to come to a settlement. If they cannot do so, either of them may apply to a court having jurisdiction to compel a settlement. Pending such proceeding the rights of both parties are protected by retention of the crop or a bond for the value. The evident purpose of the Legislature was to prevent litigation. Nothing is more certain to bring about litigation than the course pursued by the defendants. They had not satisfied the liens, and it is evident from the testimony that they knew the law. To satisfy a claim is to pay or discharge it, not to set up some other claim for unliquidated damages. There was not, so far as the testimony shows, any suggestion by the defendants to the landlord that they had any such claim. While we recognize the duty of the court to avoid overruling its decisions, we feel well assured that the language of the statute demands that we concur with his honor's ruling, and overrule our own decision in *Neal's Case*. It is very desirable that the relative rights and duties of landlords and tenants be clearly defined. The statute is plain, and, when it is understood that the court will not encourage experimenting with it, both parties will recognize and respect the rights of each other.

While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this court in *State v. Neal*, supra. If so, to try them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights as acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this court, to order a new trial, with the direction that the testimony offered in this

case, in so far as it is made admissible by the ruling of this court in *State v. Neal*, be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in *Neal's Case*, they are entitled to do so; but the construction now put upon the statute will be applied to all future cases. While, as we have said, we find no authority directly in point, we think this course is sustained by what is said in *Wells on Stare Decisis*, 566. See, also, *Township v. State*, 150 Ind. 168, 49 N. E. 961; 26 A. & E. Encyc. Law, 179; *In re Dunham*, 8 Fed. Cas. 37. There will be a new trial. Let this be certified.

New trial.

DOUGLAS, J. (dissenting). I still adhere to the principles asserted in my concurring opinion in *Neal's Case*, 129 N. C. 692, 40 S. E. 205, as it seems proper that all statutes should, as far as possible, be construed in accordance with natural justice. Section 1759 of the Code provides that "any lessee or cropper, or the assigns of either, or any other person, who shall remove said crop, or any part thereof, from such land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, shall be guilty of a misdemeanor." It will be noticed that the conjunction "and" is used in connecting the three acts constituting the offense, which therefore depends upon the concurrence of all three of the conditions. If consent is obtained, or notice is given, or the liens are paid, there can be no offense, as one of its essential conditions is lacking. The evident purpose of the statute is to secure the payment of all liens; and if such liens are paid its essential object is fully accomplished.

The record states that "the defendants offered to prove that they had suffered damage by reason of the prosecutor not complying with his contract in excess of the advancements and the rents. The court said he would permit the evidence to set off the advancements made by the prosecutor, but exclude its application to set off the rents." I do not clearly see the distinction between rents and advancements. In either aspect, I do not see why a defendant may not be permitted to plead a just indebtedness arising out of the same transaction of renting. This would be a valid set-off or counterclaim in a civil action, and would prevent any recovery by the landlord. Of course, the tenant would act at his own peril, and would be criminally liable if he failed to make good his defense; but it seems to me that he should have the opportunity of presenting it. Whether the landlord was in fact liable in any amount to the defendants in the case at bar is immaterial to the consideration of this question. We must assume he was, as they

were refused the opportunity of proving the fact. It did the defendants no good to permit them to set off their claims against the advancements, if they were held criminally liable for the rents. Landowners are justly entitled to the equal protection of the law; but I do not feel called upon to change the conjunctive "and" in the statute into the disjunctive "or," when it results in putting a man upon the roads for neglecting to pay a debt that he did not owe and removing a crop that was his own.

(126 N. C. 489)

GREEN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Nov. 15, 1904.)

TELEGRAM — NEGLIGENCE — PRESUMPTION —
MENTAL ANGUISH—MOTION TO NON-
SUIT—EFFECT.

1. The fact that a message received by a telegraph company for delivery at a certain street number was not delivered until the day following its receipt, when called for by the sendee, raises a presumption of negligence on the part of the telegraph company.

2. Where a message was received by a telegraph company for delivery at a certain street number, but the name of the sendee was incorrectly recorded by the receiving operator, the telegraph company is not excused from its negligent failure to deliver the message at the street number because the mistake was due to the similarity of sound on the telegraph keys between one of the letters of the sendee's name and one of the letters in the name as incorrectly taken from the wires.

3. Mental anguish caused by the negligence of a telegraph company in failing to deliver a message announcing the arrival of a 16 year old girl alone on a midnight train in a town where she was a stranger constitutes a basis for the recovery of damages in an action by her against the telegraph company, though the anguish consisted merely in annoyance resulting from the failure to have some one meet her at the station.

4. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action admits all the facts alleged in the complaint, construed in the light most favorable to the plaintiff.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by Willie Hall Green, by her next friend, I. E. Green, against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Reversed.

The material facts are thus briefly stated by the defendant: This is the plaintiff's appeal from a judgment sustaining the defendant's demurrer. The complaint states that the plaintiff was a girl of 16, living in Weldon, the daughter of Isaac E. Green. That the defendant telegraph company maintained offices at Weldon and Columbia, and on September 23, 1903, she left Weldon to go to Spartanburg, S. C., via Columbia, and that it was necessary for her to remain over in Columbia during the night. That the agent

¶ 2. See *Telegraphs and Telephones*, vol. 45, Cent. Dig. § 61.

of the defendant company at Weldon was acquainted with the young lady and her father, and the father informed the agent that he greatly desired some one to meet his daughter in Columbia. That, immediately after the train on which the young lady was traveling left Weldon, her father, Dr. Green, delivered the following message to the defendant's agent in Weldon, directed to: "Mrs. Jno. B. Lee, 2010 Main Street, Columbia, S. C.: Willie leaves here on Coast Line train 39 to-day. Meet her. [Signed] I. E. Green." This message was taken in Columbia as addressed to "Mrs. Knoblee, 2010 Main street," and was not delivered until the next morning, when Mrs. John B. Lee inquired for it at the telegraph office at Columbia. The plaintiff, Miss Willie Green, arrived in Columbia about 12 o'clock the same night, and found no one to meet her. She was naturally disturbed and anxious. The conductor put her in charge of the colored matron at the station in Columbia, the matron secured a hack, and after some delay she was driven to the house of her friend Mrs. Lee. That, by reason of this negligence upon the part of the defendant, the plaintiff suffered mental anguish. Upon this the defendant demurred to the complaint, for that it did not state facts sufficient to constitute a cause of action which, under the circumstances set forth, entitled the plaintiff to recover damages for so-called mental anguish, and that the disappointment and annoyance which the plaintiff calls "mental anguish," arising under the circumstances set out in the complaint, is not a legal ground for damages for mental anguish. His honor sustained the demurrer, and the plaintiff appealed.

Day & Bell, Murray Allen, and W. E. Daniel, for appellant. F. H. Busbee & Son and R. C. Strong, for appellee.

DOUGLAS, J. (after stating the facts). The defendant in its brief thus states the question intended to be presented: "This case baldly presents the question, which it has been apparent would soon arise, whether the barriers are to be thrown down, and every disappointment, annoyance, or vexation which may arise from a delay or a misdirected telegram can be the subject of an action for mental anguish. In other words, whether any annoyance, disappointment, vexation, or anxiety on account of a missing friend at the station, or from other cause, can be dignified by the name of 'mental anguish,' and adjudged to rank in the same class with the poignant grief arising from a failure to reach the bedside of a dying wife in time to receive her last adieus." We are fully aware of the importance of the question thus presented, and have given it the careful consideration which it deserves. We do not desire to impose any additional burdens upon telegraph companies or require any unnecessary restrictions, but we cannot

ignore the essential purposes of their creation. A telegraph company is a quasi public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession, and freedom from individual liability, and possesses, also, in addition thereto, the extraordinary privileges which under our Constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation, nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English judge: "A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." This has been expressly held by this court in *Cashion v. Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; *Landle v. Tel. Co.*, 124 N. C. 523, 32 S. E. 886; and *Cogdell v. Tel. Co.*, 135 N. C. 431, 47 S. E. 490.

The demurrer admits all the facts alleged in the complaint, construed in the light most favorable to the plaintiff. It is therefore admitted that the message was received by the defendant, and not delivered until the following day, when called for by the sendee. This of itself raises the presumption of negligence. *Sherrill v. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Hendricks v. Tel. Co.*, 128 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Laudie v. Tel. Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668; *Rosser v. Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Hunter v. Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *Cogdell v. Tel. Co.*, 135 N. C. 431, 47 S. E. 490. Aside from this presumption, we think the facts alleged clearly tend to prove negligence on the part of the defendant. The telegram was addressed to Mrs. Jno. B. Lee, 2010 Main street. The name of the sendee was changed in transmission to Mrs. Knoblee. The defendant urges in excuse for such negligence the similarity between the telegraphic

"J" and "K." This is no legal excuse. *Cogdell v. Tel. Co.*, 135 N. C. 431, 47 S. E. 490. If the defendant adopts a code intrinsically liable to such mistakes, it should exercise the greater care in preventing them. The defendant's agents could at least have inquired at the street address given in the telegram. Such inquiry would doubtless have resulted in ascertaining the identity of the sendee. Such was the result when Mrs. Lee called for the telegram on the following day. The plaintiff alleges that she suffered mental anguish, and this is also admitted by the demurrer. Aside from this, we think the circumstances in which she was placed may well have caused it. A girl 16 years of age finds herself after midnight in a strange city, riding two miles in a carriage with an unknown driver. It is true, she suffered no insult or physical injury; but the question is, what would be the natural effect upon the mind and nervous system of a child of her age? Nature offers no flower more tender or more fair than budding womanhood, and around it every protection will be thrown by the hand of the law. The defendant was informed of the full purpose of the telegram, and the importance of its immediate delivery. It therefore remains only to consider whether, under the admitted facts, the plaintiff is entitled to recover compensatory damages for the mental anguish she may have suffered as the direct result of the defendant's negligence. We see no reason why she cannot, and we find no authority in this state to the contrary.

It is said by the defendant that "it does not require to be pointed out that if the barriers are once thrown down, and any disappointment, annoyance, or unnecessary alarm occasioned by a delayed telegram shall be allowed to be the subject of damages, every barrier which the law has erected in the limitation of actions for damages will be thrown down, and the waters will be out in deluge." We do not think that any such result will follow our decision in this case, but such a possibility should not deter us from giving to the plaintiff the full measure of justice to which she is entitled. The defendant, in its brief, quotes the following extract from the decision of this court in *Chappell v. Ellis*, 123 N. C., on page 263, 31 S. E. 709, 68 Am. St. Rep. 822, which we may here repeat: "But it is urged that the principle of the *Cashion Case*, if carried to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles. * * * We do not feel at liberty to adopt any one principle as the sole guide of our decisions, and to carry it out to extreme and dangerous limits, regardless of other great principles of justice and of law so firmly established by reason

and precedent." As we have already said, we are now considering the question of damages resulting from the breach of a public duty by a quasi public corporation. How far this principle may in the future be extended to other corporations or to other circumstances, we cannot tell; and, in the absence of any matter before us involving its further consideration, we have neither the right nor the wish to limit or extend its application, as a pure matter of legal speculation. As the cases come up, we will decide them as best we may. In the meantime we will try to confine our opinion to the facts of this case, and others identical therewith. We may, however, say that there seems a material difference between an incidental tort by an individual or a private corporation, and the breach by a quasi public corporation of a public duty relating to the essential object of its creation. The exact nature of this difference it is difficult and at present unnecessary to determine.

It is true, no case has been called to our attention in which this court has allowed damages for mental anguish arising from the failure to deliver a telegram, except in cases relating to sickness or death. On the other hand, we are not aware of any case in which this court has drawn any such distinction either in the allowance or disallowance of damages. The nearest approach to any such limitation that the diligence of the learned counsel for the defense, aided by our own research, has been able to find, is *Chappell v. Ellis*, 123 N. C. 259, 31 S. E. 709, 68 Am. St. Rep. 822, in which a poor old woman, against whom a writ of possession had been issued, was thrown out upon the highway. In that case the eviction was lawful, and it was merely the unlawful taking of certain personal property, nearly all of which was soon after returned, that could be considered in the assessment of damages. It is true, this court, in distinguishing that case from *Cashion's Case*, says: "The opinion in *Cashion's Case* was hinged on the solemn fact of death, and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heart string, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig." This language, correctly describing the facts in *Cashion's Case*, was used to more fully and forcibly distinguish it from *Chappell's Case*, and not as a limitation upon the general doctrine. Its purpose and application is apparent from the following language of the court in the same case: "The doctrine of mental suffering or 'mental anguish,' as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance,

contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive, or vindictive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendant, can be allowed only where there is shown, on the part of the defendants, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud. * * * We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter and with but little to eat; but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law." Both before and since that opinion was rendered this court has recognized the doctrine in cases merely of sickness. While one may lead to the other, there is a vast difference between sickness and death, and there seems no reason why principles recognized in the former should not apply to kindred cases of equal strength and importance. While we find no direct decision of the question in any of our cases, we think that their line of reasoning tends to recognize the legal existence of mental suffering apart from sickness and death. This is especially so in *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883; *Morton v. Tel. Co.*, 130 N. C. 299, 41 S. E. 484; *Bright v. Tel. Co.*, 132 N. C. 317, 43 S. E. 841; and *Bryan v. Tel. Co.*, 133 N. C. 603, 45 S. E. 938. In *Cashion v. Tel. Co.*, 123 N. C. 267, 31 S. E. 493, this court quotes as follows from *Shearman & Redfield on Negligence*, § 605: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." This same language is quoted with approval in *Young v. Tel. Co.*, 107 N. C., on page 373, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883.

In neither *Bright's* nor *Cashion's* Case was the plaintiff the sendee of the message, nor was she deprived of the satisfaction of attending the death or burial of the deceased. In both cases she sued on account of the absence of a relative to whom she looked for consolation and assistance. The death of the deceased was the occasion, rather than

the cause, of the anguish for which she recovered. In cases where great stress is laid upon the fact of sickness or death, it is with the view of fixing the defendant with notice of the importance of the message, where it has received no special information, like those cases where near relationship is relied on simply to raise the presumption of suffering. In *Lynne v. Tel. Co.*, 123 N. C. 129, 31 S. E. 350, this court says, on page 133, 123 N. C., page 351, 31 S. E.: "The same contention [that the relation of the parties was not disclosed] was made in that case that the defendant makes in this, and the court say, among other things, 'that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. * * * When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.'" In *Cashion v. Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160 (second appeal), this court says on page 464, 124 N. C., page 747, 32 S. E., 45 L. R. A. 160: "The telegram in question stated that Mr. Cashion had been killed while at work, and, on its face, suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair; that some one the lonely death watch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another."

Another significant fact is the growing tendency of judicial opinion to allow compensatory damages for mental suffering even when disconnected with any physical suffering. This is forcibly illustrated in the case of *Osborne v. Leach*, 135 N. C. 628, 47 S. E. 811, where this court holds that in cases of libel, where the statute forbids punitive damages, actual damages may be allowed for mental suffering alone. This court says on page 633: "This being an action upon a libel per se, the plaintiff has a right to recover compensatory damages. Newell on S. & L. 43; Hale, supra, p. 99. Compensatory damages include all other damages than punitive, thus embracing not only special damages, as direct pecuniary loss, but injury to feelings, mental anguish, and damages to character or reputation. 18 Am. & Eng. Ency. (2d Ed.) 1082 et seq.; Hale, supra, 108, 99. 'Actual damages are synonymous' with 'compensatory damages.' Newell, supra, 839; 18 Am. & Eng. Ency. (2d Ed.) 1081 et seq. Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Ency. (2d Ed.) 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character."

Of course, in cases merely of slander or libel there could be no physical pain except as the reaction of mental suffering. The mere fact that a shock to the feelings which goes directly to the mind, without ever touching the body, may produce such reaction upon the physical system as even to endanger life itself, is *per se* the surest proof of the existence of actual suffering, and the strongest argument for the allowance of compensatory damages. If such suffering actually results directly from the wrongful act of the defendant, it would seem to make but little difference what were the collateral circumstances.

The case at bar was ably and elaborately argued, orally and by brief, on both sides; and, in the end, we find ourselves compelled to decide the question upon the reason of the thing, rather than any weight of decided authority. Of course, we could not look for precedents where the doctrine of mental anguish is not recognized; and, even where it is, the facts of the respective cases generally fall short of direct application. With few exceptions, as in our own state, the element of death or sickness appears directly or indirectly in the case; but, as with us, we find no decision containing any such limitation of the doctrine. The cases most nearly in point are those of *Western Union Tel. Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811, and same plaintiff in error *v. Taylor* (Tex. Civ. App.) 81 S. W. 69. In the latter case, filed April 3, 1904, and reaffirmed by the denial of a rehearing on June 1, 1904, it was held (quoting the headnote) that: "Where a wife telegraphed to her husband to meet her, but, owing to the telegraph company's negligence, the message was not delivered, and she arrived at the railroad station at night, and went to a hotel, where she failed to secure lodging, owing to its crowded condition, and from which, after a delay, she voluntarily went, escorted by a stranger, who treated her with courtesy, in a search for her husband, to a second hotel, where she found him, she was not entitled to damages from the telegraph company for mental suffering accruing from the time she reached the first hotel until she found her husband." We do not very clearly understand the reasoning of this case, nor do we see the force of the apparently arbitrary distinction between the mental suffering incurred between the depot and the first hotel, and that between the first hotel and the second. The latter seems to have been based upon the belief of the appellate court that in fact there was no such suffering. The point pertinent to the case at bar is that the plaintiff was allowed to recover compensatory damages for mental suffering disconnected from any physical pain or attending circumstances of sickness or death.

In *Proctor's Case* the court held (quoting headnote) that: "R. eloped with plaintiff's daughter, aged 15 years, going towards the

county seat to procure license and be married. Plaintiff at once telegraphed the county clerk, stating the girl's age and forbidding the issuance of license; but, through negligent delay in the delivery of the message, it did not reach the clerk until after license had been issued and the parties married. Held, that plaintiff was entitled to recover of the telegraph company damages for the loss of his daughter's services up to the age of 18, and also for the mental distress involved." In that case the court, on page 304, 6 Tex. Civ. App., page 813, 25 S. W., says: "We think, also, that he was entitled to recover for the mental distress involved. We cannot distinguish this case, in principle from the case of *Stuart v. Telegraph Co.*, 86 Tex. 584, 18 S. W. 351, 59 Am. Rep. 623 (relating to sickness and death), and that line of decisions. The solicitude of a parent for the welfare of an only daughter of tender years, committed to his care both by nature and law, is certainly not less substantial than the affection of one brother for another."

Although not a telegraph case, we are much impressed with the reasoning of the court in *Missouri P. Ry. Co. v. Kaiser* (Tex. Sup.) 18 S. W. 306, where a girl 16 years of age, accompanied only by a girl companion, was ejected from the train at a small town where she was a stranger, and where she remained an hour before she was discovered by friends. The court therein says: "It is contended that the court erred in refusing a special charge asked by the defendant to the effect that plaintiff could not recover for mental suffering arising from any supposed or anticipated danger, because there was no aggravation attending her leaving the train, nor in the action of the conductor, and, such being the case, she could only recover for inconvenience, loss of time, labor, and expense of reaching her destination. We do not think that this charge should have been given. We do not think that the mental condition of the plaintiff can properly be considered as arising 'from a supposed or anticipated danger.' The circumstances of two inexperienced girls, unaccustomed to traveling, suddenly ejected from a train at a small railroad station, where they were entire strangers, and contrary to provisions made for their safety by their careful parents, were well calculated to arouse in their minds feelings of insecurity and danger that would not have been properly characterized by referring to them in a charge as merely 'supposed or anticipated.'" This language singularly fits the case at bar.

In the recent case of *Gillespie v. Brooklyn Heights R. Co.*, 70 N. E. 857, decided April 26, 1904, the Court of Appeals of New York, in an able and learned opinion, held that a passenger on a street car can recover from the company for injuries to her feelings caused by the insulting language of the conductor; and that such damages are compensa-

tory, and not exemplary. The opinion quotes with approval the following language from Thompson on Negligence, § 3288: "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary, damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not, and generally does not, depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice." Further on in the opinion the court uses the following language: "Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake." The court also says: "The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of the contract." We have quoted from this opinion because it unequivocally asserts the principle that a plaintiff can recover in tort compensatory damages for purely mental suffering, without any physical pain whatever, resulting from the breach of public duty by a common carrier. Telegraph and railroad companies are in their nature essentially similar, as being quasi public corporations organized for a public purpose, and fixed with a public use. For the breach of a public duty they are both liable in tort, and we see no reason why similar injuries arising from such breach of duty should not be governed by similar principles. That it is well settled in railroad cases is abundantly shown by the authorities cited in the last-named case, and we think that those authorities are applicable by analogy to the case at bar. For this reason, we have not deemed it necessary to cite the decisions allowing compensatory damages for mental suffering, without any physical pain, in such cases as seduction, breach of promise, slander and libel, malicious arrest and prosecution, false imprisonment, criminal conversation, and kissing a female against her will.

The defendant apparently relies upon the case of *McAllen v. Telegraph Co.*, 70 Tex. 243, 7 S. W. 715, where the plaintiff sent a telegram to his father, who lived 75 miles from a railroad, to send the family carriage to take him home. The message was not delivered, and the carriage was not sent, whereupon the plaintiff took up the idea that "some dreadful calamity had befallen his father." He thereupon took passage in a "jerkey" and on a buckboard, and subse-

quently sued the telegraph company for mental anguish as well as physical suffering. The court held that neither the imaginary death of his father, nor the bouncing of the buckboard, was within the contemplation of the parties. That case has no application to the one at bar, coming clearly within the rule laid down in *Bowers v. Tel. Co.*, 135 N. C. 504, 47 S. E. 597.

We are struck with the phrase so often used—notably by Joyce on Electric Law—"Telegrams as to sickness, death, or the like." The meaning of the last three words is not defined, but there is an unwelcome suggestion, upon which the mind refuses to dwell, of what might happen to a defenseless girl in the deserted streets of a city at midnight, that may well be likened to death itself.

In this connection we have endeavored to ascertain the latest decisions of the courts of the different states upon this subject. When we remember that this doctrine of mental anguish in telegraph cases is of recent origin, having theretofore been deemed contrary to the principles of the common law, and has made constant progress in opposition to the preconceived ideas of courts and jurists, it seems that it must possess much inherent strength and merit. This is especially evident from the actions of certain courts, some of them of the highest reputation, which, while denying the doctrine in telegraph cases that damages for mental suffering may be recovered in the absence of physical pain or injury, allow it in cases of a kindred nature, such, for instance, as insulting or humiliating a passenger. The following is the present status of the doctrine in the different states, as far as we have been able to ascertain:

Its history in the state of Texas, where it was first specifically announced, may be briefly stated as follows: The first case in that court is the celebrated one of *So Relle v. Telegraph Company*, 55 Tex. 308, 40 Am. Rep. 805. There it was held that there could be a recovery in such cases. The next cases were *Railway Company v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, and *Id.*, 59 Tex. 563, 46 Am. Rep. 278. These cases were construed by the profession as in some respects modifying the doctrine in the first case. The question again arose in *Stuart v. Western Union Telegraph Company*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623, and the rule announced in *So Relle's Case* was followed. That case was very thoroughly considered, and the decision then made has settled the law in that state upon the main question. Its reports show some 50 cases since in which the doctrine has been followed without question.

In Tennessee the doctrine was first announced in *Wadsworth v. Telegraph Company*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 884, and has been reaffirmed in *Telegraph Company v. Mellon*, 96 Tenn. 72, 33 S. W. 725, and *Gray v. Telegraph Company*, 108 Tenn.

39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706.

In Alabama the doctrine was expressly recognized in *Telegraph Company v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, but seems to have been somewhat modified in the more recent case of *Telegraph Company v. Crumpton*, 138 Ala. 632, 36 South. 517, which appears to be the latest decision upon the subject.

In Kentucky the leading case in which such damages are allowed is *Chapman v. Telegraph Company*, 90 Ky. 265, 13 S. W. 880. The doctrine is affirmed in the later cases of *Telegraph Company v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366, and *Telegraph Company v. Fisher*, 107 Ky. 513, 54 S. W. 830.

In Iowa damages for mental anguish unaccompanied by physical pain are allowed. The leading case is *Mentzer v. Telegraph Company*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, a carefully considered case, which has been widely cited. This case stood as the only expression of that court upon the subject until the recent case of *Cowan v. Telegraph Company*, 98 N. W. 281, 64 L. R. A. 545.

In Louisiana such damages are allowed. The leading and most recent case is *Graham v. Telegraph Company*, 34 South. 91.

In South Carolina they are also allowed. At first the doctrine was denied in *Lewis v. Telegraph Company*, 57 S. C. 325, 35 S. E. 556. This case was followed by an act of the Legislature (23 St. at Large, 748; Civ. Code 1902, vol. 1, § 2223) permitting damages in such cases. This statute was held to be constitutional in *Simmons v. Telegraph Company*, 63 S. C. 429, 41 S. E. 521, 57 L. R. A. 607, which has subsequently been uniformly followed.

In Nevada the doctrine has been recently adopted in the case of *Barnes v. Telegraph Company*, 76 Pac. 931, 65 L. R. A. 666, in an able and learned opinion by Fitzgerald, J.

In Washington there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in *Davis v. Tacoma Ry. & Power Company*, 35 Wash. 203, 77 Pac. 209, in which telegraph cases are cited with approval.

The doctrine is denied in the following states, as is shown by the most recent cases:

Florida: *Telegraph Company v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810, apparently the only case upon the subject in that state.

Georgia: *Chapman v. Telegraph Company*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Giddens v. Telegraph Company*, 111 Ga. 824, 35 S. E. 688.

Illinois: *Telegraph Company v. Haltom*, 71 Ill. App. 63. The question does not appear to have come before the Supreme Court of that state.

Indiana: *Telegraph Company v. Ferguson*,

157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

Kansas: *West v. Telegraph Company*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530, appears to be the latest telegraph case in that state involving the question; but that case has been reaffirmed in *Railway Company v. Dalton*, 65 Kan. 661, 70 Pac. 645.

Minnesota: *Francis v. Telegraph Company*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, which is the only case in that state.

Mississippi: *Telegraph Company v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300. This case has apparently been doubted in one or two subsequent cases, which, however, are not directly in point.

Ohio: *Morton v. Telegraph Company*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648, seems to be the only case in that state involving the question.

West Virginia: *Davis v. Telegraph Company*, 46 W. Va. 48, 32 S. E. 1026.

Wisconsin: *Summerfield v. Telegraph Company*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17.

Virginia: *Connelly v. Telegraph Company*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919. In this state a statute was passed upon the subject, which apparently failed of its purpose.

In the following states there have been no decisions in telegraph cases upon the question, so far as we have been able to ascertain: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

As the primary doctrine of mental anguish in telegraph cases has been too long and firmly settled by this court to be now called in question, if decided cases stand for aught, and as we feel impelled by both reason and authority to apply these principles to the case at bar, the judgment of the court below is reversed, and the demurrer overruled.

Reversed.

CONNOR, J., concurs in the result.

(136 N. C. 506)

GREEN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Nov. 15, 1904.)

TELEGRAMS—FAILURE TO DELIVER—MENTAL SUFFERING.

1. Plaintiff, who sent a telegram announcing that his young daughter would arrive at a certain place during the night, and requesting the addressee to meet her, is entitled to recover for mental suffering because of the negligent fail-

ure to deliver the telegram, though he would have had no such suffering but for the fact that the company informed him next morning that the telegram was not delivered, where, if it had promptly informed him of the nondelivery, he could have sent another telegram in time for the addressee to meet his daughter.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by I. E. Green against the Western Union Telegraph Company. From a judgment for plaintiff for 50 cents and costs, plaintiff appeals, because the court adjudged on demurrer that the complaint did not entitle him to recover for mental anguish. Reversed.

Day & Bell, Murray Allen, and W. E. Daniel, for appellant. F. H. Busbee & Son and R. C. Strong, for appellee.

DOUGLAS, J. This case is the correlative of that of Willie H. Green against the same defendant, which we have fully discussed and decided. 49 S. E. 165. That discussion, settling the underlying principles in this case, it is unnecessary to repeat. The transaction was the same, and the negligent failure of the defendant to deliver the telegram was as much a breach of public duty towards the father as it was towards the daughter. The injury being the same, it would follow that the right of recovery would be equal, provided the mental suffering complained of was the direct and natural result of the defendant's wrong. The disturbing element in the case at bar, which we frankly confess gave us some trouble in the beginning, is the fact that the plaintiff would apparently have suffered no mental anxiety, had he not been informed by the defendant on the following day that the message had not been delivered. The defendant claims that it was its duty, under the repeated decisions of this court, to inform the plaintiff of the nondelivery of the message, and that it should not be held liable for damages resulting from the performance of a legal duty. At first blush, this seems a plausible defense, but it will not stand the test of investigation when applied to the facts of this case. The rule as laid down in *Hendricks v. Tel. Co.*, 126 N. C. 304, 311, 35 S. E. 543, 78 Am. St. Rep. 658, is as follows: "We think that it is the duty of the company, in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence per se, it is clearly evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect." Here the spirit as well as the letter of the rule is clearly set forth. The

company must promptly notify the sender of the nondelivery of the message, in order that he may take such steps as may be within his power to avoid or mitigate the effects of the company's negligence. The contention of the defendant comes neither within the letter nor spirit of the rule. The message was sent shortly after 12 o'clock midday on the 23d, and the sender was not notified of its nondelivery until the next morning. The company could have found out within two hours whether the message could be delivered, if, indeed, it ever made any effort to deliver it, and could have notified the sender of its nondelivery by 2 or 3 o'clock in the afternoon. He could then have sent other telegrams to the same party, or to different parties, or even to his daughter on the train. But when the defendant not only failed to promptly deliver the telegram, but further negligently failed to notify the sender until the following morning, seven or eight hours after the arrival of the train in Columbia, it deprived the plaintiff of any opportunity of making any further provision for the safety and comfort of his daughter. This purely colorable compliance with the rule was of no benefit to the plaintiff, and should afford no protection to the defendant. We do not mean to say that even if the defendant had complied with the rule in good faith, by promptly notifying the sender of the nondelivery of the message, it would have been relieved from all liability. Here the cause of action was the negligent failure of the company to deliver the message, which fixed its liability. Any further action on its part would merely go in mitigation of damages. If in fact the subsequent act of the defendant prevents the occurrence of any substantial damage, it might diminish the plaintiff's legal claim to nominal damages; but the effect is the reverse in the case at bar. In any event, he would be entitled to nominal damages.

The defendant earnestly contends that the plaintiff ought not to recover, as his suffering was purely imaginative, and relies on the case of *McAllen v. Tel. Co.*, 70 Tex. 243, 7 S. W. 715. We fail to see the pertinency of the citation. As the case before us stands on demurrer, we have no hesitation in saying, for the purposes of its present decision, that the mental suffering of the plaintiff was the direct result of the negligence of the defendant. To what degree he suffered, and whether a man of reasonable firmness should have suffered at all under such circumstances, are questions for the jury. Of course, upon the trial of the case the evidence may not sustain the plaintiff's contention; but, taking the allegations of the complaint as admitted by the demurrer, we must hold that they present facts sufficient to constitute a cause of action.

The demurrer should have been overruled in the court below, and its judgment is therefore reversed.

CONNOR, J. (concurring). I concur in the result, but do not concur in the reasons assigned by the majority of the court. The plaintiff had a cause of action against the defendant company for negligently failing to send and deliver the message. If the facts are found upon the trial as alleged, he is entitled to punitive damages. The complaint sets out a case of gross and inexcusable negligence. I prefer not to discuss or express any opinion, in the present condition of the case, upon the other questions decided by the court. I do not think that the tender of the amount paid for the telegram defeated the cause of action. The plaintiff was entitled to go to the jury on the question of damages.

(137 N. C. 224)

GOODWIN v. CLAYTOR et al.

(Supreme Court of North Carolina. Dec 13, 1904.)

CORPORATIONS — FOREIGN CORPORATION AS GARNISHEE—JURISDICTION — EXEMPTIONS — NONRESIDENT PLAINTIFF AND DEFENDANT—EXEMPTIONS FROM GARNISHMENT.

1. Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum.

2. Where a corporation organized in New Jersey, but having no property in that state—the bulk of its property and its principal place of business being in North Carolina—was summoned in North Carolina as garnishee in an action between two residents of Virginia, the exemption laws of Virginia were not applicable.

3. Code, § 364, provides that when the officer shall serve an attachment on any person supposed to be indebted to, or have any effects of, defendant in attachment, he shall summon such person as garnishee, and that it shall be lawful to enter up judgment and award execution for plaintiff against the garnishee for all money due to defendant, and for all effects and estates of any kind belonging to him in the possession or custody of the garnishee. *Held*, that where service of summons was had by publication on a nonresident of the state, and a debt due the defendant was garnished, plaintiff did not lose any lien on the debt by taking a judgment against the defendant and the garnishee; the judgment against the garnishee appearing warranted by statute, and the one against defendant being void as a personal judgment entered without jurisdiction.

4. In garnishment proceedings against a nonresident defendant, service being had by publication, no jurisdiction is acquired to support a personal judgment against the defendant.

5. Code, § 364, provides that, when an attachment shall be served on any garnishee, it shall be lawful to enter up judgment against him for all sums of money due to the defendant from him, and for all estates of any kind belonging to defendant in his possession or custody, or so much as shall be sufficient to satisfy the debt, and that all goods in the hands of the garnishee shall be liable to satisfy the plaintiff's judgment. *Held*, that the statute clearly indicates the intention that any money due by the garnishee, or goods in his hands, belonging to the debtor, at the time of appearance and answer, shall be applied to the satisfaction of the debt, and a judgment against the garnishee was not erroneous because it included a part of the debt not due at the time the garnishee was summoned to answer.

6. A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover.

7. Code, § 194, provides that an action against a foreign corporation may be brought by a nonresident plaintiff when the cause of action shall have arisen or the subject of the action shall be situated within the state. A corporation organized in New Jersey had no property there, but the bulk of its property and its place of business were situated in North Carolina. The terms of a contract between such corporation and one of its traveling salesmen had been agreed on in North Carolina, and, while the services were performed in Virginia, all checks sent for his salary or wages were drawn at and sent from a city of North Carolina. *Held*, that the courts of North Carolina had jurisdiction to proceed against the corporation in garnishment proceedings in an action brought in the state against the salesman; the cause of action against it and in favor of the salesman having arisen in North Carolina, and the subject of the action being situated there.

8. Code, § 493, provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. *Held*, that the exemption protects such earnings from seizure in garnishment.

9. Code, § 493, exempting certain earnings of a debtor from execution, inures to the benefit of nonresidents as well as residents.

Appeal from Superior Court, Forsyth County; McNeill, Judge

Action by G. O. Goodwin against A. B. Claytor; R. J. Reynolds Tobacco Company, garnishee. From a judgment of the superior court affirming a judgment in favor of plaintiff, the defendant and the garnishee appeal. Reversed.

This action was heard in the superior court of Forsyth county at spring term, 1904, by McNeill, J., upon a case agreed as follows:

The action was commenced before a justice of the peace by Goodwin, a resident of the state of Virginia, against Claytor, also a resident of the state of Virginia, for the recovery of \$109.87, with interest on \$96.01 from January 14, 1903, due by judgment. The indebtedness of Claytor to Goodwin is admitted. Service of summons was duly had by publication, and by garnishment of a debt due from the R. J. Reynolds Tobacco Company to Claytor. Claytor is an employé of the R. J. Reynolds Tobacco Company in the capacity of traveling salesman, and the money which was attached in the hands of the R. J. Reynolds Tobacco Company was the earnings of Claytor for his personal services; and said earnings accrued within 60 days next preceding the institution of this action, service of garnishment, filing of answer, and the order of the justice. These earnings were used for the support of a family dependent upon him. It is admitted that the R. J. Reynolds Tobacco Company is a corporation duly chartered and created under and by virtue of the laws of the state of New Jersey, and is engaged in the manufacture of tobacco, with its principal place of business and bulk of its property in Winston, N. C.; it hav-

ing no property in New Jersey, save that such office as is required by the laws of New Jersey is located there. The said company has complied with the laws of North Carolina in reference to foreign corporations of the nature and character of this company. The contract between Claytor and the company was signed by Claytor in Virginia, and returned to Winston by mail. The preliminary arrangements, however, and the principle involved in the contract, were agreed upon at the office of the company in Winston. The salary of Claytor is usually paid him by check upon a bank in New York, which is sent to him by mail in Virginia, but occasionally a check is drawn on a bank in Winston and mailed to him in Virginia. These checks are sent from the office of the company in Winston. The contract between the company and Claytor does not fix where or how his salary shall be paid. All services performed and done under and by virtue of this contract are performed and done in the states of Virginia and West Virginia, and no part of said work is done in North Carolina. At the date of the service of the writ of garnishment on the company, it was indebted to Claytor by reason of the contract in the sum of \$16.55 for salary and \$17.58 expense money, and likewise, since the service of the writ of garnishment, has become indebted to Claytor up to the date of filing the answer in the sum of \$86 for salary, and \$—— for expense money; the expense money being advanced by Claytor, and the company reimbursing him for the same upon receiving statement thereof.

The laws of Virginia upon the question of exemptions are as follows:

Section 3630 of the Code of 1887 [Code 1904, p. 1935]: "Every householder residing in this state shall be entitled to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for any debt or liability on contract, his personal and real estate, or either, to be selected by him, including money and debts due him, to the value of not exceeding \$2,000."

Section 3652 [Code 1904, p. 1949]: "Wages owing to a laboring man being a householder, not exceeding \$50 per month, shall also be exempt from distress, liability or garnishment."

Section 3656 [Code 1904, p. 1952]: "An injunction may be awarded to enjoin the sale of any property exempt under the provisions of this property, and to prevent the wages exempted by section 3652 from being garnished or otherwise collected by an execution creditor."

It is admitted that Claytor is a householder, or head of a family, within the meaning of the exemption law of the state of Virginia, and it is likewise admitted that he has never had allotted to him any exemption under and by virtue of the laws of that state.

This agreed statement of facts is made

and signed without prejudice to any rights of either of the interested parties to make any motion or enter any special appearance as, in its or his judgment, may be deemed advisable.

The court, upon the case agreed, rendered judgment in favor of the plaintiff and against both defendant and garnishee for the full amount of his debt and the costs. Defendant and the garnishee excepted and appealed.

Glenn, Manly & Hendren, for appellants.
A. H. Eller, for appellee.

WALKER, J. (after stating the facts). The counsel of the defendant and of the garnishee, in their able and exhaustive brief, rely on several grounds to defeat the plaintiff's recovery. For convenience, we will change somewhat the order in which they are stated in the brief. It is contended: (1) That the debt-garnished is exempt by the laws of Virginia from garnishment. (2) That, if the debt was subject to garnishment at all, any lien acquired by the service of the writ was waived and the garnishee released by taking a general and personal judgment against the defendant and the garnishee, instead of taking an order condemning the debt to the payment of the plaintiff's claim. (3) That the judgment is erroneous, as it condemned a debt due after the service of the writ. (4) That the court was without jurisdiction to proceed against the garnishee for the purpose of condemning the debt due by him, because it is necessary to the possession and rightful exercise of such jurisdiction that three things should occur: (a) The corporation who is the garnishee in this case must have such a residence and agency within the state as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this state, for the recovery of the debt; (c) it must appear that the situs of the debt is in this state. (5) And lastly, they insist that the earnings of a debtor are exempted from condemnation by the laws of this state. We will consider these contentions in the order thus presented.

The right of exemption under the laws of Virginia cannot be enforced here. It is well settled that exemption laws have no extra-territorial effect. They are not, in respect to the question now under discussion, a part of the contract, but relate only to the remedy, and the right to an exemption is therefore subject to the law of the forum. Rood on Garnishment, § 100; Railroad v. Sturn, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; Sexton v. Ins. Co., 132 N. C. 3, 43 S. E. 479. But there is another decisive answer to this claim of exemption. We have concluded, as will appear hereafter, that the domicile of the corporation, the Reynolds Tobacco Company, is, for the purposes of this case, in this state, and it nowhere appears that it

has any domicile or even an agency in the state of Virginia. Indeed, the case shows that, while it was created a corporation in the state of New Jersey, it has no property in that state, but the bulk of its property and its principal place of business are here. For this reason, it could not be sued by the defendant Claytor in the state of Virginia for the debt garnished in this action, and Claytor therefore could not avail himself of the exemption laws of that state. It is argued that, as the plaintiff and the defendant Claytor are residents of Virginia, if Claytor is not allowed his exemption under the laws of that state the plaintiff will be enabled thereby to evade or "shove by" the law of the domicile of both of them, and set it at defiance. How can this be, if the plaintiff cannot, by the process of the courts of that state, reach and lay hold of the res, which is the debt due by the tobacco company? An exemption, it would seem, can be allowed only in property actually situated in the state where the claim of exemption is asserted, and where the property in which it is claimed is subject to the jurisdiction and process of its courts. As we will presently show, the tobacco company had no domicile and could not be served with process there; and, besides, as will also appear hereafter, the situs of the debt, if any is required, was here. The argument predicated upon the exemption of the particular debt in Virginia must therefore fail, as no exemption exists.

We do not think that, if the plaintiff acquired any lien on the debt due to the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the garnishee seems to be expressly warranted and contemplated by the statute (Code, § 364), and that against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him, except in so far as it could by its process levy upon or seize his property; and in this respect the suit is to all intents and purposes in the nature of a proceeding in rem, and not of one in personam. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198; *Fisher v. Ins. Co.* (at this term) 48 S. E. 667; *Insurance Co. v. Stratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. Nor do we think the judgment was erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. Code, § 364, provides: "When an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee for all sums of money due to the defendant from him, and for effects and estates of any kind

belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of the garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment." The language thus employed clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor, at the time of appearance and answer, shall be applied in satisfaction of the debt. 1 Am. & Eng. Enc. of Law (1st Ed.) pp. 1150, 1151, 1165. It does not appear in this case how or when the salary was to be paid. It is admitted, however, that an amount more than sufficient to pay the plaintiff's claim was due at the time of filing the answer, and judgment was rendered only for the amount of the defendant's indebtedness to the plaintiff.

We come now to the consideration of the defendant's fourth exception, which involves important questions not at all free from difficulty. For the purpose of determining whether any one of the defendant's contentions under the fourth exception is well founded, we may admit the general rule that a garnishment is, in effect, a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee, to recover the debt due to the plaintiff's debtor, and apply it to the satisfaction of the plaintiff's demand. It would appear to be a necessary corollary from the proposition thus stated that the plaintiff in the garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and can enforce no claim against the garnishee which the debtor himself, if suing, would not be entitled to recover. *Shinn*, § 487; *Myer v. Ins. Co.*, 40 Md. 595; *Brauser v. Ins. Co.*, 21 Wis. 509. The garnishee can be placed in no worse position by reason of the garnishment than he occupied as a debtor to the defendant, nor subjected to any greater liability. This is a just and reasonable doctrine, but it does not by any means sustain the objections of the defendant. It seems to be conceded that, if the creditor of the garnishee can sue the latter in this state, then the plaintiff can proceed here against the garnishee. That the garnishee, the tobacco company, although a corporation having its domicile of origin in New Jersey, was amenable to process such as issued in this case, is too well settled to be now an open question. We are speaking now of the service of process, and not of jurisdiction. It is found as a fact that the company has complied with the laws of this state concerning foreign corporations, which means either that it had an agent in this state upon whom process could be served under the general

law in all actions against it, or that it had complied with the provision of chapter 5, p. 66, Acts 1901. As the tobacco company transacted business here by the favor or comity of this state, it was subject to the state's laws, and to all of its reasonable rules and regulations regarding the service of process; and any judgment of a state court, having jurisdiction of the cause or of the subject of the action, is binding upon the company, at least in this state, the same as if it were a domestic corporation or an individual. The subject is fully discussed in *Fisher v. Ins. Co.* (decided at this term) 48 S. E. 667. See, also, *Railroad v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Railroad v. Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Shields v. Ins. Co.*, 119 N. C. 380, 25 S. E. 951. While the company cannot be treated as a domestic corporation or as a distinct entity in this state, for the purpose of determining the jurisdiction of the federal courts, it may be so regarded in respect to its liability to be sued here, and the jurisdiction of our courts over it, which extends to suits not only by residents of this state, but to those by residents of other states, who are equally entitled to be admitted to our courts to prosecute actions for the protection of their rights and the recovery of their property, in the absence of any law forbidding the same. The state may, it is true, exclude nonresidents from our courts, if it sees fit to do so, without infringing the Constitution of the United States, which protects only citizens of a state against such discrimination by another state; but we do not think the principal defendant, who is the debtor of the plaintiff, has been denied the right to sue his debtor, the garnishee, in our courts, by section 194 of the Code. It having been settled that a foreign corporation exercising its franchises in this state may be subjected to the process of garnishment when it holds property or credits of the debtor for which the latter can sue in our courts, and that the plaintiff in attachment, as against the garnishee, is subrogated to the rights in that respect of the debtor, and can recover only by the same right and to the same extent as the debtor could recover if he were suing the garnishee, his debtor (*Myer v. Ins. Co.*, supra), it must follow that the plaintiff may maintain his action, and the garnishment proceedings as ancillary to it, unless he is precluded from doing so by section 194. That section provides that an action may be brought against a foreign corporation by a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this state.

It appears in this case that the terms of the contract between Claytor and the tobacco company were agreed upon in this state, and, while the services were performed by Claytor in Virginia, all checks for his sal-

ary or wages were drawn at and sent from Winston, in this state; and it further appears that the tobacco company has no property in New Jersey, which by courtesy may be called its domicile of origin, and that the bulk of its property is in this state, which is actually its domicile by adoption. What a curious result would follow if we should hold that Claytor cannot sue the company in this state! We will force him to seek his debtor in New Jersey, but he will find no property there to satisfy his debt; and there is no good reason why he should be required to resort to the courts of any other state than New Jersey, where there may happen to be some of the property of his debtor, but where the debtor has no domicile of any kind, and where the same law may exist as we have here; nor should he be required to first obtain judgment in New Jersey, and then come here to sue upon it. A construction of our statute, with reference to the special facts of this case, which would produce such an anomaly, by requiring him to pursue any one of the courses indicated, should not be accepted as the true one unless no other is admissible. The transactions out of which the cause of action of Claytor against the company arose occurred in this state, and the debt due to him was as much payable here as it was in Virginia. For some purposes it may be important to determine precisely where a debt is payable or a contract is to be performed, but it is a well-established general rule that "all debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons, Cont. (8th Ed.) 702. The contract between Claytor and the tobacco company contained no "special limitation or provision in respect to payment," and the debt growing out of it, if not, by reason of the special circumstances of its creation, payable here (*Perry v. Transfer Co.* [Com. Pl.] 19 N. Y. Supp. 239), was payable generally, and could have been sued on by Claytor in this state, and therefore was attachable here. "This is the principle and effect of the best-considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." *Railroad v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; *Beale on Foreign Corp.* § 284. Considering the special facts of this case, we find that the tobacco company obtained a charter in New Jersey for the avowed purpose of establishing its principal office and transacting its business in this state. It was born, it is true, in New Jersey, but it lives, moves, and has its being in this state. It is nominally a corporation of the other state, where it was originally created, but in reality has

its home, its domicile, here. There is no valid or practical reason why this case should not be held to come substantially within the principle of *Sexton v. Insurance Co.*, supra, and *Boyd v. Insurance Co.*, 111 N. C. 372, 16 S. E. 389; and, if that is the correct view, the tobacco company cannot certainly be prejudiced in the least when it is required to pay its debts where it conducts its business and has all or the larger part of its assets. On the contrary, it will be to its advantage if it is required to pay where it has its assets, rather than at the domicile of its origin, where it has none, and where it performs none of its corporate functions. This case is clearly distinguishable from *Balk v. Harris*, 124 N. C. 468, 32 S. E. 799, 45 L. R. A. 257, 70 Am. St. Rep. 606, and *Strause v. Ins. Co.*, 126 N. C. 223, 35 S. E. 471, 48 L. R. A. 452. The facts of this case and of those two cases are wholly different. It has been said that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty (*Bank v. Earle*, 13 Pet. 588, 10 L. Ed. 274); but this dictum has been held to be nothing but a rhetorical statement of the perfectly obvious principle that a corporation, wherever it goes, is subject to the law of the state where it was created, and cannot rid itself of the control of that state, nor can it disregard the restrictions of its charter, which embodies the limitations of its legal existence and its corporate powers. It may, though, acquire a domicile or a residence in another state, and be subject to its laws to the same extent as if it had been fully domesticated there. *Murfee on For. Corp.* §§ 8, 9.

Our conclusion on this branch of the case is that the tobacco company was amenable to the process of our courts, both mesne and final; that the cause of action against it and in favor of Olaytor arose in this state (*Steele v. Com'rs*, 70 N. C. 137); and that the subject of the action is situated here; that is, the debt due from the tobacco company to the defendant—the res, as it is called (*Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198)—which has been brought within the jurisdiction of the court by service of the garnishment.

It was necessary to decide the questions we have discussed before considering the defendant's last ground of objection, because a decision for him on any one of those questions would have settled the case entirely in his favor.

The defendant further insists that his earnings for personal services at any time within sixty days next preceding the garnishment were exempt under section 493 of the Code. He admits that this exemption is allowed by that section in supplementary proceedings, but his counsel argue that it is intended by the law that such earnings shall in no way be condemned or applied to the payment of debts. The humane and benef-

icent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction, so as to embrace all persons coming fairly within their scope. *Black, Interp. of Laws*, 811. This court has uniformly held that, where property is exempted from seizure under final process, it is similarly exempt from levy or seizure under any mesne process issued for the purpose of placing it in the custody of the court, and thus preserving it until it can finally be applied to the satisfaction of the plaintiff's debt. *Chemical Co. v. Sloan* (at this term) 48 S. E. 577. Supplementary proceedings are in the nature of final process, when viewed either as a substitute for a creditors' bill to enforce the payment of a judgment at law, or as a proceeding having the essential qualities of an equitable *fi. fa.*; and, if the defendant comes within the general description of the persons designated in the act, there is no good reason for denying him the exemption under the garnishment. The homestead and personal property exemptions can be claimed only by residents of this state. But this is so by reason of the express words of our Constitution and laws. There is no such limitation in section 493, and we are unable to see why we should restrict its meaning so as to exclude the defendant from the benefit of its wise provisions, and thereby defeat the evident policy and benevolent purpose of the Legislature. We prefer to give the section a liberal construction, which will be apt to do justice, and at the same time carry out the legislative intent, and which, too, will not be contrary to the letter of the law.

The defendant should be allowed his exemption out of his earnings in accordance with the provisions of section 493, and to this extent there was error in the judgment upon the case agreed.

We have discussed the case somewhat at length, as it involves questions of great and increasing importance, and, it may be, of far-reaching consequences. It was unusually well presented on both sides by counsel in their briefs.

Error.

(126 N. C. 633)

STATE v. VAN PELT et al.

(Supreme Court of North Carolina. Dec. 18, 1904.)

CRIMINAL CONSPIRACY—SUFFICIENCY OF INDICTMENT—BILL OF PARTICULARS.

1. An indictment against five carpenters alleged that defendants conspired to injure the prosecutor in his business as dealer in lumber; that, pursuant to such conspiracy, three of defendants went to prosecutor's place of business, and notified him that he could not be considered in sympathy with organized labor unless he employed union men; that he would not be considered in sympathy with organized labor while he kept employed nonunion men, notwith-

standing the fact that he had employed and contracted with nonunion men for as much as a year in advance; that, they being informed by the prosecutor that he would not discharge nonunion men, and would not agree to employ only union men, defendants published in a local newspaper that at a meeting of the carpenters and joiners to consider the attitude of the prosecutor toward organized labor he was declared unfair, and so listed, and that no union carpenter would work any material from his shop after a date specified; that the purpose of publishing said notice was to induce all persons who would otherwise have purchased lumber or materials from said prosecutor to refrain from so doing for fear of the ill will of defendants, and that they would be subject to delay and inconvenience by reason of the refusal of defendants to work the material so purchased of the prosecutor; that thereby defendants intended to prevent persons desiring to purchase lumber from purchasing the same from the prosecutor, with intent to injure and destroy his business. Held insufficient to state a criminal conspiracy.

2. The bill of particulars in a criminal prosecution is not a part of the indictment, and does not prevent quashing the indictment if the indictment in itself is insufficient.

Appeal from Superior Court, Rowan County; O. H. Allen, Judge.

An indictment for criminal conspiracy was filed against A. Van Pelt and others. From a judgment sustaining a demurrer to the indictment and granting a motion to quash the same, the state appeals. Affirmed.

This was an indictment against the defendants in the following words, to wit: "The jurors for the state upon their oath present that A. Van Pelt, W. T. R. Jenkins, C. A. Shuman, S. W. Henry, and S. A. Shuman, being persons of evil minds and dispositions, together with divers other evil-disposed persons, whose names are to the jurors unknown, wickedly devising and intending to injure and destroy one C. A. Rice, of the county of Rowan and state of North Carolina, in his trade and business as a dealer in lumber, on the 15th day of January, 1904, at and in the county of Rowan and state aforesaid, and within the jurisdiction of this court, fraudulently, wickedly, maliciously, and unlawfully did conspire, combine, confederate, and agree together between and amongst themselves unlawfully to injure and destroy the said C. A. Rice in his trade and business which he then and there used, exercised, and carried on as aforesaid, against the peace and dignity of the state. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said A. Van Pelt, W. T. R. Jenkins, C. A. Shuman, S. W. Henry, and S. A. Shuman, together with other evil-disposed persons, whose names are to the jurors unknown, contriving and devising to injure and destroy the said C. A. Rice in his trade and business aforesaid, and as much as in them lay unlawfully and feloniously to ruin him in his trade and business as a dealer in lumber, which he then and there carried on, used, and exer-

cised as aforesaid, and to prevent and hinder him from using, exercising, and carrying on the said trade and business in as full, ample, and beneficial a manner as he was used and accustomed to, on the 15th day of January, 1904, in the county and state aforesaid, and within the jurisdiction of this court, unlawfully, wickedly, and maliciously did conspire, confederate, combine, and agree together with divers, fraudulent, and wicked means and devices to injure, oppress, and impoverish the said C. A. Rice, and wholly to prevent and hinder him from using, exercising, and carrying on his trade and business of a dealer in lumber as aforesaid, and caused to be published in a certain newspaper issued daily in the city of Salisbury, county and state aforesaid, a certain article in words and figures as follows, to wit: 'Action of the Carpenters and Joiners.—At a meeting of the Carpenters and Joiners, held last evening, for his attitude towards organized labor, Mr. C. A. Rice was declared unfair, and so listed, and that no union carpenter would work any material from his shop after February 15, 1904. S. A. Shuman, Sr., Pres. W. T. R. Jenkins, R. S.' And that the aforesaid publication was caused to be printed as aforesaid, in the newspaper aforesaid, on the 16th day of January, 1904, to the great damage of the said C. A. Rice, to the evil and pernicious example of all others in the like case offending, and against the peace and dignity of the state."

Defendants moved that the state be required to file a bill of particulars to the first count in the indictment. Motion allowed, whereupon the solicitor filed the following bill of particulars; to wit: "The State alleges: That the defendants, A. Van Pelt, S. A. Shuman, W. T. R. Jenkins, S. W. Henry, and C. A. Shuman, together with other evil-disposed persons, to the state unknown, contriving and devising with the intent to injure and destroy one C. A. Rice in his trade and business as a dealer in and manufacturer of lumber, and as much as in them lay unlawfully and maliciously to injure and ruin him in said trade and business as a dealer in and manufacturer of lumber, which he then and there carried on, used, and exercised in the county of Rowan and state of North Carolina, and to prevent and hinder him from using, exercising, and carrying on the said trade and business and manufacture in as full, ample, and beneficial a manner as he was used and accustomed to, on the 15th day of January, 1904, in the county and state aforesaid, and within the jurisdiction of this court, unlawfully, wickedly, and maliciously did conspire, combine, and agree together to injure, oppress, and impoverish the said C. A. Rice, and, with the intent to prevent and hinder him from using and carrying on his trade and business as a dealer in and manufacturer of lumber as aforesaid, caused to be published in a certain newspaper in the city of Salisbury, county and

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 320.

state aforesaid, a certain article in words and figures as follows, to wit: 'Action of Carpenters and Joiners.—At a meeting of the Carpenters and Joiners, held last evening, for his attitude towards organized labor, Mr. C. A. Rice was declared unfair, and so listed, and that no union carpenter would work any material from his shop after February 15, 1904. S. A. Shuman, Sr., Pres. W. T. R. Jenkins, R. S.' And that the aforesaid publication was caused by the defendants to be printed in the newspaper, as aforesaid, on the 16th day of January, 1904, to the great damage of the said C. A. Rice, and that it was the intent and purpose of the defendants by said publication to injure, oppress, and impoverish the said C. A. Rice in his trade and business and manufacture as aforesaid, and that the defendants did combine, agree, and conspire together to publish said notice as above set forth for the unlawful and malicious purpose of injuring the said C. A. Rice in his trade and business and manufacture as aforesaid by inducing all persons who would otherwise have purchased lumber and material from the said C. A. Rice to refrain from so doing for fear of the ill will of the defendants and other evil-disposed persons so conspiring and contriving with them, whose names are to the state unknown, and for fear that if they—that is to say, all persons who would otherwise have purchased lumber and material from the said C. A. Rice—should so purchase the same; they, the said persons, would be subject to delay and inconvenience by reason of the refusal of the defendants and other evil-disposed persons, whose names are unknown to the state, to work the material so purchased from the said C. A. Rice; and that in so conspiring and combining together to injure the business of the said C. A. Rice, as aforesaid, by the publication as aforesaid, in manner and form as above set forth, the defendants intended to prevent persons desiring to purchase lumber from purchasing the same from the said C. A. Rice, and to influence and deter persons desiring lumber from procuring the same from the said C. A. Rice, with the intent to injure, destroy, and damage the trade and business and manufacture of the said C. A. Rice. And before the said 15th day of January, 1904, as hereinbefore mentioned, the said A. Van Pelt, W. T. R. Jenkins, and S. W. Henry, three of the defendants in this case, did unlawfully, wickedly, maliciously, conspire and agree together, and did go together, on or about the 13th day of January, 1904, to the place of business of the said C. A. Rice, in the city of Salisbury, in the county and state aforesaid, and then and there notified the said C. A. Rice that he, the said C. A. Rice, could not be considered in sympathy with organized labor unless he kept constantly employed only union men, and notified him further that he would not be in sympathy with organized

labor if he kept in his employ any nonunion men, notwithstanding the fact that he had heretofore employed and contracted with nonunion men for as much as a year in advance, and to discharge them would be a violation of his contracts with such nonunion men; and, upon being informed by said Rice that he would not discharge any nonunion men with whom he had contracted in advance by the year to work for him, and that he would not agree to employ only union men in his business, the said A. Van Pelt, W. T. R. Jenkins, and S. W. Henry went away, and on the 15th day of January, 1904, in furtherance of their said conspiracy and combination to injure and destroy the business of the said C. A. Rice, as aforesaid, they combined and agreed among themselves and with the other defendants, and with divers evil-disposed persons, whose names are to the state unknown, to publish the aforesaid notice hereinbefore set forth, for the purpose aforesaid, and did actually cause the same to be published with the intention to injure and destroy the business and trade and manufacture of the said C. A. Rice, as above set forth. Hammer, Sol."

The counsel for the defendants thereupon demurred ore tenus to the bill of indictment, and moved to quash, for that the bill, together with the bill of particulars, did not charge a criminal offense. Motion and demurrer sustained, and bill quashed. The state excepted to the order of the court, and appealed to the Supreme Court.

J. H. Horah, A. H. Price, and the Attorney General, for the State. T. F. Klutz, R. Lee Wright, and Overman & Gregory, for defendants.

CONNOR, J. We do not find it necessary to consider the sufficiency of the first count in the bill. By filing the bill of particulars, the state, for the purpose of this appeal, makes sufficiently definite the charge and means by which the alleged conspiracy was to be put into execution. The demurrer ore tenus is based upon the indictment and the bill of particulars. We, however, fully approve the language of Shaw, C. J., in *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 348: "From this view of the law respecting conspiracy we think it an offense which especially demands the application of that wise and humane rule of the common law that an indictment shall state with as much certainty as the nature of the case will admit the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of an acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense." It is further said that, when the criminality of the offense consists in an unlawful agreement to compass some criminal or illegal

purpose, that purpose must be fully and clearly stated in the indictment. If the criminality intended to be charged consists in the agreement to compass some purpose not unlawful or criminal in itself by the use of force, fraud, falsehood, or other criminal or unlawful means, such intended means must be set forth in the indictment. *Lambert v. People*, 9 Cow. 578. In *State v. Trammell*, 24 N. C. 379, Gaston, J., says: "It is said that the gist of a criminal conspiracy is the unlawful concurrence of many in a wicked scheme, and that the crime of conspiracy is complete without any act having been done to carry it into execution. This consideration renders it but the more important that the charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may know what is the accusation they are to defend." Waite, C. J., in *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, passing upon the sufficiency of an indictment for conspiracy, says: "The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demur, or plea; and the court that it may determine whether the facts will sustain the indictment. So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the court; not the prosecutor. Therefore the indictment should state the particulars to inform the court as well as the accused. It must be made to appear—that is to say to appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged." Mr. Justice Clifford, concurring in the result, says: "Descriptive allegations in criminal pleadings are required to be reasonably definite and certain, as a necessary safeguard to the accused against surprise, misconception, and error in conducting his defense, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of this kind are entitled to respect; but it is obvious that, if such a description of the ingredient of the offense created and defined by an act of Congress is held to be sufficient, the indictment must become a snare to the accused." *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. In *State v. Younger*, 12 N. C. 357, 17 Am. Dec. 571, the offense is fully described and the means by which it was consummated set out, to wit, by making the prosecutor drunk, and falsely, fraudulently, and deceitfully cheating him at a game of cards.

While it is the right of the defendant to demand, and the duty of the court to require,

a bill of particulars, this is for the benefit of the defendant, and does not in any degree deprive him of the right to have the bill of indictment quashed if insufficient. Mr. Bishop well says, "The bill of particulars, not being made by the grand jury on oath, cannot supply any defect in the indictment." *Crim. Prac.* § 646. It would seem that, as the defendant is entitled to demand the bill of particulars, and as the state on the trial is restricted to proofs of the facts set out, it would be more in accordance with reason, good criminal pleading, and the safety of the citizen, to require the state to set out in the indictment the charge in full, together with the means by which the alleged conspiracy is to be effectuated. It is so held by many courts and required by statutes. No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written constitution. We can see no good reason why an exception to the general rules of criminal pleading should be made in favor of this crime. Certainly there is nothing in the history of the criminal law of England or this country to recommend it to the favor of courts having regard for liberty regulated by law. Such an indictment has been appropriately termed "a drag net of vague charges" to catch innocent persons, who in times of excitement may be convicted by the suspicions and prejudices of juries. An examination of the cases cited in *Wright on Criminal Conspiracy*, 186, discovers a state of painful uncertainty in the rulings of courts, explained frequently by the political or other bias of temper or opinions of the judge. Certainty should never be sacrificed to the plea for simplicity. Viewed properly, there is no conflict between them. We cannot but think that an omission of the needless repetition of epithets and denunciatory terms of the defendant, and the insertion, in place thereof, in plain language, of the facts relied upon, would be conducive to that certainty and simplicity which are the real safeguards of society and the citizen. General and indefinite descriptions of alleged crimes, like general warrants, "are dangerous to liberty, and ought not to be tolerated." *Const. art. 1, § 15*. "Every man has right to be informed of the accusation against him." *Id. § 11*. These truths are of the essence of civil liberty. They are not to be explained away to meet the demand for speedy trials and swift punishment. "No man shall be put to answer any criminal charge . . . but by an indictment," etc. We find nothing here of "bills of particulars" drawn up, after

indictment found, by prosecuting officers to aid defective bills, or bills in which, if the charge was set forth in a full and specific manner, could never have received the indorsement of a grand jury. "Bills of particulars" are suggestive of "informations" which became odious because of the oppressive use made of them by officers of the crown in the prosecution of persons charged with offense. When grand juries would not aid in such prosecution, "informations" were resorted to. They recall the days of "constructive treasons." Men were hung, drawn, and quartered for "imagining" the death of the King. They recall the time when Titus Oates swore away the lives of innocent men charged with being members of an imaginary "Popish plot."

The solicitor having filed a bill of particulars, the state is confined "to the items therein set down." Bish. Crim. Proc. 643. We are thus brought to a consideration of the question whether, eliminating all irrelevant matter, the facts charged and admitted by the demurrer constitute a criminal conspiracy, either by reason of the character of that which was agreed to be done or the means by which the agreement was to be effectuated. "The preamble and introductory matter in the indictment—such as 'unlawfully, deceitfully, designing and intending unjustly to extort great sums,' etc.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of facts constituting the description of the offense. The same may be said of the concluding matter which follows the averment as to the great damage," etc. Stripped of these introductory recitals and alleged injurious consequences and the qualifying epithets attached to the facts, the averment is this: That the defendants conspired to injure the prosecutor in his trade and business, and thereby impoverish him. (1) That pursuant to this agreement three of the defendants, on January 13, 1904, went together to the place of business of the prosecutor, and notified him that he could not be considered in sympathy with organized labor unless he kept constantly employed union men. (2) That he would not be considered in sympathy with organized labor if he kept in his employment nonunion men, notwithstanding the fact that he had theretofore employed and contracted with nonunion men for as much as a year in advance. (3) That upon being informed by said Rice that he would not discharge nonunion men with whom he had contracted, and would not agree to employ only union men, etc., the defendants published the notice set out in the bill of particulars. That the purpose of publishing said notice was to induce all persons who would otherwise have purchased lumber and material from the said Rice to refrain from doing so (a) for fear of the ill will of the defendants, etc., and other evil-disposed persons; (b) that they would be subject to de-

lay and inconvenience by reason of the refusal of the defendants and other evil-disposed persons, whose names are to the state unknown, to work the material so purchased from the said C. A. Rice, etc. That by the means aforesaid the defendants intended to prevent persons desiring to purchase lumber from purchasing the same from the said C. A. Rice, and to influence and deter persons desiring lumber from purchasing the same from the said C. A. Rice with the intent to injure and destroy, etc. We omit at this time any reference to the alleged motive of the defendants.

A criminal conspiracy is defined to be an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Shaw, C. J., in *Com. v. Hunt*, says: "Without attempting to review or reconcile all the cases, we are of the opinion that as a general description, though perhaps not a precise or accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms 'criminal' or 'unlawful,' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment. * * * But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as a conspiracy." Mr. Wright, in his work on Criminal Conspiracy, classifies the decisions in the different states, and places North Carolina in the class which holds that conspiracies are indictable "where neither the object nor the means are criminal, but where injury results to individuals"; and for this he cites *State v. Younger*, 12 N. C. 357, 17 Am. Dec. 571. With the exception of *State v. Younger*, we find no case in our own Reports in which an indictment is sustained which did not allege a conspiracy to commit acts, or the bill of particulars did not set out facts showing a conspiracy to commit acts, indictable either at common law or under some statute. It must be conceded that expressions are to be found in the opinions of the court to the contrary. In *State v. Tom*, 13 N. C. 569, the charge was a conspiracy by slaves to commit murder. It was made indictable by statute. It was equally so at common law. In *State v. Trammell*, 24 N. C. 379, Judge Gaston says that it is not necessary to decide whether the facts set out constitute a criminal conspiracy. The court held that in no view were the defendants guilty. In *State v. Christianbury*, 44 N. C. 46, the court expressly declined to pass upon the sufficiency of the bill, putting the case off on the statute of limitations. In *State v. Brady*, 107 N. C. 822, 12 S. E. 325,

the second count charged a conspiracy to cheat and defraud by falsely and fraudulently representing that certain lands contained gold mines, whereas the defendant well knew that the said lands did not contain gold mines, etc. There was a motion to quash, which was denied. There was a general verdict of guilty. The court said that, if either count was good, it would support the verdict. This was sufficient to dispose of the appeal. The second count was undoubtedly good, and the motion to quash could not be allowed. In *State v. Powell*, 121 N. C. 635, 28 S. E. 525, *Montgomery, J.*, says that the bill charged a conspiracy to commit an offense indictable at common law. In *State v. Wilson*, 121 N. C. 650, 28 S. E. 416, the question is not raised or discussed; a new trial was given on other grounds. In *State v. Earwood*, 75 N. C. 210, the only question decided was the admissibility of evidence upon which a new trial was given. In *State v. Howard*, 129 N. C. 585, 40 S. E. 71, there were three counts. The first charged generally a conspiracy to cheat and defraud. The second and third, setting out the facts showing a conspiracy to rob and to obtain money under false pretenses, and the means resorted to, were *not* pressed, but referred to as a bill of particulars. The first count was sustained by a divided court, the present chief justice, writing for the majority, saying that by the second and third counts, considered as a bill of particulars, the defendants were fully informed, etc. It will thus be seen that in all of the cases in our Reports a conspiracy to commit an indictable offense is charged in the indictment, or facts set forth in a bill of particulars charging a conspiracy to commit such an offense. In *Younger's Case*, *supra*, the charge in the indictment was that the defendants conspired to cheat and defraud the prosecutor, etc., and to accomplish that end they procured him to be intoxicated, and engaged him to play at cards, by means whereof by falsely, fraudulently, and deceitfully playing at the game of cards, they cheated him, etc. It is not necessary to discuss the question whether the acts charged were indictable at common law. *State v. Phifer*, 65 N. C. 321. We incline to the opinion that they were. The learned chief justice writing the opinion did not seem to think so, although he says, "Playing at cards for money was in itself unlawful." The word is of such varied and uncertain import that it is unfortunate that it was ever used to define a criminal act. It is not our purpose to bring the decision of *Younger's Case* into question, but we cannot accept the definition given of a criminal conspiracy: "Every combination to injure individuals or to do acts which are unlawful or prejudicial to the community is indictable." It will be noted that this case was submitted by the Attorney General without argument, and the defendants were not represented by counsel. The

court cites but one case to sustain the definition. *King v. Journeymen Tailors of Cambridge*, 8 *Mad.* 10 (1721). That was an indictment against certain journeymen tailors for a conspiracy to raise their wages. The court said: "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them to do if they had not conspired to do it, as appears in the case of *Tubwomen v. The Brewers*." An examination of the report of that case shows the lengths to which counsel and court went in sparring over technicalities and losing sight of the real merits of the question. Quite a number of objections were made to the indictment which at this day would not be listened to with any degree of respect. The court announces the proposition that any conspiracy, however lawful its purpose, is indictable. The case has been treated with but scant courtesy in England, and would not at this day be cited as authority. By statute it was made indictable for journeymen tailors to enter into any contract or agreement to advance their wages. Happily this and all other such laws have been repealed in England, and were never in force in this state. Lord Campbell, in *Hilton v. Eckerby*, 6 *E. & B.* (88 *E. C. L.* 62) 1855, repudiated the definition given in the Tailors' Case, referring to what it said in this and other cases as "loose expressions." He says: "I cannot bring myself to believe, without authority more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. The object is not illegal, and therefore, if no illegal means are used, there is no indictable conspiracy." The courts have found but little difficulty in adhering to satisfactory and consistent rulings in those cases wherein the conspiracy charged is to commit acts which are criminal and indictable either at common law or by statute. Dr. Wharton says: "The conflict begins when we reach those combinations which are assumed to be indictable, not as aimed at an indictable offense, but from the idea that the policy of the law forbids the reaching of the attempted object by a conspiracy." *Crim. Law*, 357. After discussing conspiracies to cheat and defraud, he says: "But to extend indictable conspiracies so as to include cases where acts not in themselves indictable are attempted by concert, involving neither false statement nor concerted force, should be resolutely opposed. A distressing uncertainty will oppress the law if the mere act of concert in doing an indifferent act be held to make such act criminal. We all know what acts are indictable, and, if we do not, the knowledge is readily obtainable. Such offenses, when not

defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious, and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. * * * No man may know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitution of an indictable offense * * * that it should be prohibited either by statute or common law, but conspiracies to commit by nonindictable means nonindictable offenses, if we resolve them into their elements, are neither prohibited by common law nor by statute. * * * An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which, in one phase of judicial sentiment, would be regarded as a meritorious impetus to commercial activity, would be, in another phase of judicial sentiment, as it once has been, treated as an indictable offense. Legislative and judicial compromises which one court may view as essential to the working of the political machines, another court may hold to be indictable as a corrupt conspiracy." In this country, in which judges are, in respect to their source of appointment and tenure, sensitive to changes of popular opinion and temper, amid the ever-increasing acuteness of the struggle between opposing social and industrial forces, the lines which separate a criminal from a noncriminal conspiracy should be clearly defined. To a timid, conservative, judicial mind trained to regard even the slightest disturbance of such forces as portending danger to the peace of the state, a combination of the most harmless character would assume "unlawful" form and force. To a different type of judicial mind, believing that the safety and highest interest of the state are promoted by the freest possible play of mind and action in trade competition, "however severe and egotistical, if unmattened by circumstances of dishonesty, intimidation, molestation, or other such illegalities," the same combination would appear not only lawful, but stimulating to trade in the community. The study of the struggle between the ruling class and the laborers in England, culminating in the passage of the statute of 38 & 39 Vict., is of interest to the student and value to the lawmaker and judge. It is declared by that statute that an agreement or combination to do any act in furtherance of a trade dispute shall not render the person committing it indictable for a conspiracy if such acts committed by one person would not be punishable as a crime. "These latter words may almost be described as 'The Workmen's Charter of Liberty,' for they dispose at once and for-

ever of the contention that a combination to do acts, not illegal in themselves, is entitled to be regarded by the law as a conspiracy." Cent. Law Reform, 253. A great English statesman said that for the first time employers and employed sat under equal laws.

As indicating the practical operation of the definition of a criminal conspiracy contended for by the state, we may recall some incidents coming under our observation. Not long since the farmers producing cotton in this and other states believed that their interests demanded combined action to protect themselves against what they considered an unreasonably high price charged by the manufacturers for jute cotton bagging. They openly and with the avowed purpose of compelling the manufacturers to sell bagging at a lower price, and, of course, reduce their profits, and to that extent injure them in their trade and business, formed combinations and adopted measures—entirely peaceful and lawful—to accomplish their purpose. They agreed themselves, urged and by various means induced others, to refrain from buying or using jute bagging. They encouraged the use of other kinds of bagging, and by and through organization maintained a peaceful but effective contest with the manufacturers. Their declared purpose was to injure, cripple, and, if necessary, destroy, the manufacturers, unless they sold their product at a lower price. Again, at a more recent date the producers of tobacco found the price of their product, as they thought, unreasonably low. They believed that a large and wealthy corporation, being the largest purchaser in the markets, was responsible for the low price of tobacco. Large numbers of the producers, with the avowed purpose of compelling the purchasers, and especially the said corporation, to pay them higher prices, combined and agreed that they would withhold their product from the market, urged and induced all other producers to do so. They declared their purpose to refuse to buy the goods of the corporation, and urged and induced merchants to refuse to buy or sell such goods. They held public meetings, made and issued addresses, and by many other lawful and peaceful means sought to injure, and, so far as possible, destroy, the offending corporation. It did not occur to any one that these men were guilty of a criminal conspiracy, nor were they. It must be noted that in neither instance was there any legal standard as to the price of cotton bagging or tobacco. They were sold in open market, and, from a legal standpoint, with fair competition. The farmers who in one case were buyers thought bagging unreasonably high, and in the other, being sellers, thought tobacco unreasonably low. They believed that, in order to protect themselves from what they regarded unfair treatment, they must organize. That their purpose was to injure the manufacturer in the one instance and the purchaser in the other in

their trade and business was not denied, but openly avowed; their defense being that they were seeking fair treatment at the hands of both. We must keep in mind the fact that we are discussing the question as it is affected by the common law. The proposition is that the defendants conspired for the purpose of injuring the prosecutor in his trade and business, and that it is unlawful for them to do so. It cannot be that every conspiracy to injure one in his trade and business, without reference to the means to be employed, is criminal. A carpenter or joiner has, by his apprenticeship, study, and experience, acquired skill and knowledge in his trade. His capital consists in his physical strength and his intellect trained and directed by his skill and experience. It is the use of this which, in a sense, he offers for sale. In what respect, for the purpose of securing the best prices for his labor on the best terms, do his rights differ from the man who has cotton for sale, the product of his capital—land and labor—or the man who has money to invest in mercantile or manufacturing enterprise? Each of them enters into the field of competition. Each finds that organization with others engaged in the same field of labor or investment will secure better results and fairer treatment from those with whom he deals. There is no evil or harm in organization per se. Every copartnership, corporation, joint-stock company, and other association of labor or capital is a recognition of this truth. We find no better illustration of the correct principle upon which this right depends and the benefits which may come from its application under proper limitations than that given by Chief Justice Shaw in *Com. v. Hunt*, supra: "Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of bread too high, should propose to him to reduce his prices, or, if he did not, they would introduce another baker, and on his refusal such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices, the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to render the price of bread to themselves and their neighbors. * * * We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another—that is, to diminish his gains and profits—and yet, so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment.

If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows, as a necessary consequence, that, if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment." Although decisions have been made by some of the American courts which hold otherwise, they are in every instance based upon the principle of the *Journeyman Tailors* or other English cases which follow that decision. Mr. Wright, after a review of the cases, says: "These authorities on the whole strongly favor the view that a combination to injure a private person [otherwise than by fraud] is not, as a general rule, criminal, unless some criminal means are to be used." Cases may be found to the contrary. Judge Holmes, in his dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, discusses the question with much force and clearness. Speaking of the right of laborers or mechanics to combine to promote their interests, he says: "If it be true that working men may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. * * * The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful any more than when a great house lowers the price of certain goods for the purpose and with the effect of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw in *Com. v. Hunt*." He further says: "There is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them might lawfully do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle." See, also, his dissenting opinion in *Plant v. Woods*, 176 Mass. 504, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. Judge Caldwell, in *Ames v. U. Pac. Ry. Co.* (C. C.) 62 Fed. 14, says: "Organized labor is organized capital. It is capital consisting of brains and muscle. * * * If it is lawful for the stockholders and officers of a corporation to associate and confer together for the purpose of reducing the wages of its employes, or for devising other means for making their investment more profitable, it is equally lawful for organized labor to asso-

ciate, consult, and confer with a view to maintain or increase wages." *Thomas v. Cin., N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803; *People v. Radt* (Gen. Sess.) 71 N. Y. Supp. 846. It is said: "One may refuse to deal with a firm because of a belief that it does not give honest compensation for labor, and may ask his friends or the public to do the same thing, and the conduct may do injury to the public without thereby becoming illegal." *Id.* "An agreement among the members of an association of plumbers not to deal with wholesale dealers who sell to any who are not members of the association, and the sending notices to that end, do not constitute an unlawful conspiracy, since the object of the combination and the means adopted for its accomplishment are lawful." *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 87 L. R. A. 455, 61 Am. St. Rep. 770. In *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, it appeared that the plaintiff was a manufacturer and dealer, wholesale and retail, in lumber and other building material. The defendant was a voluntary association of retail lumber dealers. It had certain rules for its government and that of its members. The plaintiff sold two bills of lumber to contractors or consumers in places where members of the association were engaged in the retail business. The secretary of the association made a demand upon the plaintiff for 10 per cent. on the sales so made. The demand not being complied with, the secretary notified, or, as the complaint averred, threatened, that unless plaintiff immediately settled the matter, he would send to all members of the association the lists or notices provided by the by-laws, notifying them that plaintiff refused to comply with the rules, and was no longer in sympathy with it. The court, referring to the affidavits, etc., said: "Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exasperated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as 'wreck,' 'coerce,' 'conspiracy,' 'monopoly,' 'drive out of business,' and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. * * * Now, when reduced to its ultimate analysis, all that the retail dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or other nondealers at points where a member of the association is engaged in retail business. The means adopted to effect this end are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to consumers not dealers at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufactur-

er makes any such sale. That is the head and front of defendant's offense. * * * There was no element of fraud, coercion, or intimidation either towards plaintiff or the members of the association." The court says that the compliance with the demand was entirely optional with the plaintiff. "The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not of itself render those acts unlawful. That depends on whether the acts are in themselves unlawful. 'Injury,' in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious."

"The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty—expressed in some instances and implied in others—of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended injuriously to affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. 'Injury,' however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view of increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition." *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1, 87 L. R. A. 455, 61 Am. St. Rep. 770.

The court refused to enjoin the defendants. It is urged by counsel that the guilt

of defendants does not involve what they did, but what they conspired to do. If the defendants had pleaded to the first count in the bill without calling for a bill of particulars, they would have gone to the jury on the general issue of traverse to the bill. When, however, the state files its bill of particulars, which, for the purpose of the trial, is as if the means had been set out in the original bill of indictment, the question is presented whether, either in respect to the purpose of the conspiracy or the means by which it was to be accomplished, any crime is charged. If no crime is charged, there is nothing for the jury to pass upon. The court will either, upon motion, quash the indictment, or, as it did in *Com. v. Hunt*, supra, arrest the judgment. We are of the opinion that a conspiracy to injure one's business is not per se indictable. Do the means set out make it so? This brings us to consider the acts done by the defendants. Three of them, on January 13, 1904, went together to the prosecutor's place of business, and notified him that he could not be considered in sympathy with organized labor unless he kept constantly employed union men. Certainly, the number of the defendants was not so large as to intimidate him, and there is no suggestion that their manner was either offensive, violent, or even discourteous. As we have seen, organized labor, or labor organizations, are not unlawful. The prosecutor had no legal right to demand that he should be considered in sympathy with organized labor; therefore he was not to be deprived of any legal right if he preferred to employ nonunion men, and the defendants had an equal right to consider him unsympathetic with organized labor if he exercised such right. Suppose the same number of persons, being members of the anti-saloon league, should go to a merchant's store and notify him that he would not be considered in sympathy with the temperance cause if he employed clerks who did not belong to the league. If he continued to employ such clerks, he was simply considered as unsympathetic with the cause. We fail to see any difference in principle between the act of the defendants and the case supposed. They notified him that he would not be considered in sympathy with organized labor if he kept in his employment nonunion men, although he was then under contract with nonunion men for a year in advance. It is intended, we assume, in this item to charge that the defendants conspired to compel the prosecutor to break his contract with nonunion men and discharge them. It will be noted that it is nowhere charged that such was the purpose of the defendants. Not a word is said capable of that construction. Certainly nothing should be left to conjecture. To what extent a conspiracy to induce men to violate their contracts is criminal is not clear. We are not required to discuss or decide it here. There is no com-

plaint that the conduct of the defendants was intended to injure nonunion men. This case has no such element in it, and we do not wish to be understood as expressing any opinion in regard to it. The question has been before other courts. There is a painful absence of harmony in the decisions. Suppose, however, that it be conceded that the defendants did notify the prosecutor that, unless he discharged nonunion men with whom he had contracted, etc., what was to be the result to him if he refused? He was to be considered as unsympathetic with union labor. This falls far short of intimidation or coercion. It will be noted that there is no charge that these defendants were members of any secret or other organization, or that they had the power or threatened to control the conduct of large numbers of men. It is said that they, "together with other evil-disposed persons, conspired," etc. Who "the other evil-disposed persons" are, what (if any) relation they bear to the defendants, is not stated. This alleged conspiracy is confined to the five defendants. When informed by the prosecutor that he would not discharge any nonunion men with whom he had contracted, and that he would not agree to employ only union men in his business, the defendants "went away," and "in furtherance of the said conspiracy did actually" publish and cause to be published the aforesaid notice, etc.: "Action of Carpenters and Joiners. At a meeting of the carpenters held last evening for his attitude towards organized labor, Mr. C. A. Rice was declared unfair and so listed, and that no union carpenters would work any material from his shop after February 15, 1904." The counsel for the prosecutor in their brief say: "It is perfectly true that defendants had a right to refuse to work material from Rice's shop; that they had a right to put him on their unfair list." The criminality, they say, consists in the intent or purpose with which these things are done. This, they say, is a question for the jury. It is not easy to see how it is a question for the jury when the defendants admit the purpose, etc. If that which they did is lawful—if they had a perfect legal right to do it—we are unable to perceive how the publication renders it unlawful. We are not aware of any principle of law which makes it criminal to publish that a person has done an act which he had a perfect legal right to do, or that a person intends to pursue a course of conduct which he has a legal right to pursue. Judge Holmes says: "As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, giving warning of your intention to do in that event—and thus allow the other person the chance of avoiding the consequences; so, as to 'compulsion,' it depends upon how you 'compel.'" Parker, O. J., in *Nat. Protec. Ap. v. Cumming*, 170 N. Y. 315,

63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, says: "A labor organization is endowed with precisely the same legal right as an individual to threaten to do that which it may lawfully do." "If an act be lawful—that is, one which a person has a legal right to do—the fact that he may in doing it be actuated by an improper motive does not render it unlawful." *Bohn Manfg. Co. v. Hollis*, supra. It being properly conceded that it was not unlawful—that is, for the purpose of this discussion, criminal—for the defendants to declare Mr. Rice "unfair," and to refuse to work his material, we can find nothing criminal in the publication made of their opinion or purpose.

Does the fact that the defendants intended to induce persons who might otherwise purchase material from Mr. Rice to refrain from doing so make their conduct unlawful? This brings us back to the original question. Persons who might wish to buy material from Mr. Rice had no legal claim on the services of the defendants. They were under no obligation to work the material purchased from him. Therefore in saying that they would not do so they deprived such persons of no legal right. They could not have maintained an action for damages against the defendants for refusing to work such material or for saying so. How, then, in a legal sense, can he be said to be injured? It is said that the purpose of the defendants in making the publication was to induce persons to refrain from purchasing material for fear of incurring the ill will of the defendants. This certainly is not unlawful. *Bowen v. Matheson*, 14 Allen, 499. If courts were to maintain actions upon such grounds, society would soon be converted into an array of hostile litigants. As is well said by Judge Black in *Jenkins v. Fowler*, 24 Pa. 308: "Malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful. * * * Any transaction which would be lawful and proper if the parties are friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motive to Him who searches the heart." In *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, it is said: "To entitle the plaintiff to recover, there must be a wrong done. No one is a wrongdoer but he who does what the law does not allow. He who does what the law allows cannot be a wrongdoer, whatever his motive." "The exercise of a legal right cannot be a legal wrong to another." *Cooley on Torts*, 65; *Cotterell v. Jones*, 73 C. L. 718. In *Hunt v. Simonds*, 19 Mo. 583, it is said: "The act charged upon the defendants as having been done by preconcert was an act which each and every one of the defendants had a right to do, and was no violation of any right which the plaintiff could claim under the

law. He had no right to demand insurance upon his boat from any or all of the defendants, nor that they should insure a cargo upon his boat; and consequently their refusal to insure, from any motive, however improper, could give him no right to sue them. The moment it is established that the conspiracy is not a substantial ground of action, it follows that no action can be brought to recover damages for the joint act of several, unless the right itself is alleged." The case of *Payne v. W. & A. R. R.*, 13 Lea, 507, 49 Am. Rep. 666, illustrates the principle as seen from the other viewpoint. The agent of the railroad caused to be posted by the yardmaster a notice in these words: "Any employé in this company on Chattanooga pay roll who trades with L. Payne from this date will be discharged. Notify men in your department." The plaintiff alleged that he was a merchant having a large trade with the employes and others; that the act of the defendant was malicious, etc. The defendant demurred. The court sustained the demurrer in an able opinion, holding that, as the act was not unlawful, the motive with which it was done did not give a cause of action. The judge said that any other doctrine would lead to evils innumerable. "It would be incredible that our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act. It is suggestive of the days of constructive treason." *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93. In *Richardson v. R. R.*, 126 N. C. 100, 35 S. E. 235, Clark, J., says: "But upon the plaintiff's own showing his discharge was within the right of the defendant, and not wrongful, and malice disconnected with the infringement of a legal right cannot be the subject of an action." The principle is well stated by *Bowen, L. J.*, in *Mogue Steamship Co. v. McGregor*, 23 Q. B. D. 612: "We were invited by plaintiff's counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have popular and less precise signification, into which it is necessary to see that the argument does not slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." The question, as applied to a disturbance of relations between an employer and employed, underwent a most exhaustive examination in *Allen v. Flood*, L. R. A. C. 1, in which

the conclusion was reached that "an act lawful in itself is not converted, by a malicious or bad motive, into an unlawful act, so as to make the doer liable." In the later case of *Quinn v. Leatham*, L. R. A. C. (1901) the same question, with some modifying facts, was discussed. The reporter says, "*Allen v. Flood* explained, and its real effect stated." An interesting discussion of the question may be found in the *Law Quar. Rev.* January, 1904. Without undertaking to mark the limitations or exceptions to the general principle, we are of the opinion that the defendants' conduct was not unlawful; that the motive prompting them does not change or affect its legal quality. It is not to be doubted that many acts which subject a party to a civil action, without regard to the motive with which they are committed, are indictable either by the common law or by statute by reason of the motive which prompts them. To kill a man's horse is actionable; to do so maliciously is indictable. The act itself is a legal injury. The statute makes it a crime when malice is the moving cause. Many other instances readily occur to the mind. We think that it will be found that in every case where the act is criminal there is a trespass on some legal right, or a legal wrong done to the complaining person. We concur with his honor that no criminal act is charged in the indictment.

We have not overlooked the cases cited in the briefs. The courts are very far from agreement in regard to the law of conspiracy. This fact tends to show the danger of giving to the word "unlawful" a broad and all-embracing meaning in the definition of a criminal conspiracy. We are told this is a case of great importance. It is said: "We are now at the parting of the ways. It is safe to predict that there will be no more criminal conspiracies, no more demands for union shops, and no strikes, sympathetic or otherwise, in this state, if the court sustains the bill in this case." We are also told by counsel that "it rests upon the members of this court to decide whether labor and capital * * * shall dwell together in peace and unity controlled by the law," etc. It is desirable that this condition, which has always so happily prevailed in this state, shall be preserved. We are duly sensible of our duty, as judges, to so declare the law as to secure, as far as the law may, this condition. As we have endeavored to show, concerted action and association to protect common interests and promote common advantage is not peculiar to those whose capital consists in their labor. The security of the state demands that the same principles of law must apply to all sorts and conditions of men. It is well to consider how far liberty of thought and action may be restricted by a resort to the "loose expressions" and dangerously uncertain definitions of this crime affecting the liberty of the citizens. It is very doubtful whether industrial conditions,

or relations between employer and employes, have been improved by prosecutions for criminal conspiracy. As we have seen, in England the subject has received the most careful attention of enlightened statesmen, resulting in the passage of wise statutes. It is asked, may not a man conduct his business in his own way? And undoubtedly he may. For any unlawful interference with this right he has a remedy, either civil or criminal, as such interference may justify. The question is asked, may not men organize to promote their common interests, and, when such interests conflict with other interests, resort to lawful and peaceful means to secure the best results? It is clear that they may. Where, then, is the line which separates conduct which is lawful from that which is unlawful? The answer comes from Chief Justice Shaw, one of the wisest and most learned of American jurists: "If it is to be carried into effect by fair or honorable or lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of a criminal conspiracy." We would not be misunderstood. Capital, either in the form of money or other property, or in the form of skill, experience, intelligence, and strength, may combine for lawful purpose. When, in either form, or under whatever guise it seeks or conspires to effectuate its purpose, however lawful, by means of violence to person or property, or by fraud, or other criminal means, or when, by such means, it conspires to prevent any person from conducting his own business in his own way, or from employing such persons as he may prefer, or by preventing any person from being employed at such wages or upon such terms as he may prefer, the courts will be prompt to declare and firm to administer the law to punish the guilty and protect the injured. What acts will constitute such unlawful means it is impossible to define. As all other questions arising out of the struggle of political, social, or industrial forces, they must be decided as they are presented.

We have refrained from using terms having a popular, but as yet indefinite legal, meaning. The word "boycott," by reason of the circumstances under which it originated, and the extent to which the means used to accomplish the purpose of the parties engaged in it were carried, is commonly supposed to involve unlawful means. The word is defined in *Black's Law Dictionary*, p. 150, as follows: "In criminal law. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from or employing the representatives of said business by threats, intimidation, or other forcible means." In *Brace v. Evans*, 3 Ry. & Corp. Law J. 561, it is said: "The word in itself implies a threat in popular acceptance. It

is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and have coerced him, through fear of his own injury, to submit to dictation in the management of his affairs." In *Matthews v. Shankland* (Sup.) 56 N. Y. Supp. 123, the term is held to come within the statutory definition of an "unlawful conspiracy." For history of the word and definition as adopted by many courts, see "Words and Phrases," vol. 1, page 855. We find nothing in the charge in this case which brings the purpose or conduct of the defendant within such definition. Much obscurity and uncertainty has originated in the careless use of the terms of this character.

Mutual confidence, forbearance, patience, and concession, accompanied by a free, frank interchange of thought and feeling, will do more to perpetuate the kindly relations existing among us, with our homogeneous population, than prosecutions for criminal conspiracies when no criminal or unlawful elements exist. In view of the wide divergence of judicial opinion, by reason whereof the law is oppressed with a distressing uncertainty, it would seem that the Legislature should abrogate the common law on the subject, and enact a plain, clearly expressed, and carefully guarded statute in lieu thereof. We think it also proper to say that in the discussion of this case we do not mean to suggest that Mr. Rice is unfair to his employes. We have considered the appeal in its legal aspects as presented by the record.

His honor's judgment quashing the indictment must be affirmed.

CLARK, C. J. (concurring). As stated in the opinion in chief: "The sufficiency of the first count in the bill is not called in question, as filing the bill of particulars makes sufficiently definite the charge and means by which the alleged conspiracy was to be put into execution. * * * The solicitor filed a bill of particulars, and the state is confined to the items therein set down." Bishop, Cr. Pro. 643." Those items are, in substance: (1) That pursuant to a previous agreement three of the defendants at the time charged went to the prosecutor's place of business, and notified him that he could not be considered in sympathy with organized labor unless he employed none but union men; (2) nor if he retained nonunion men, notwithstanding he had already contracted with some as much as a year in advance; (3) that upon the prosecutor's refusal to discharge the nonunion men with whom he had already contracted, and whose time had not expired, and would not agree to employ only union men in his business, the defendants published in a local newspaper that at a meeting of the carpenters and joiners to consider the attitude of the prosecutor towards organized labor he was "declared unfair, and so listed, and that no union carpenter would work any material from his shop after 15 Feb. 1904."

It was charged that the defendants conspired to do this with intent to injure the prosecutor in his business by causing other persons to refrain from buying lumber and material from the prosecutor for fear of the ill will of the defendants, and also lest they might be subjected to delay and inconvenience by reason of the refusal of the defendants and others to work upon material purchased from the prosecutor.

A criminal conspiracy is defined to be "an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." No act charged above, nor any of the means set out in the bill of particulars, is unlawful, and the charge of intent is immaterial unless the act or the means used were unlawful. It was not unlawful for the carpenters' union to try to induce the prosecutor to employ none but members of their union, neither illegal threats nor violence or other unlawful means being used; nor was it forbidden by any law to publish the fact of his refusal, and to ask those friendly to their organization not to patronize him. Whether such publication would reduce or increase the prosecutor's business would depend entirely upon the public, and whether a majority of those dealing with one in the prosecutor's business preferred the union or non-union system. The state was restricted to the items set forth in the bill of particulars, and, there being no unlawful act alleged therein, nor unlawful means to do a lawful act, the bill was properly quashed. This matter is fully discussed and thus held by Parker, C. J., in *National Protective Ass'n v. Cumming*, 170 N. Y. 815, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648. There is no exception to the means being furnished by a bill of particulars, but it may be well to note that it is well settled that in indictments for conspiracy, barratry, assault and battery, nuisance, and some other offenses, it is sufficient if the illegal act is charged, and the means need not be charged. In *Aikens v. Wisconsin*, 25 Sup. Ct. 3, 49 L. Ed. —, it is said, "The very plot is an act in itself," citing *Mulcahy v. Reg.*, L. R. 3 H. L. 317. The means are never charged in most, if not all, other offenses—for instance, in murder, burglary, rape, arson, and, indeed, nearly all crimes—yet as to conspiracy and others above named a bill of particulars as to the means may be, and usually will be, ordered by the court, to furnish information to the defendant. In *State v. Brady*, 107 N. C. 824, 12 S. E. 325, which was an indictment for conspiracy, it was held, citing the English cases, that, an illegal conspiracy being indictable, though no act be done in pursuance thereof, the means need not be charged. It is enough if the conspiracy is charged to do an act which act the court can see is unlawful, but the court would order a bill of particulars, if asked. The court quotes, among other cases, from *Goersen v. Com.*, 99 Pa. 398, which was an indictment for murder: "The nature and

cause of a criminal prosecution are sufficiently averred by charging the crime alleged to have been committed. This must be done. The mode or manner refers to the instrument with which it was committed, or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment. Whenever one, before trial, needs more specific information than is contained in the indictment to enable him to make a just defense, it may be obtained on proper application to the court." This court then goes on (*State v. Brady*, supra) to state the practice as to applications for bills of particulars, and adds: "This practice is much favored, because no demurrer or motion to quash lies to a bill of particulars, but, if an insufficient bill is furnished, the court will order a fuller statement of particulars to be furnished." The object of the law is not to require technical refinements in indictments, that guilty men may escape punishment, but to dispense with them, that criminal cases may be tried upon the facts, and the truth of the charge ascertained. The object of the indictment is simply to give the defendant notice of the crime with which he is charged. If he needs information as to the means by which the state will seek to prove that he committed the crime, the court will order a bill of particulars, and, if the one furnished is not sufficient, will order another and another. *State v. Brady* has been cited and approved on this point in *State v. Gates* (indictment for perjury) 107 N. C. 835, 12 S. E. 319; *State v. Dunn* (resisting an officer) 109 N. C. 840, 18 S. E. 881; *Avery, J.*, in *State v. Bryant* (destroying line trees) 111 N. C. 695, 16 S. E. 326; *Avery, J.*, in *State v. Shade* (secret assault) 115 N. C. 758, 20 S. E. 537; *Townsend v. Williams*, 117 N. C. 337, 23 S. E. 461; *Montgomery, J.*, in *State v. Pickett* (resisting officer) 118 N. C. 1233, 24 S. E. 350; and in the *Gold Brick Case* (*State v. Howard*) 129 N. C. 657, 40 S. E. 71, in which last many authorities elsewhere are cited, and our ruling reaffirmed that in indictments for conspiracy to do an unlawful act, the means, being mere matters of evidence, need not be charged in the indictment, but that a bill of particulars will be ordered for information of the defendant, if applied for. In *State v. Brady* this court cites with approval from *Wright on Criminal Conspiracy*, 189, 191, that: "If unexecuted, the means cannot be stated; if executed, the means employed are but evidence of the offense or an aggravation of it, * * * for the crime of conspiracy consists of the conspiracy, and not of the execution of it;" I. e., the agreement to do an unlawful act. In the present case the act agreed to be done—the publication aforesaid—was not an unlawful act.

The practice is uniform in all jurisdictions. In 2 *McClain, Cr. Law*, §§ 966, 976, 977, it is said that it is not necessary to charge anything as done. "A conspiracy to do an unlawful act is a separate and distinct offense from that of the act itself, and

is to be governed in its prosecution by the provisions relating to conspiracies, and not those relating to the specific offense" (citing *Com. v. McHale*, 97 Pa. 397, 39 Am. Rep. 806); but that the court will order a bill of particulars to give the defendant all necessary information (citing numerous cases, among them, upon the last point, *Rex v. Hamilton*, 7 C. & P. 448; *Reg. v. Rycroft*, 6 Cox, 76; *Reg. v. Edalle*, 1 F. & F. 213; *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997). To the same effect (in embezzlement), *Rex v. Hodgson*, 8 C. & P. 422, and *Rex v. Bootyman*, 5 C. & P. 300. The law and practice seem uniform, and are thus summed up by Dr. Wharton in his admirable work on *Pleading & Practice*, § 702, with abundant citation of authorities: "It is allowable to indict a man as a common barrator, or as a common seller of intoxicating liquors, or assaulting a person unknown, or as conspiring with persons unknown to cheat and defraud the prosecutor by 'divers false tokens and pretenses'; and in none of these cases is the allegation of time material, so that the defendant is obliged to meet a charge of an offense comparatively undesigned, committed at a time which is not designated at all. Hence has arisen the practice of requiring in such cases bills of particulars, and the adoption of such bills, instead of the exacting of increased particularity in indictments, is productive of several advantages. It prevents much cumbrous special pleading, and consequently failure of justice, as no demurrer lies to bills of particulars; and it gives the defendant in plain unartificial language notice of the charge he has to meet." The same statement as to the law is made in 1 *Bishop, New Crim. Proc.* § 644 (2), with the same reason that a bill of particulars "enables the defendant on the one hand fairly to defend himself, and, on the other hand, not fettering the prosecution." In 2 *Bishop, New Cr. Proc.* § 208, it is said as to conspiracy: "As agreed means are not essential to the offense, it would be a perversion of justice to require the prosecuting power to allege them;" and in section 209 he says that as to conspiracy, assault and battery, barratry, common scolds, and some others, "they may be charged in as few words" as possible, adding that, where further information as to the means, which are mere evidential matters, should be given the defendant, the court will order a bill of particulars. The courts all seem to adopt the same rule and for the same reason. It was held that a bill of particulars was the remedy on an indictment for adultery. *People v. Davis*, 52 Mich. 569, 18 N. W. 362. It was recognized as the settled practice in indictments for nuisance (*State v. Hill*, 13 R. I. 314); in indictments for perjury (*Williams v. Comm.* 91 Pa. 493); in indictments for murder (*Goersen v. Com.* 99 Pa. 388). In short, in all cases where information as to the means is necessary to the defendant, it will be given him by a

bill of particulars, but these need not be set out in the indictment, which is required only to charge the offense, which in conspiracy is the "conspiring" to do an illegal act. Hence the act must be charged, but not the means, which are merely evidential and which cannot be known, as often none are resorted to; the "conspiracy," not the perpetration of a substantive offense, being the charge. In an ancient case in Massachusetts (*Com. v. Hunt*, 4 Metc. 411, 38 Am. Dec. 346) Shaw, C. J., did say that in cases where the conspiracy charged was not to do an unlawful act, but to resort to unlawful means to do a lawful act, the means should be charged. But this does not conflict with the above authorities, for the unlawful act conspired to be done must be charged; and, when the unlawfulness is the unlawful acts to be done to effect a lawful purpose, of course such unlawful acts must be charged. And in a much more recent case in Massachusetts (*Com. v. Meserve* [1891] 154 Mass. 72, 73, 27 N. E. 997) that learned court reaffirmed the universal doctrine above laid down that the means need not be charged in an indictment for conspiracy, but that information will be given by a bill of particulars; and cites *Com. v. Hunt*, supra, as authority that such information should be in the indictment only when "the purpose of the conspiracy itself does not appear to be criminal or unlawful." The practice as to setting out evidential matters in bills of particulars is a wise one, observed in the English as well as the American courts, and has been held by all the authorities here as elsewhere, and has been reaffirmed by us as recently as the *Gold Brick Case*, 129 N. C. 657, 40 S. E. 71. The whole matter is well summed up in the *Star Route Case* (*U. S. v. Dorsey* [D. C.] 40 Fed. 752, which holds, citing *U. S. v. Cruikshank*, 92 U. S. 564, 23 L. Ed. 583, that, if an indictment for conspiracy charges that the object was to commit a crime or unlawful act, the means, being evidential, need not be set forth in the indictment, and information, if desired by the defendant, may be given him by a bill of particulars; but where the conspiracy is to use unlawful means to do a lawful act, then the means is the unlawful object to be effected by the conspiracy, and must be charged in the indictment. Indeed, the definition of criminal conspiracy, "an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means," might be properly shortened by omitting the latter half, for, where the conspiracy is to resort to unlawful means to secure the lawful end, such unlawful means is the unlawful act which the conspiracy contemplates, and should be charged that the court may see, as a matter of law, that an offense is charged.

Bills of particulars are not peculiar to indictments for conspiracy, but are allowed as to all offenses, and in civil cases also. Code,

§ 259. They are for the benefit of defendants desiring information as to evidential matters which are not required to be set out in an indictment or complaint. The practice is just the opposite of "general warrants" or "informations." No good pleading ever requires matters of evidence to be set out, and this is simply a benevolent practice recognized by all courts and our statute as well, to furnish the defendants information, if applied for, to assist them in preparing the defense.

DOUGLAS, J. (concurring). I concur in the admirable opinion of the court upon well-settled rules of law as well as the highest principles of public policy and natural right. I can add nothing thereto beyond what has been said in my dissenting opinion in *State v. Howard*, 129 N. C. 663, 40 S. E. 71. In that case I used the following language: "I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons; and, if the English rule prevails in this state, what is there to prevent the indictment of the members of our usual labor organizations?" What I then foresaw has come to pass, and it needs not a prophet's vision to foresee the vast potentialities of evil that would attend the decision of this court were it other than it is.

We are assured that if we break up the labor organizations there will be no more strikes, and that peace and order will reign throughout the land. When Kosciusko fell, and Poland lay once more beneath the Cossack's heel, Sebastiani announced that, "Order reigns in Warsaw;" while Louis Napoleon, in seizing the throne of France, declared that, "The empire is peace." North Carolinians seek not the peace of despotism, but that peace alone which follows the mutual recognition of equal rights, and the impartial enforcement of just and equal laws.

(137 N. C. 1)

NORTH CAROLINA CORPORATION COMMISSION v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Dec. 13, 1904.)

CORPORATION COMMISSION — POWERS — REGULATING CONNECTIONS OF CARRIERS — LEGISLATIVE POWER — DIRECTING VERDICT — FINAL JUDGMENT ON APPEAL.

1. Under the Corporation Commission act (Acts 1899, p. 291, c. 164, § 1), providing that the Corporation Commission shall have such general control and supervision of railroad companies as is necessary to carry into effect the provisions of the act, and section 21, providing that all common carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic and forwarding freight and passengers, and shall make as close connections as practicable for the convenience of the traveling public, the commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain

time, so as to connect with a train of another company.

2. The Corporation Commission act (Acts 1899, p. 304, c. 164, § 21), requiring connecting lines of common carriers to make as close connections as practicable for the convenience of the traveling public, does not mean a simple physical connection of tracks, but a connection of trains.

3. Code 1883, § 1957 (9), giving railroad companies the right to regulate the time and manner in which passengers and property shall be transported, is modified by the Railroad Commission act (Acts 1891, p. 275, c. 320), making the right of the railroad companies to fix the time of running their trains subject to the power of the commission to require connections to be made when public convenience requires it and it is reasonable and just, which provision is reenacted in the Corporation Commission act (Acts 1899, p. 291, c. 164).

4. The Corporation Commission, under the authority given by the Corporation Commission act (Acts 1899, pp. 291, 304, c. 164, §§ 1, 21) to control railroad companies so far as necessary to carry into effect the provision of the act that common carriers shall afford reasonable and proper facilities for forwarding passengers, and shall make as close connections as practicable for the convenience of the traveling public, may require a railroad company to make connection with a train of another railroad, though it costs the railroad company \$15 a day to do this; its net earnings in the state being nearly \$2,000,000 per year, and several thousand passengers a year being thus saved several hours and the inconvenience of traveling at night.

5. The Corporation Commission act (Acts 1899, pp. 291, 304, c. 164, §§ 1, 21), giving the commission power to require a railroad company to make reasonable and proper connection with the trains of other roads for the convenience of the traveling public, is within the power of the Legislature.

6. It is error to direct a verdict on issues of fact, there being conflicting evidence.

7. Under Code, § 957, providing that the Supreme Court may render such judgment as it shall appear to it ought to be rendered, it will, on reversal of a judgment reversing a proper order of the Corporation Commission, render final judgment.

Appeal from Superior Court, Wake County; Brown, Judge.

Proceedings by the state, on the relation of the North Carolina Corporation Commission, against the Atlantic Coast Line Railroad Company. From a judgment for defendant on appeal from an order of the commission, the commission appeals. Reversed.

It appears from the record that for some 10 years prior to 11th October, 1903, the passenger traffic from a large portion of eastern North Carolina to Raleigh and the adjacent central part of the state was made by the defendant, Atlantic Coast Line Railroad Company, connecting with the Southern Railway at Selma at 2:50 p. m. daily. For a year or two prior to that day the connection became very irregular, to the great inconvenience of the traveling public; passengers frequently being compelled to lie over at Selma till 11 o'clock at night, and then forced to take a mixed train, with uncomfortable accommodations, to go westward. The Southern Railway finding its time between Goldsboro and Greensboro (38 miles per hour) dangerous, on account of the condition of its track,

had also lately changed its schedule to leave Goldsboro 30 minutes earlier. The matter being called to the attention of the Corporation Commission, it attempted to remedy the evil. After much correspondence with the officials of both roads, the commission on 8th December, 1903, made the following order: "Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day; and whereas, it appears that such close connection is practicable: It is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 p. m. each day, instead of 2:50 p. m., as the schedule now stands. It is further ordered that if the Atlantic Coast Line trains have passengers en route for the Southern Railway, and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait 15 minutes for such delayed trains upon receipt of such notice. This order shall take effect December 20, 1903. By order of the commission. Franklin McNeill, Chairman. H. C. Brown, Clerk." This order quickened the arrival time of the Atlantic Coast Line train at Selma 25 minutes, but, as it required the Southern to wait at that point 15 minutes for delayed trains, it more than divided the time between the roads; exacting only 10 minutes' advance of time on the part of the defendant to procure this convenience to the traveling public. On 18th December, 1903, on the application of counsel for the defendant, the order was suspended, and both companies were notified to appear before the Corporation Commission at Raleigh on 12th January, 1904, that "the matter of the connection at Selma of the Atlantic Coast Line going south with that of the Southern Railway going west in the afternoon" might be heard, and asking both companies to have representatives present. The defendant appeared by its superintendent and its general counsel, and the other company was also represented. After hearing both sides, "the situation being thoroughly discussed," the commission took the matter under advisement. On 16th January, 1904, the commission rendered a full finding of the facts, concluding with this judgment: "And it is therefore ordered that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 and by and before 2:25 p. m. each day. It is further ordered that the Southern Railway hold its train No. 135 at Selma 15 minutes if for any reason the Atlantic Coast Line train connecting at that point is delayed." It was further ordered that the order should take effect 26th January, 1904. To this judgment the Southern Railway Company did not except. The Atlantic Coast Line filed five exceptions: (1) That it was not practicable to make the con-

nection at Selma by extending the run of either its Plymouth or its Springhope train to Selma; (2) that it would be unprofitable and a loss for it to make the connection by putting on an additional train from Rocky Mount to Selma; (3) the commission has no power to require it to put on extra trains; (4) that it is not practicable to make the connection without putting on an extra train, which the commission has no power to do; (5) that the order is unreasonable, because passengers from Rocky Mount can make connection at Goldsboro at 6:50 a. m., or at Selma by night train over the Southern, or they could go up to Weldon and go over the Seaboard Railroad. A letter in the record from the transportation department of the defendant company, dated 23d January, 1904, states that prior to the breaking of connection at Selma the defendant's 2:50 p. m. train transported on an average 12 passengers daily for the Southern at Selma, while since the average was only two. This shows 3,650 passengers annually inconvenienced by the failure to connect at that point. There is evidence elsewhere in the record that it was a very much larger number. On 2d February, 1904, the exceptions were heard by the commission upon the testimony of witnesses offered by the defendant and other evidence. Upon all the evidence, and after argument by counsel for the defendant, the commission, on 13th February, 1904, made a fuller finding of fact, in the course of which it is recited, *inter alia*, that, by the connection at Selma at 2:50 p. m. between the Atlantic Coast Line train No. 39 (south bound) and the Southern train No. 135 (west bound), "the greater portion of the section of the country reached by the said branch roads was for years furnished the nearest and cheapest route of travel to Raleigh and other Southern Railway points. The greater portion of the travel between the Atlantic Coast Line territory and the Southern Railway points was by this route. It is admitted in the correspondence of the Atlantic Coast Line in this matter that this was the most important connection, being the principal outlet for passengers en route from eastern Carolina territory to Raleigh and other Southern Railway points. There seems to have been no complaint about the failure of these railroad companies to keep this schedule and make this connection until about the year 1900. The Atlantic Coast Line informs the commission that 'this matter has been a frequent source of correspondence between this company and the Southern Railway Company since 1900, and that during this time frequent complaints have been made to this company by the Southern Railway Company of its failure to make schedule time at Selma.'"

The commission found (giving its reasons) that passengers ought neither to be required to go a much longer distance around by Weldon, nor to make connection at unreasonable

hours at Goldsboro (6:50 a. m.), nor to take a night train (11 p. m.) connection at Selma, when a few minutes quickened time would maintain the connection which had been made at Selma, in the early afternoon, for more than 10 years. The commission also found that the defendant could make the connection, if it chose, by extending the run of its Springhope train, which, coming down 19 miles from that place, reached Rocky Mount at 12:10, where it lay over until 4 p. m. before returning to Springhope, during which four hours it could easily be run 41 miles and back, making this connection. It thus concludes its judgment: "There is within the territory served by these branch lines approximately 400,000 inhabitants. The report of the Atlantic Coast Line to this commission for the fiscal year ending 30th June, 1903, shows net earnings from operation in North Carolina amounting to \$1,943,116.63, and that there was a surplus of \$1,293,983.54 after paying interest on its debts and 5% dividends on its stock, both common and preferred, from the net earnings of the company's entire line. On a mileage basis, this will show that there was a surplus of net earnings in North Carolina for that year of approximately \$324,493. The commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line to the traveling public should not be lessened; that the connection furnished passengers from the Washington Branch, the Norfolk & Carolina Branch, the Plymouth Branch, and the Nashville Branch with No. 135 Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma for nearly 10 years, should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39, as formerly, on account of this train being heavier, containing usually one or more express cars, and, in all, usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from Eastern Carolina to Selma and other Southern Railway points for the last ten years, instead of being abandoned, should be made permanent and certain; and that this result be accomplished by carrying out the order heretofore made in this court. It is ordered, therefore, that the exceptions be, and they are hereby, overruled. Franklin McNeill, Chairman."

From this order, thus repeated the third time, and after the fullest investigation occupying several months, the defendant appealed to the superior court. In that court the following issues were submitted, the Corporation Commission excepting:

"(1) Is it practicable for train No. 39 of the Atlantic Coast Line, due to arrive at Selma at 2:50 p. m., to make connection at

Selma with train No. 135, west bound, of the Southern Railway, due to leave Selma at 2:25 p. m.?

"(2) Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return, and, if so, what would be the additional expense?"

"(3) Is it practicable to make said connection by the use of the Springhope train, and, if so, what would be the additional expense?"

"(4) In order to make such connection, would the defendant company have to run an additional train on its main line from Rocky Mount to Selma?"

The court directed the jury to answer the first three issues "No," and the fourth issue "Yes," and the Corporation Commission excepted.

The following issues the jury were permitted to answer, to which they responded as follows:

"(5) Is it practicable for said train to run the schedule prescribed in the plaintiff's order, having due regard to the number of trains and number of stops, on the defendant's main line from Rocky Mount to Selma? Yes.

"(6) What would be the daily cost of operating such train from Rocky Mount to Selma and return? \$40.

"(7) What would be the probable daily receipts from such train? \$25.

"(8) Is it reasonable and proper that, for the convenience of the traveling public, the defendant company should be required to make such connection? Yes."

Upon the verdict the Corporation Commission moved for judgment, but the court rendered judgment for the defendant, giving as a reason that Code 1883, § 1867 (9), gave to railroad companies the right to regulate "the time and manner in which property and passengers shall be transported," and that it had been unable to find where this had been repealed; that he was of opinion that the statute had not conferred any power upon the Corporation Commission to order any connection to be made between the trains on connecting railroads, and hence he refrained from passing upon the defendant's further contention that the General Assembly had no constitutional right to grant such power. The Corporation Commission appealed, assigning several grounds of error, which will appear in the opinion.

Busbee & Busbee, F. A. Woodard, Argo & Shaffer, and the Attorney General, for appellant. Junius Davis and Pou & Fuller, for appellee.

OLARK, C. J. (after stating the facts). For more than 10 years the people of a large part of the eastern portion of the state, having occasion to come to the capital or to the adjacent central section, have found

their most direct and convenient route to be via Selma, at which point, by its schedule, the south-bound train No. 39 of the defendant, Atlantic Coast Line, delivered its passengers at 2:50 p. m. daily in time to connect with the Southern Railway west-bound train No. 135 from Goldsboro to Greensboro. On 3d October, 1903, the Southern notified the Corporation Commission that, owing to the condition of its track, it was dangerous to maintain its speed—38 miles per hour—on its train No. 135, and proposed to leave Goldsboro 30 minutes sooner, which would cause its arrival a few minutes earlier at Selma. This the commission found to be proper and reasonable. It was brought to the attention of the commission, by proper complaint made, that for many months the Atlantic Coast Line had failed to make this afternoon connection regularly at Selma at its schedule time, to the great inconvenience of the traveling public, and it was asked to order the afternoon connection to be resumed and observed. After much correspondence with the officials of both roads, the commission on 8th December, 1903, ordered that the afternoon connection should be made, and, to that end, directed that the defendant should quicken its schedule so as to arrive at Selma at 2:25 instead of 2:50, p. m. as before—an advance of 25 minutes; but, as the same order required the Southern train to wait 15 minutes whenever the Atlantic Coast Line was delayed for any cause, the order practically required the defendant to arrive ten minutes earlier. Objection being taken, the order was suspended, and both companies were summoned before the Corporation Commission; and, after investigation and argument, on 16th January, 1904, the order was renewed. The Southern thereupon acquiesced in the order. The defendant alone filed exceptions, upon which testimony and argument were heard, and the commission renewed its order in the same terms, 13th February, 1904. On appeal by the defendant to the Superior Court, there were sundry issues submitted, over the exception of the Corporation Commission. But as the order of the commission appealed from simply directed the connection to be made as in former years, prescribing no details of the method (which was left to the judgment of the defendant itself), save an acceleration of 25 minutes, subject to a delay of the Southern train of 15 minutes, when the defendant's train should be late, we think the matter could have been, and was, fully disposed of by an affirmative response of the jury to the eighth issue, "Is it reasonable and proper that, for convenience of the traveling public, the defendant company should be required to make such connection?" taken together with the findings upon the sixth and seventh issues, that, even if an additional train should have to be put on between Rocky Mount and Selma, the loss to the defendant would be only \$15 per

day, which might be overcome by the increased travel induced by certainty of connection, and the official returns made by the defendant to the commission 30th June, 1903, as required by law, and which are in the evidence, that the net earnings of the defendant from its operations in North Carolina amounted for the year ending 30th June, 1903, to \$1,908,118.83, with a surplus of nearly \$1,300,000 after paying interest on its debts, and 5 per cent. dividends on its stock, both common and preferred, from the net earnings of the entire line. It is surely sufficiently large, as it stands, to justify the affirmation of the order of the Corporation Commission that this great inconvenience to the public should be avoided, even at a cost to the defendant of \$15 per day, when the net earnings of the defendant from all its operations in this state approximate \$2,000,000 annually, and the net surplus of the defendant's whole system, after payment of interest on its debts and dividends on its stock, whether watered or not, amounts to near \$1,300,000 annually. And upon such verdict, the judge below should have entered judgment affirming the order of the Corporation Commission, and we should reverse his judgment and enter such judgment here, provided (1) the Legislature has conferred such authority upon the commission; (2) and the Legislature was not restrained by any provision of the state or federal Constitution from granting such authority. Mr. Davis, the able and accomplished counsel of the defendant, states this clearly in his brief: "The defendant's contentions in brief are as follows: (1) That the Corporation Commission had no power or authority to make the order in question in this cause. (2) That the order is in violation of the Constitutions of the United States and the state of North Carolina. (3) That the order is unreasonable and unjust." His third contention is settled by the verdict and finding as above stated. As to the first proposition, we think the General Assembly clearly intended to confer and did confer the power upon the commission to order connection made by any two railroads when the public convenience required it, and the order was just and reasonable. This is not an arbitrary power, for, as in this case, such order is subject to review by a judge and jury on an appeal to the superior court, whence a further appeal lies to this court.

Section 1 of the Corporation Commission act (Acts 1899, p. 291, c. 164), in enumerating the qualifications and the duties and powers of the commission, provides that "they shall have such general control and supervision of all railroad * * * companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers * * * necessary to carry into effect the provisions of this act." Section 21 of the act provides that "all common carriers subject to the provisions of this act shall

according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith * * * and connecting lines shall be required to make as close connection as practicable for the convenience of the travelling public." This provision is positive, clear, and mandatory. Common carriers are (1) to afford all reasonable, proper, and equal facilities for the interchange of traffic and forwarding freight and passengers. This would include both the place and time of delivery and forwarding of passengers and freight. The terms of the law are general, and cannot be interpreted to mean alone the place at which passengers and freight are to be delivered. It does not mean simply facility for delivery, which might be confined to the place, but also requires facility for forwarding, which includes time as well, and prohibits such management as would produce delay in forwarding passengers. This requires close connection in point of time with connecting lines. (2) In the second place, common carriers are "to make as close connection as practicable for the convenience of the travelling public." The defendant insists that this last requirement means simply a physical connection; that is, a track connection. It is contended that the demands of the law would be met by a simple joining of the railroad iron of one railroad to that of another, regardless of the time of the delivery of passengers at the junction, and of their finding the means of "traveling" on or continuing their journey, and of the delays and inconveniences resulting from a failure to make connection of trains. The statement of this proposition, even if the acts were ambiguous, contains its own refutation. But the language is plain and unequivocal, and, as Mr. Argo, of counsel for the commission, well says, "the requirement is that 'connecting lines shall make as close connection as practicable for the convenience of the traveling public.' This means that those railroads that have or pretend to have a physical connection—a connection of tracks—shall also have as close a connection of trains as practicable, in order to secure the convenience of the 'traveling public.' It is well known that the principal inconvenience attendant upon traveling arises from delays resulting from failure of trains to connect according to time schedules. It would contribute little to the convenience of the traveler to be dumped out upon a track making a 'physical connection,' and be compelled to wait for hours, frequently without food or adequate shelter, and in the night, for a train upon which he might proceed on his way. The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required, to furnish facilities for traveling at

all, and a close connection of both to secure the convenience of the traveling public."

It is true that section 1957 (9) of the Code of 1883, originally enacted in 1871-72, gave to railroad companies themselves the right to "regulate the time and manner in which passengers and property shall be transported"; but by the act of 1891, p. 275, c. 320, creating a railroad commission, the state made a radical change in its attitude towards railroads. It asserted its power to supervise and regulate their conduct, forbade discrimination and issuance of free passes; conferred upon the railroad commission the power to regulate and to fix their charges for freight and passengers; to prohibit rebates; to make joint through rates; to make personal visitation of all railroad offices and places of business; to examine their officers, agents, and employes under oath; to require all contracts and agreements between railroads as to their business in this state to be submitted for approval; to require annual reports from the railroads; to require the railroads to make repairs to their tracks, and additions to or changes of their stations; forbade the abandonment of any station without the permission of the commission; to require, if the commission saw fit, separate accommodations for the races at the stations and in the cars, and "that connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public"; and many other matters which before that had been left to the railroads themselves. This act was passed after the fullest discussion for years before the people of the state. It expressed their deliberate conviction that the time had arrived when the state, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones, and steamboats. Similar legislation had preceded our act in England, in the federal Congress, and in many of our sister states. Similar legislation has now been adopted in most of the states. The act of 1891 modified the Code, § 1957 (9), certainly to the extent that the right formerly conferred on railroad companies of fixing the time of running their trains was made subject to the power of the commission to require connections to be made wherever public convenience should require this to be done, and the order was reasonable and just. That act (Laws 1891, p. 275, c. 320) had a repealing clause as to all previous legislation in conflict with it. The present act of 1899 renewed the general provisions of the railroad commission law, with some extension of its powers and changes, but re-enacting verbatim the provision requiring connections to be made, and giving the Corporation Commission "general control and supervision of all railroads," with all powers "necessary to carry out the provisions of this act."

In this case the excuse of the defendant

for its often missing connection at Selma since 1900 is that train 89 was a through train, and that its increase in business made it more and more difficult to get to Selma in time. It may be natural that the officers of the company, looking to profits, should prefer the through business to the neglect of the convenience of the people of North Carolina, and should be reluctant to avoid the delay caused by heavy through business by putting \$15 of its profits into affording the required convenience by an additional train, if necessary. But it is precisely because just and proper regard for public convenience did not always coincide with the largest profit to the corporation that the state had to enact a statute giving to the Corporation Commission the power to regulate their rates, require suitable connections to be made, and a general supervision of their conduct. An act of the Legislature or order of the commission reducing the defendant's charges for freight and passengers many hundreds of thousands of dollars would be valid if it left enough profit, over running expenses, "with economical salaries and management (of which the court will judge), to pay interest on its bona fide debt and some profit to stockholders." *Railroad v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176. It follows that this order, even if it cost the defendant \$15 per day, is in the power of the commission, if it serves public convenience.

The other point, as to the constitutional power of the Legislature to so enact, is also well settled. The general power of the Legislature to provide reasonable rules and regulations, directly or through a commission, has been held by us in *Express Co. v. Railroad*, 111 N. C. 472, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805; in *Corporation Com. v. Railroad*, 127 N. C. 288, 37 S. E. 266, and cases there cited. Among the federal decisions, this was asserted in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, and has been reiterated in numerous cases since, collected in 9 *Rose's Notes*, pp. 21-55. The doctrine is thus stated in *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 566, 15 Am. St. Rep. 460: "Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *Navigation Co. v. Bank*, 6 How. 382, 12 L. Ed. 465. Their business is therefore affected with a public interest, within the meaning of the doctrine which Lord Hale has so forcibly stated. But we need go no further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation." This has been repeated over and over again in all the courts. Citation of authorities would be a work of supererogation. If the public can regulate the charges of a common carrier, so that only it is not deprived of all profit, as is held in *Railroad v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176, and *Dow v. Beidelman*, 125 U. S. 680,

8 Sup. Ct. 1028, 31 L. Ed. 841, it can certainly require a connection, for the accommodation of thousands of our people, even if, at the utmost, it requires a loss of \$15 a day out of a railroad company making \$2,000,000 net earnings annually out of its operation in this state. It is not necessary that the particular service required shall be profitable, if the total earnings in this state show a profit. It is precisely because some particular service which the public comfort or convenience may require is not profitable that the company declines to render it; it prefers to work the soft spots—the best paying ore—only; and it is precisely for that reason that the commission is vested with the power to require those things to be done, if reasonable and just (not necessarily profitable), as to which there is the protection of an appeal to the superior court, and a further review here.

In *Railroad v. Gill*, 156 U. S. 665, 15 Sup. Ct. 491, 39 L. Ed. 567, the court, affirming the Supreme Court of Arkansas in same case (54 Ark. 112, 15 S. W. 18), says that the common carrier cannot "attack as unjust a regulation which fixes a rate at which some part would be unremunerative. * * * To the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated." In *Railroad v. Minn.*, 186 U. S. 261, 22 Sup. Ct. 902, 46 L. Ed. 1151, the court says that if, upon the whole operations in hauling coal, the road makes a profit, the requirement as to a fair profit upon investment is satisfied, notwithstanding, under the order of the commission, there would be a loss in hauling at the rate fixed in car-load lots. In *Railroad v. Minn.*, *supra*, the court says: "We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular." In *Cantrell v. Railroad*, 176 Ill. 512, 52 N. E. 292, the Supreme Court of Illinois laid down the same doctrine thus: "The sufficiency of the earnings of a railroad to justify the expense of running a separate passenger train over a certain branch-line, constituting part of the entire system, is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts of the roads operated with the branch as one continual line." In *Railroad & S. S. Co. v. Commission of La.*, 33 South. 214, the Supreme Court of that state, through Nichols, C. J., in defining the powers possessed by the Railroad Commission, says: "They extend to matters concerning public comfort and convenience, and, in the consideration of matters of comfort and convenience, the number of persons who may be concerned or interested in some particular matter at some particular point en-

ter as important factors in determining what is to be done. The commission cannot ignore the comfort and convenience of numbers of citizens on a line of travel or conveyance, to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. * * * In the present issue it cannot be claimed that the Southern Pacific Road, either in the operation of its line as a whole or that part of it which falls within the limits of Louisiana, has not been and is not remunerative; nor can it be said that the Morgan Railroad Company is not a paying corporation. * * * We do not think the point is made that, after the business of the railroad corporation had made it fairly remunerative, the commission is without general authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly in view." In *U. S. v. Trans-Mo. Freight Ass'n*, 166 U. S. 332, 17 Sup. Ct. 555, 41 L. Ed. 1007, the court says: "It must also be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges (and among such the right to take private property of citizens is not the least), and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders." In *Gladson v. Minn.*, 166 U. S. 430, 17 Sup. Ct. 628, 41 L. Ed. 1064, the court says: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may prescribe the location and the plan of construction of the road, and the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience, and comfort of its passengers and of the public." In *Wisconsin v. Jacobson*, 179 U. S. 297, 21 Sup. Ct. 115, 45 L. Ed. 194, the court says "that railroads from the very outset have been regarded as public highways, and the right and duty of the government to regulate, in a reasonable and proper manner, the conduct and business of a railroad corporation, have been founded upon that fact. Constituting public highways of a most important character, the functions of proper regulation by the government spring from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests,

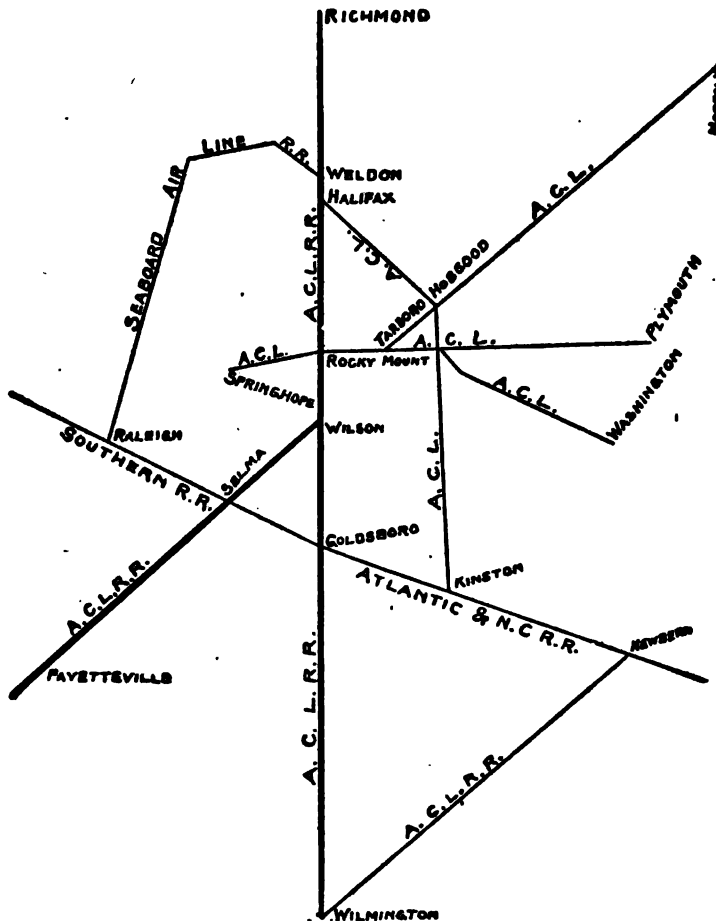
and to subserve primarily the public good and convenience."

It is needless to multiply authorities. As the United States Supreme Court says in the last-cited case, the defendant was granted incorporation by the state "to subserve primarily the public good and convenience." If all those things required for the public convenience or comfort were profitable per se to the company, a corporation commission would not be necessary to compel the adoption and operation of such betterments. In *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173, it was held that the Legislature could regulate gas and water and other like companies, and require them to furnish their customers at prices to be fixed by the municipal authorities of the locality; and in *Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, that the Legislature could require, even as to railroads already built, the removal of grade crossings at railroad expense. Certainly, then, the police power extends to authorizing the State Corporation Commission to require two railroad companies to make connection. The Corporation Commission, after three several investigations, has

found that this connection would subserve that end. The jury, after an overwhelming array of evidence, which we have not deemed it necessary to recapitulate or cite, has so found. The statute clearly gives the power, and the authorities are beyond question that the Legislature could confer it. Requiring two railroads to make connection is the exercise of a far less power than making rates or compelling the erection of union depots at such junctions.

While we must reverse the decision below, and affirm the judgment of the Corporation Commission, in view of the novelty and importance of this class of litigation, it is well to take notice of some of the exceptions taken by the commission.

It was error to direct a verdict upon the first four issues. Upon the first issue (whether it was practicable to make connection by train No. 39) and the second issue (whether it was practicable to make connection by extending the run of the Plymouth train to Selma) there was a conflict of evidence, and the issues were of fact, and, if material, should have been submitted to the jury. More especially was this true since the order of the commission was presumed to



be valid, and the burden was on the defendant to show otherwise. *Railroad v. Minn.*, 186 U. S. 264, 267, 22 Sup. Ct. 900, 46 L. Ed. 1151. On the third issue, as to the practicability of running the Springhope train to Selma in the four hours that it lies over at Rocky Mount, the evidence was uncontradicted that this could be done; and there was even evidence from two reputable witnesses which proved, if believed by the jury, that the cost of the extra run would be only \$10, showing a profit of \$15 daily. The excuse that the engine was used for shifting at Rocky Mount, or that, being a wood burner, a small stand for wood would need to be built at Selma (the other engines being coal burners), did not deserve to be considered, against the inconvenience to thousands of the public caused by failure to make this connection. It follows that it was error to instruct the jury, in response to the fourth issue, to find that the connection could only be made by an additional train from Rocky Mount to Selma.

The first seven issues were irrelevant and immaterial. The motion of the plaintiff for judgment upon the verdict should have been granted. The eighth issue, "Is it reasonable and proper that, for the convenience of the traveling public, the defendant company should be required to make such connection?" was answered "Yes." This was the only material issue, and upon that finding alone the judgment should be entered here. This view is strengthened by the "inspection of the whole record," which shows that the findings upon the sixth and seventh issues are that, if the connection were made by the most expensive of the four methods named, the loss was only \$15 per day, and the report of the defendant to the Corporation Commission, which is in the record, that its annual net earnings in this state were nearly \$2,000,000. This shows the correctness of the finding upon the eighth issue, as to the reasonableness of the order, even in the most adverse view.

The court has the power to enter final judgment here, and on proper occasions has done so. Code, § 957; *Alsbaugh v. Winstead*, 79 N. C. 526; *Griffin v. Light Co.*, 111 N. C. 438, 16 S. E. 623; *Cook v. Bank*, 130 N. C. 184, 41 S. E. 67. Final judgment has been entered here not infrequently by order and without opinion, as a matter of course. In *Bernhardt v. Brown*, 118 N. C. 710, 24 S. E. 527, 715, 716, 36 L. R. A. 402, it is said: "If this court reverses or affirms the judgment below, it may, in its discretion, enter a final judgment here, or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since the act of 1887 (chapter 192)." In *Wilson v. Caldwell*, 121 N. C. 473, 28 S. E. 554, which resembles this case in being a matter of public interest, and not a judgment for money, it was held, "The judgment must

therefore be affirmed, but, in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this court," which was done—ousting the defendant from office and seating the relator. Among many other cases in which final judgments were entered here is *White v. Auditor*, 126 N. C. 584, 36 S. E. 132, and similar cases, in none of which the dissents were upon the power of this court to enter final judgment here. Code, § 957, provides as to this court: "In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." Rule 49 of this court provides for "a judgment docket of this court," with references to entries as to different causes of action in which recovery is adjudged; and rules 50 and 51, for the issuance of executions from this court on its judgments.

In this matter there has already been a year's delay. The inconvenience to the public continues each day. The act of the Legislature for that reason expedites the hearing of these causes by giving them precedence of all other civil cases. Judgment will therefore be entered here reversing the judgment of the Superior Court, and affirming in all respects and declaring valid the order of the Corporation Commission made in this case 13th February, 1904. That order simply directed the defendant to make the connection daily at Selma at the time mentioned therein, without specifying whether this should be done by quickening the speed of train No. 39, or by extending the run of the Springhope or the Plymouth train, or by putting on an extra train from Rocky Mount to Selma, and our judgment leaves to the defendant the same liberty of choice as to the mode in which it shall put into effect the order of the commission. Owing to the possible necessity of making preparations to comply with this judgment, there will be a cessat executio till 10th February, 1905, entered on the judgment docket of this court, and until that date no mandate shall issue to the defendant upon this judgment.

The judgment of the superior court is reversed. Reversed.

DOUGLAS, J. (concurring). I fully concur in the opinion of the court, but there is a question omitted therefrom which, though perhaps not essential to the present decision of the court, may become of the greatest importance in view of the federal question raised, or attempted to be raised, by the defendant.

I think there was error in excluding, upon the objection of the defendant, answers to the following questions asked by the plaintiff, to wit: "Q. Mr. Borden, what is the stock of the Atlantic Coast Line worth today?" "Q. What was the stock of the Wilmington & Weldon Railroad Company worth

20 years ago?" "Q. Is not the present value of the original stock of the Wilmington & Weldon Railroad Company, which constituted the basis of the present stock of the Atlantic Coast Line, to-day worth \$1,900 or \$2,000 in the market?" "Q. What dividends are now being received by the holders of the original stock of the Wilmington & Weldon Railroad Company?" The questions sufficiently disclose the scope of the proposed inquiry, but would doubtless have been followed by other questions eliciting in greater detail the desired information. In its second exception to the order of the commission, the defendant claims the protection of the Constitution of the United States, in the following words: "The company therefore excepts to the order of the commission in so far as it is construed as requiring it to run an additional train from Rocky Mount to Selma between the hours above named, because to do so would be requiring the company to perform services without compensation to it for the same, and thereby taking its property without due process of law, and in violation of the Constitution of this state, and in violation of the Constitution of the United States." In its brief the defendant also says: "Neither the commission nor the Legislature has the power to require the defendant to run an additional train at a loss. The jury finds that to operate this train will impose a daily loss of \$15 upon the defendant, and to compel the defendant to operate this train at a loss would be taking its property without compensation, and in violation of the Constitution of this state and of the Constitution of the United States." In this view of the case, the excluded testimony might become of the utmost importance. We cannot presume that the Corporation Commission intends "to take the property of the defendant without due process of law," or to require unnecessary services without compensation in some form or another; but we cannot admit that the defendant can ignore the just demands of the public by creating for its own profit and convenience a condition of affairs that makes one train unprofitable by throwing all the remunerative business on trains that do not make connection. The order of the commission does not require the defendant to run an additional train, but simply to make connection. It does not necessarily require any additional, unusual, or special services, but simply the performance of its essential duties in such a manner as will meet the reasonable convenience of the public. This the defendant can do by making a through train arrive at Selma a few minutes earlier; but, if it prefers to ignore the rights of those living along its line, whose lands it has taken through the exercise of the right of eminent domain, in order to cater to its through travel, it cannot justly complain if its public duties require the running of an extra train. The mere fact that through passengers from the North to Florida have the

choice of three or more through routes, varying but little in time and comfort, is no excuse for an unjust discrimination against that part of the traveling public who are dependent upon local lines. This idea was evidently in the mind of this court when, speaking by Rodman, J., in *Branch v. Railroad*, 77 N. C. 347, upon the necessity for the imposition of penalties, it says on page 350: "The Legislature considered the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interest of local shippers, for whose interest principally the road was built, and against whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage in order that the company might obtain the carriage from points where there were competing lines by land or water, as from Wilmington to Augusta." The fact that the defendant in that case was the parent of the present defendant may lend additional significance to the words of the court. In this view the profits of the road, both for the present and the immediate past, would become material. Suppose the witness had answered that no dividend had been paid for years, and that the company was unable to earn anything beyond bare expenses, whereby the stock was almost unmarketable; would it not have been competent as tending to prove the defendant's contention that it is unreasonable to demand of it any additional service? On the contrary, suppose the witness had testified as follows: That on one share, of the par value of \$100, in the Wilmington & Weldon Railroad Company, the following stock dividends or bonuses had been issued, in addition to large annual dividends: That in 1887 the said railroad company had issued upon this one share of stock, as a bonus, a certificate of indebtedness in the sum of \$100, bearing 7 per cent. interest; that in 1900 there were issued, in lieu of this one share of stock, two shares, of \$100 each, of preferred stock in the Atlantic Coast Line Company, and two shares, of \$100 each, of common stock in the Atlantic Coast Line Company; that in 1897 there was also issued to the holder of the one original share of stock four shares of the Atlantic Coast Line Company of Connecticut, of \$100 each; and in 1900 a certificate of indebtedness of the Atlantic Coast Line Company of Connecticut for \$400. That all of said stock and certificates of indebtedness were much above par in value, and receiving handsome dividends. That recently a dividend of 25 per cent. had been declared, and that the one original share in the Wilmington & Weldon Railroad Company had thus developed into thirteen shares of stock and certificates of indebtedness, of the par value of \$1,300, but of the real value of about \$2,500. Suppose it had been further shown that a little over 30 years ago the state's half interest in the Wilmington & Weldon Railroad Company

had been bought for \$35 a share. Suppose, further, that it was shown that a large part of the alleged indebtedness of the company were certificates of indebtedness issued to the stockholders without any consideration whatever, other than the mere capitalization of profits. Would not this evidence have been competent to prove that the order of the Corporation Commission, requiring the defendant to quicken its regular train 25 minutes in order to make connection at Selma, was not unreasonable, and not "taking its property without due process of law and in violation of the Constitution of the United States?" Would not such evidence also tend to prove that it would not be unreasonable to require the defendant to make such connection, even if it did require an extra train, at a loss of \$15 per day, if other trains running on the same line of road and by the same places more than made up the difference?

There are hypothetical answers on both sides. Where the truth may be was peculiarly within the knowledge of the defendant, upon whose objection it was excluded. It cannot be contended that such an investigation would be an impertinent inquisition into private affairs, as property taken for a public purpose under the power of eminent domain is indelibly impressed with a public use. This has been too often decided by the Supreme Court of the United States to be any longer an open question. Two cases will be sufficient for my purpose. In *Chicago, etc., Railroad Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176, the court says on page 345, 143 U. S., page 402, 12 Sup. Ct., 36 L. Ed. 176: "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries—fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company, for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this—that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other im-

proper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

The Corporation Commission act (chapter 164, p. 291, Laws 1899), in section 2, provides as follows: "Provided, that in fixing any maximum rate or charge or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this act, the said commission shall take into consideration if proved or may require proof of the fair value of the property of such carrier, persons or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered as in determining the fair value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state of North Carolina; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges, and tariffs."

The case of *Cotting v. Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, is cited by the defendant, but does not seem to sustain its contentions. In the opinion in that case appears the following clear distinction between those corporations which, like railroad and telegraph companies, are created for a public purpose, and endowed with certain governmental powers, such as that of eminent domain, and those corporations which are only incidentally devoted to public use, receiving no governmental powers, and not impressed with any permanent public purpose. The court says on page 93, 183 U. S., page 86, 22 Sup. Ct., 46 L. Ed. 92: "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered, and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one, the owner has intentionally devoted his property to the discharge of a public service; in the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one, he deliberately undertakes to do that which is a proper work for the state; in the other, in pursuit of merely a private gain, he has placed his property in such a position that the public has become interested in its use. In the one, it may be said that he voluntarily accepts all the conditions of public service which attach

to like service performed by the state itself; in the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one, he expresses his willingness to do the work of the state, aware that the state, in the discharge of its public duties, is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he, in a measure, subjects himself to the same rules of action, and, if the body which expresses the judgment of the state believes that the particular services should be rendered without profit, he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation; that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt, which ultimately works its appropriation—still is there not force in the suggestion that, as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public? Again, wherever a purely public use is contemplated, the state may, and generally does, bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the state; and, exercising those powers and doing the work of the state, is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public have an interest in. In reference to this latter class of cases, which is alone the subject of the present inquiry, it must be noticed that the individual is not doing the work of the state. He is not using his property in the discharge of a purely public service. He acquires from the state none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract."

(187 N. C. 186)

CITY OF HICKORY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 13, 1904.)

EMINENT DOMAIN—RAILROAD RIGHT OF WAY—PRESUMPTION OF TITLE—FAILURE TO PRODUCE GRANT—DEEDS—TRUSTS—INCAPACITY OF TRUSTEE—ULTRA VIRES.

1. Laws 1854-55, p. 264, c. 228, § 27, gave a railroad power to purchase lands necessary for its purposes. Section 29 provided that on failure to agree for a purchase it should have power to condemn land, and to hold in fee simple lands belonging to the state over which the road should pass to an extent not exceeding 100 feet, and that, in the absence of any contract as to lands, it should be presumed that the land over which the road was constructed, together with 100 feet on each side thereof, had been granted to the railroad, unless the owner should apply for an assessment of the value of the land within two years after the location of the road. *Held*, that the statute did not give to the railroad any land not belonging to the state, and did not prescribe any fixed width for the right of way, which might vary in different localities, but it contemplated that land in excess of 100 feet on either side of the road belonging to the state, and all land belonging to private owners not freely given, should be paid for in full.

2. Laws 1854-55, p. 264, c. 228, § 29, gave a railroad the same powers to condemn lands, in the event that necessary lands could not be purchased from the owner, as were granted to a former railroad by its act of incorporation, and empowered it to condemn such lands in the same manner and to the same extent, and under the like rules, restrictions, and conditions, as were prescribed by the charter of that railroad. Laws 1836-37, p. 247, c. 47, chartering the railroad referred to, provided in section 9 (page 258) that the railroad should have a right to enter upon the land condemned and construct its road, after payment of the full amount of the assessed damages. *Held*, that an effort to purchase the land should be made before condemnation.

3. Under Laws 1854-55, p. 264, c. 228, § 29, providing that in the absence of contract in relation to land through which a certain railroad may pass it shall be presumed that the land has been granted by the owner to the company, unless the owner shall apply for an assessment of the value of the land within two years next after the road has been "located," the location of the railroad is its physical location by the laying of its track.

4. Under Laws 1854-55, p. 264, c. 228, § 29, raising a presumption of title to its right of way in a railroad unless the owner should apply for an assessment of the value of the lands within two years after the location of the road, the burden of showing when the road was located and built was upon the railroad claiming title to the lands by virtue of the statute.

5. Laws 1854-55, p. 264, c. 228, § 29, providing that in the absence of any contract in relation to lands through which a railroad may pass it shall be presumed that the land has been granted by the owner to the company, unless the owner shall apply for an assessment of the value of the lands within two years next after the location of the road, has no application where a deed is executed by the owner of the land to the railroad within two years after the building of the road, and a claim under the deed is inconsistent with a claim under the statute.

6. A recital in a deed that it is executed and accepted as a duplicate of a former deed constitutes an admission of the execution of the former deed.

7. In the absence of specific provisions in its charter to the contrary, the power of making and receiving contracts as to the right of way belongs to the president of a railroad.

8. The act of a railroad in taking title to land-in trust for the purpose of a public square around the depot, for the common use of both the railroad and the town, is not ultra vires.

9. The fact that a railroad's act in taking title to land in trust for a public square is ultra vires is immaterial on an issue as to the beneficial ownership of the land, and the rights of the railroad therein, as the trust would not be permitted to fail for want of a trustee.

10. Where a railroad acquired land by virtue of a deed, and so held it for over 45 years, it could not repudiate the deed, and rely on the presumption of a grant created by Laws 1854-55, p. 264, c. 228, § 29, in case a railroad failed to acquire a deed to land over which its track was laid, and the owner brought no proceedings for an assessment of damages.

Appeal from Superior Court, Catawba County; Neal, Judge.

Suit for an injunction by the city of Hickory against the Southern Railway Company. There was a judgment of nonsuit, and plaintiff appealed. Reversed.

The suit was brought to enjoin defendant from enlarging its depot buildings on a square of ground to which defendant held title by virtue of a deed which recited that the conveyance was "for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory; not to be built up or exclusively occupied by any one to the exclusion of the public as a free common. To have and to hold the aforesaid tract or lot of land, and all privileges and appurtenances thereto belonging, to the said Western N. C. R. R. Co., in trust as aforesaid, for the public uses and purposes aforesaid." The Western North Carolina Railroad Company, through which the defendant claims by succession, was originally chartered by chapter 228, p. 264, of the Laws of 1854-55, of which sections 27 and 29 are essential in the consideration of this case. They are as follows:

"Sec. 27. Be it further enacted, that the said company may purchase, have and hold in fee, or for a term of years, any lands, tenements and hereditaments, which may be necessary for the said road, or the appurtenances thereof, or for the erection of depots, storehouses, houses for the officers, servants, or agents of the company, or for workshops, or foundries to be used for the said company, or for procuring stone or other materials, necessary for said company, in the construction or repair of the road, or for effecting transportation thereon, and for no other purpose."

"Sec. 29. Be it further enacted, that when any lands for right of way may be required by said company for the purpose of constructing their road, or for any of the uses described in section 27 of this act, and for the want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the said company shall have the same powers

to condemn all such lands belonging to individuals or corporations as may be needed for the aforesaid purposes, as were granted in and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions and conditions as are prescribed in the charter aforesaid, for the government of the said company, and the said company shall be entitled to hold in fee simple all lands belonging to the state, over and through which the said road may pass to an extent not exceeding one hundred feet on either side of said road; and in the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said lands as hereintoforesaid directed, within two years next after that part of said road has been located; and in case the owner or owners shall not apply within two years from the time aforesaid, he, she or they shall be forever barred from recovering the same or having an assessment or compensation therefor: provided, that nothing herein contained shall affect the rights of infants, feme coverts, persons non compos, or beyond seas, until two years after the removal of their respective disabilities, and the same and all the estate aforesaid, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

The North Carolina Railroad Company, referred to in the above sections, was chartered under the name of the "North Carolina Central Railroad Company" by chapter 47, p. 247, of the Laws of 1836-37, reprinted in the Revised Statutes at page 405. Section 9 (page 253) of said act is alone essential in the consideration of this case. It is as follows:

"Sec. 9. Be it further enacted, that if the president and directors cannot agree with the owner of land through which it may be necessary to make the said railroad, as to the terms upon which the said railroad shall be opened through the same, then it shall be lawful for the said president and directors to file their petition in the court of pleas and quarter sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed by law in laying off public roads; and upon the filing of said petition, the same proceedings shall be had as in cases of public roads; and when the jury shall have assessed the damages to be paid to the owners of the land through which

the same shall be laid off, then it shall be lawful for the said president and directors, upon payment to the owner or owners of said land, his, her or their guardian, as the case may be, or into the office of the clerk of the court of pleas and quarter sessions of the county wherein the land lies, the sum or sums so assessed, to enter upon the land laid off, and construct the road thereon; to make all necessary excavations and embankments, and all other structures necessary to the construction and preservation of said road; and to hold the said land to their use and benefit during their corporate existence; and in all things to have the same power and authority over said land so laid off, during their existence as a corporation, as though they owned the fee-simple therein: provided: that nothing in this act contained shall be so construed as to give power to said company to lay off said road through the yard, garden or burial ground attached, or appurtenant to the dwelling house on any plantation through which it may be deemed necessary to lay off said road, without the consent of the owner thereof."

Section 11 gives the company the right to purchase lands not exceeding 10 acres in any one tract. Section 27 confers the right to condemn "such quantity of ground, not exceeding one acre at any one place, as may be necessary for a toll house," etc., prescribing much the same method of condemnation as section 9. These are evidently the sections referred to in the charter of the Western North Carolina Railroad Company, and must be taken as an essential part thereof.

E. B. Cline, T. M. Hufham, and Self & Whitener, for appellant. S. J. Ervin and A. B. Andrews, Jr., for appellee.

DOUGLAS, J. (after stating the case). It is important that we should in the beginning ascertain the relief sought in this action. It is thus stated in the prayer of the complaint: "That the defendant, its agents, officers, employés, servants, representatives, and any person or persons acting by or under any contract or agreement with it, be perpetually enjoined from erecting and building a platform and any other structure whatsoever or any part thereof within that boundary of land in the city of Hickory, Catawba county, North Carolina, referred to and described in Exhibit A, which is a part of this complaint." No other specific relief is demanded beyond the costs of the action. In our opinion, the plaintiff was entitled thereto, irrespective of any question of nuisance, upon which we do not care to intimate an opinion. If that question is to be decided by this court, it can be more clearly presented free from any complications as to title to land.

The vital defect in the defendant's case is the assumption that its charter gives it a right of way including 100 feet of land on each side of its track. The charter does not

and could not give any land whatever except such as belongs to the state. All that it does, or pretends to do, is to give to the company the right to acquire by purchase or condemnation such lands as may be necessary for its essential purposes. It does not prescribe any fixed width for its right of way, for the evident reasons that the company might need more land at one place than another; and that, where the land was valuable, the company would not care to pay for more than it actually needed. The charter gives to the company "in fee simple all lands belonging to the state over and through which the road may pass to an extent not exceeding one hundred feet on either side of said road." Beyond this it is evident that its charter contemplates that all lands taken, but not freely given, shall be paid for in full, and that an effort to purchase shall be made before condemnation. It expressly provides in section 29 that, when the necessary lands "cannot be purchased from the owner or owners, the said company shall have the same powers to condemn all such lands belonging to individuals or corporations as may be needed for the aforementioned purposes as were granted to and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions, and conditions as are prescribed in the charter aforesaid." The charter of the North Carolina Railroad Company gives it right of entry upon the lands so condemned only after payment to the owner of the land or into the office of the clerk of the court of the full amount of the assessed damages.

It is true, the charter of the Western North Carolina Railroad Company provides that: "In the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said lands as hereintofore directed, within two years next after that part of said road has been located," etc. This creates the presumption of a grant, founded upon the idea that the continued failure of the owner for two years after the building of the road to bring an action for damages would indicate that he had sold or voluntarily donated the land to the company. We think his honor properly construed the word "location" as meaning the physical location of the road—that is, the laying of its track—and this construction does not seem to be doubted by counsel. Any other would lead to the

most absurd results. We know that many roads are surveyed and located that are never built, or built long years thereafter. To say that a railroad company can, by a mere abstract location of its route, without building its road, come 25 or 30 years thereafter and take private property, without the pretense of compensation, under an irrebuttable presumption resting merely on a row of rotten stakes, would be too great a strain upon judicial construction. However, this is not contended for by the defendant. It is admitted that the original deed was dated May 28, 1859, and that the said line of railway was constructed and said depot erected during the same year, but during what month does not appear. If this were material, the burden of showing when the road was built would rest upon the defendant, as the fact would necessarily be within its peculiar knowledge. But it is not material, as it is evident that the deed was, in any event, executed within two years after the building of the road, which prevents the presumption from ever arising under the express terms of the statute. The word "unless," used in the act, is thus defined by Webster: "Unless. Upon any less condition than (the fact or thing stated in the sentence or clause which follows); if not; supposing that not; if it be not; were it not that." The Century Dictionary defines the same word as follows, omitting some secondary meanings: "If it be not that; if it be not the case that," etc. These definitions clearly indicate a negative condition precedent, as much so as the condition in a mortgage that, "unless" the money is paid, or "if it be not" paid by a certain day, the land may be sold. If the money is paid on or before the day limited, the mortgagor is in no default whatever, and the power of sale never arises. The defendant has placed itself in the peculiar position of claiming both under the deed and under the presumption. We have seen that, if there is a deed, there can be no presumption. These are not inconsistent defenses, but are inconsistent claims of right, under which it seeks to maintain its easement. It is admitted that the fee to the land was in Robinson, and, if it did not pass out of him by virtue of the deed, it must still remain in him or his heirs. It appears that the original deed was lost, and that the deed of March 10, 1890, was executed and accepted as a "duplicate" thereof. This is expressly stated in the duplicate deed which was accepted by the defendant and filed for registration on April 17, 1890. This is, of course, an admission of the execution of the original deed.

The defendant contends that (quoting from defendant's brief) "it was not in the power of the president of the road to part with the title which the road had acquired to the land under the first deed." It does not appear that he did so. The first deed is not in the record. On the contrary, it was

admitted by the grantee to have been lost or destroyed, and a duplicate deed accepted in lieu thereof. Both the defendant and the original grantee were corporations—artificial persons, who were utterly incapable of any action whatever except through agents. The law evidently contemplates that a railroad company shall have an agent to make and receive contracts as to the right of way, and, in the absence of specific provisions to the contrary, it seems to us that those powers would come peculiarly within the duties of the president, the official head and general representative of the company.

The defendant also contends that the original grantee acted *ultra vires* in consenting to act as trustee. We do not think so, as it took the legal title in trust for itself as well as the public. It was not a naked trust, but one coupled with a beneficial interest that was in furtherance of its essential purposes. But, if it were otherwise, it would not help the defendant, as no trust is permitted to fail merely for want of a trustee. This is common learning.

The record states that "the defendant in open court agreed that it did not claim any part of the land described in the deed and the plats except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by the order of the court." It is difficult to discover what this means, unless it is an attempt to repudiate the deed under which the land was acquired, and, after thus holding it for over 45 years, create *nunc pro tunc* a presumption of a grant which by the express provisions of the statute can never arise in the face of a contract. This cannot be permitted.

We have cited no authorities, because the decision of the case depends upon the plain wording of the statute and of the deed. The defendant has nothing more than belonged to the original company, which, acquiring the land under a deed the mere existence of which prevented the presumption, holds in accordance with the terms of the deed, which is its only muniment of title. Consequently, there was error in the intimation of the court below. As the facts are now presented to us, a permanent injunction should have been granted in accordance with the prayer of the plaintiff.

Error.

(127 N. C. 302)

SATTERTHWAITE v. GOODYEAR et al.
(Supreme Court of North Carolina. Dec. 17, 1904.)

BROKERS—CONTRACTS—LIMITATIONS—TIME—ACTIONS—SEPARATE CAUSES—APPEAL
—NEW TRIAL—COSTS.

1. Where a vendor of land empowered a broker to sell the same at a certain price, provided the matter was closed up within 30 days, the time so limited began to run from the date of mailing the letter containing such authority, and not from the date it was received by the broker.

2. The jury being required to respond to issues, and not being entitled to render a general verdict, requests to charge, concluding with the words "plaintiff cannot recover," were defective.

3. Where an action was brought by a broker to recover charges for collecting rents, and also for commissions on the sale of property, and there was no exception to the verdict in plaintiff's favor on the rent issue, a new trial after reversal on appeal would be confined to plaintiff's right to recover commissions.

4. Where a verdict in favor of plaintiff on two causes of action was contested on appeal as to one only, and judgment was reversed, the costs on a partial new trial would be in the discretion of the court, as provided by Code, § 527 (2).

Appeal from Superior Court, Haywood County; E. B. Jones, Judge.

Action by S. C. Satterthwaite against Charles Goodyear and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

H. R. Ferguson, for appellants. Shepherd & Shepherd, for appellee.

CLARK, C. J. On March 20, 1901, the plaintiff, a real estate agent in Waynesville, N. C., who had been collecting rents on the realty of the Goodyear estate in and near that town, and had sold some of it, wrote to Walter Goodyear, in New York City, one of the defendants, and in the course of his letter he said: "I am trying to negotiate a deal for farm and Richland Park, including cottage. I made an offer of \$19,000 for the entire property, \$6,000 cash, balance in one and two years at 6%, or farm \$9,000 and the other \$10,000 same terms. * * * Kindly let me know if I can make a concession of \$500 on each property, if it is necessary to make the deal." To this Charles Goodyear, the other defendant, replied March 26, 1901: "Replying to yours of 20th would say we would be willing to accept the price mentioned for the farm and the Richland Park property, provided the matter could be closed up within 30 days, as I have good use now for just about this amount of money. I understand your proposition to be \$3,500 for the farm and \$9,500 for the Richland Park property, \$6,000 cash, and balance in equal payments at one and two years at 6%." Charles Goodyear was sole executor of his father, by whose will Richland Park was devised to the widow. While the plaintiff was collector of rents from and manager of the property, the above letter of 20th March shows that he did not have authority to sell this property for less than \$10,000, for the letter was either an offer or an application for authority to sell the realty named at prices therein stated, the Richland Park property being put at \$9,500. The reply of 26th March, whether it be an acceptance of an offer or a power of attorney, was restricted to prices therein named, and was limited to 30 days. The plaintiff

did not report the name of the person with whom he was negotiating, and he made no sale at any price. On April 22, 1901, Charles Goodyear telegraphed to the plaintiff, "Can you carry out your proposition of 20th March?" to which the plaintiff replied, "Prospective purchaser now in New York; am trying for \$10,000." On April 28, 1901, Charles Goodyear, as executor, or as agent for his mother, or both (it is immaterial), sold the Richland Park for \$8,000 to Jones, who was the party with whom the plaintiff had been negotiating. The plaintiff brings this action against Walter Goodyear, Charles Goodyear individually, and Charles Goodyear, executor, in part to recover \$400, being 5 per cent. commissions on the sale of the Richland Park, made by Charles Goodyear. The contract is set out in the letters of 20th March offering to sell Richland Park at \$9,500, and the reply accepting that offer "provided the matter was closed up within 30 days." The plaintiff contends that the 30 days should be counted from the receipt by him of the letter on 28th March. But, whether Charles Goodyear's reply was an acceptance or a power of attorney, it bound him from the date of mailing the same (9 Cyc. 295; *Adams v. Lindsay*, 1 B. & Ald. 68; *Benjamin on Sales*, § 44), and necessarily bound him only for the 30 days he therein specified. Had he refused altogether, and a prior authority to sell had been shown, of course a revocation of such authority would not deprive the agent of his commissions on a sale made before a valid revocation reached him. But this is not that case.

It was error to refuse the defendant's seventh prayer—that, as the plaintiff allowed 30 days to elapse without making any sale, the jury should answer the first issue "Nothing." The court should also have given the eighth prayer—that there was no evidence that either of the defendants conspired with the purchaser to defeat the plaintiff of his commissions. The other six prayers were defective in that each concludes "plaintiff cannot recover," which this court has so often held to be properly refused under the present system, under which there is no general verdict "that the plaintiff recover," but the jury respond to issues. *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125.

There is no exception as to the verdict upon the second issue as to charges for collecting rents, and hence the new trial will be restricted to the first issue. *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33, and cases cited. But as this issue alone was contested on appeal, and the costs on a partial new trial are in the discretion of the court (Code, § 527 (2)), the costs of the appeal will be taxed against the appellee.

Error.

(137 N. C. 299)

COWARD v. JACKSON COUNTY COM'RS.

(Supreme Court of North Carolina. Dec. 17, 1904.)

COUNTIES—CRIMINAL PROSECUTIONS—WITNESSES—FEES—EXTENT OF LIABILITY—STATUTES—CONSTRUCTION—TENDER—COSTS.

1. Code, § 739, provides that, if a nolle prosequi be entered or judgment be arrested in a criminal prosecution, the county shall pay witnesses one-half their lawful fees, except in capital felonies, and in prosecutions for forgery, perjury, and conspiracy, when they shall receive full fees. *Held*, that where a nolle prosequi was entered on an indictment for homicide, as to murder in the first degree, the trial thereby became one for murder in the second degree only, and hence the state's witnesses subsequently subpoenaed for the trial of that offense were not entitled to full fees.

2. Code, § 3756, fixing the per diem and mileage of witnesses, provides that witnesses attending out of their own county shall receive five cents mileage, and those attending within the county a rate to be fixed by the county commissioners, not to exceed five cents a mile; and section 739 declares that if there be no prosecutor in a criminal action, and the defendant shall be acquitted or convicted, and unable to pay costs, or a nolle prosequi be entered, or judgment be arrested, the county shall pay witnesses one-half of their lawful fees, except in capital felonies and in certain other prosecutions. *Held*, that where a nolle prosequi was entered in a prosecution for homicide, as to murder in the first degree, the fact that a state's witness attended the subsequent prosecution for murder in the second degree from without the county did not entitle him to recover full fees.

3. Though a state's witness in a criminal case was only entitled to recover half fees from the county, as provided by Code, § 739, he was entitled to repayment in full of the amount paid to the clerk for proving his ticket.

4. Where, in a proceeding to recover witnesses' fees from a county, defendant made tender on demand, and paid into court the full amount of one-half of the witness tickets held by plaintiff, which was the amount plaintiff was entitled to recover, defendant was not liable for costs.

Appeal from Superior Court, Jackson County; Ferguson, Judge.

Action by O. B. Coward against the commissioners of Jackson county. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Coleman C. Cowan, for appellants. Walter E. Moore, for appellee.

CLARK, O. J. The question presented is the liability of the county of Jackson for costs of state's witnesses in *State v. Long*, who was indicted in that county for murder, but whose cause was removed to the superior court of Macon county. After the removal to the latter court, a nolle prosequi was entered as to murder in the first degree, and the witnesses were subpoenaed to the next term, at which the prisoner was tried for murder in the second degree, and convicted of manslaughter. The witnesses for the state were entitled to their mileage and fees in full so long as attending court as witnesses upon the capital charge, including the term at which the nolle pros. was entered.

This was not contested, and those costs have been paid in full.

The plaintiff is assignee of the state's witnesses Fowler and Fengate as to their witness tickets for that part of their attendance which was at the terms subsequent to that at which the nolle pros. as to the capital charge was entered, and he claims full fees. But the attendance at those terms was to prove a noncapital charge, and by section 739 of the Code it is provided that "if there be no prosecutor in a criminal action, and the defendant shall be acquitted or convicted and unable to pay the costs or a nolle prosequi be entered or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one half their lawful fees, except in capital felonies and in prosecutions for forgery, perjury and conspiracy, when they shall receive full fees." In *State v. Hunt*, 128 N. C. 584, 38 S. E. 473, it is held that the solicitor may enter a nolle pros. as to the charge of murder in the first degree, and that thereafter it is only a trial for murder in the second degree, entitling the prisoner only to four peremptory challenges. And it is added (page 586, 128 N. C., page 474, 38 S. E.) that thereafter the county will be saved the higher expense attendant upon attendance of witnesses for the trial of the higher offense.

The plaintiff contends that at all events he is entitled to recover full pay for witness Fengate, because he attended court out of his county. Code, § 3756, fixing the per diem and mileage of witnesses, makes this discrimination between witnesses: That those attending out of their own county shall receive 5 cents mileage, and those attending within the county "a rate to be fixed by the county commissioners, not to exceed 5 cents per mile." But payment of both alike, and all other costs, must be made by the county in the manner provided by section 739, above set out, in cases in which the costs shall fall upon the county, as therein specified. The true construction of Code, § 3756 (regulating fees of witnesses), section 3759 (regulating fees of clerks), and section 3752 (regulating fees of sheriffs), is had by reading as a proviso at the end of each of them section 739. It may be noted that the court failed to find that the defendant Long was convicted and unable to pay the costs, which finding was probably necessary, under section 739, to recover against the county at all. But there is no exception on this point, and we presume that such finding was in fact made.

The second exception, that the court allowed repayment in full of 10 cents paid by the witness to the clerk for proving his ticket, cannot be sustained. This was no part of the costs of the case proper, but a necessary disbursement of the witness to procure proof of his attendance, and he or his assignee is entitled to have it back in full. If the county paid back only half of that sum, it would

be keeping half the money the witness himself has paid.

The defendant, having made tender upon demand, and paid into court the full amount of one-half the witness tickets held by the plaintiff, should not have been taxed with the costs. *Pollock v. Warwick*, 104 N. C. 338, 10 S. E. 699; *Smith v. B. & L. Ass'n*, 119 N. C. 256, 26 S. E. 41.

Error.

(137 N. C. 273)

GENERAL FIRE EXTINGUISHER CO. v. CAROLINA & N. W. RY. CO.

(Supreme Court of North Carolina. Dec. 17, 1904.)

CARRIERS OF GOODS—NEGLIGENCE—PROXIMATE CAUSE.

1. Though a carrier of goods was negligent in failing to forward goods shipped, it is not liable for the loss of the goods by fire, where it was not negligent with respect to the fire, in the absence of evidence that the negligence in failure to forward the goods was the proximate cause of the loss.

Appeal from Superior Court, McKinley County; W. R. Allen, Judge.

Action by the General Fire Extinguisher Company against the Carolina & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff on March 12, 1902, delivered to the Seaboard Air Line Railway Company at Charlotte a car load of iron piping to be delivered to the Rhods Manufacturing Company at Granite Falls, N. C. The Seaboard Air Line Railway Company issued therefor its bill of lading, "Released," contracting to deliver it to the consignee or to its connecting line at Lincolnton, N. C., to be carried to its destination. The jury, in response to an issue submitted, found that the Seaboard Air Line Railway Company delivered the piping to the defendant company at Lincolnton, being the connecting line between said point and Granite Falls, on March 15th, being Saturday. About one half of the piping was carried to its destination by defendant. The remaining half, while in the defendant's possession awaiting shipment, was destroyed by fire communicated to the car by the defendant's warehouse, which was burned on the morning of March 18th. The delay in forwarding the whole of the piping on the day of its delivery, or Monday following, was caused by the failure of defendant to have sufficient cars for that purpose. The defendant was at that time a narrow-gauge road. The car containing the piping was on the track of the Seaboard Air Line Railway Company near the warehouse of defendant. It was in evidence that the warehouse was burned about 1 o'clock on the morning of the 18th of March. There was no evidence as to how the fire originated. It was in evidence that, when the fire was discovered, the

warehouse was enveloped in flames. No night watchman was kept at the depot. The defendant kept tubs and barrels filled with water at the depot. The people of Lincolnton had no provision for "fighting fire"—depended on buckets of water. The jury, having found that the piping was delivered to defendant company, responded affirmatively to the second issue: "Was the destruction of that part of the shipment of pipe by fire caused by the negligence of the defendant as alleged in the complaint?" The defendant in apt time requested the court, in writing, to instruct the jury: "That if the jury find as a fact, from the evidence, that part of the pipe was destroyed by fire without any fault on the part of the defendant, and that it provided such appliances and equipments for protecting the property in its control and possession from fire as were ordinarily in common use in the town of Lincolnton, and exercised such care over the same as an ordinarily prudent person would have done under similar circumstances, then the jury should answer the second issue 'No.'" The court declined to give the instruction. Defendant excepted. The court, in response to plaintiff's request, instructed the jury on the second issue: "That it is the duty of a common carrier to carry and deliver with reasonable promptness under all circumstances, and if, after defendant had received said shipment or car of pipe from the Seaboard Air Line Railway, it could with reasonable promptness [have] carried the shipment of pipe from Lincolnton to its destination before the fire occurred, it was defendant's duty to do so, and such failure would be negligence, and if this negligence [was the] cause of injury, the second issue should be answered 'Yes.'" "The law imposes upon common carriers the obligation to have and to furnish sufficient facilities for reasonably prompt transportation of goods tendered for carriage, and would be liable for failure to transport promptly, whether the failure is due to a want of facilities or to a capitious refusal to carry; and, if the jury shall find that the failure of defendant to carry and deliver the said car or shipment of pipe to its destination before the said fire occurred was due to the want of sufficient cars to carry the usual and ordinary amount of freight over its road, then defendant was negligent, and this was the cause of the injury, the second issue should be answered 'Yes.'" The defendant excepted. From a judgment for the plaintiff, the defendant excepted.

Osborne, Maxwell & Keerans and J. H. Marion, for appellant. W. F. Harding, for appellee.

CONNOR, J. (after stating the case). In the view which we take of the case, it becomes unnecessary to pass upon the defendant's exceptions to his honor's charge upon the first issue. Assuming that, as found by the jury, the piping had been delivered to

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 541, 542.

the defendant company, and that the defendant was in default in not having, as was its duty, a sufficient number of cars to send it within a reasonable time to Granite Falls, we are of the opinion that the defendant was entitled to the instruction asked, and his honor should not have given the instruction asked by the plaintiff. The defendant, by its failure to ship within a reasonable time, became liable for such damages as naturally and proximately resulted from such breach of contract or duty. *Lindley v. R. R. Co.*, 88 N. C. 549. *Pearson, J.*, in *Ashe v. De Rossette*, 50 N. C. 299, 72 Am. Dec. 552, says: "When one violates his contract, he is liable only for such damages as are caused by the breach, or such as, being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application." In that case a quantity of rice was sent to the mill of defendant's intestate pursuant to a contract that it was to be worked in its "turn." The rice was not worked in its turn. The mill with its contents was thereafter burned. In an action on the contract for failure to have the rice beaten in its turn, the plaintiff claimed the value of the rice as the measure of the damage to which he was entitled. This court held that, in the absence of any evidence of negligence in respect to the burning of the mill, he was not entitled to recover the value of the rice. The court said: "There is nothing to show that the contingency that the rice might be burned, if left in the mill, was in the contemplation of the parties. On the contrary, its being burnt was an accident unlooked for and unforeseen, and can in no sense be considered as having been caused by the fact that it was not beat in the turn promised by the defendant's intestate. Consequently the damages were too remote." *Wells v. Wilmington & W. R. R.*, 51 N. C. 49, 72 Am. Dec. 556, in which the principle was applied to a contract of carriage. Upon the second trial of *Ashe v. De Rossette*, supra (53 N. C. 240), the court below submitted the question to the jury to say whether the promise was made in contemplation of the imminent risk from fire, etc., and they so found. This court held that there was no evidence to sustain the finding, saying: "So, notwithstanding the opinion of the jury, as it is a mere matter of opinion, and there is no evidence in regard to it, we are disposed to adhere to the opinion previously expressed by us." In *Whitford v. Foy*, 65 N. C. 265, the case is approved, and the distinction pointed out wherein a bailee misuses the property, or by conduct converts it to his own use, in which case, if the property is lost or destroyed, he is liable for its value without regard to the cause of such loss, in an action of trover under the former system, or for a conversion now. The court says: "But such a

rule has never been applied to other contracts, still less to a mere neglect by a trustee, when no fraud is imputed." In *Sledge v. Reid*, 73 N. C. 440, the principle was applied to the case of a wrongful taking by a sheriff of a mule, the court refusing to give damages for loss of plaintiff's crop. The court cite *Ashe v. De Rossette*, supra, and *Hadly v. Baxendale*, 9 Exch. 341, the leading case on the subject; *Edmondson v. Fort*, 75 N. C. 404; *Foard v. R. R. Co.*, 53 N. C. 235, 78 Am. Dec. 277.

The principle has been frequently applied in other courts to cases against carriers negligently delaying the shipment of freight. In *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, the defendants, common carriers by water, received the plaintiff's goods for shipment by way of canal. They used a lame horse, and thereby the boat was delayed. When the boat reached the Juniata Division of the canal, it struck an unprecedented flood, and the plaintiff's property was injured. In an action for the negligent delay it was sought to recover the value of the property. The court said that the proximate cause of the disaster was the flood; the fault of having a lame horse was a remote one, which, by concurring with the extraordinary flood, caused the injury. "In any other than a carrier's case, the question would present no difficulty. The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." After discussing the question at some length, the court says: "Now, there is nothing in the policy of the law relating to common carriers that calls for any different rule, as to consequential damages, to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; and this liability includes all those consequences which may have arisen from the neglect to make provision for those damages which ordinary skill and foresight is bound to anticipate." *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Denny v. N. Y. C. R. R.*, 13 Gray, 481, 74 Am. Dec. 645. The court cites with approval *Morrison v. Davis*, supra, saying: "The defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible." The property was burned in defendant's warehouse after its arrival at the point of destination. It was held that the

defendant was not liable. Mich. Cent. R. R. Co. v. Burrows, 33 Mich. 6; Hoadley v. N. Trans. Co., 115 Mass. 305, 15 Am. Rep. 106; R. R. Co. v. Reeves, 77 U. S. 176, 19 L. Ed. 909.

The contract with the plaintiff, by which the defendant carried the freight "released," relieved it of its common-law liability as insurer, but not against injury resulting from its own negligence. Smith v. R. R., 64 N. C. 235; 6 Cyc. 393. As his honor properly told the jury, the burden was therefore on the plaintiff to show that the piping was destroyed by the negligence of the defendant. Of course, in view of the law, as we have seen, such negligence, if any, referred to the burning of the warehouse—either in respect to the origin of the fire, or the facilities for controlling it. His honor told the jury that the measure of duty in this respect was ordinary care, or the care of the prudent man. There is no suggestion as to the origin of the fire. It may, so far as it appears, have been caused by rats, matches, incendiary, or any other of the unaccountable causes from which human experience teaches it is next to impossible to provide. In regard to keeping a watchman at the depot we are not prepared, in the absence of any evidence that it is usual to do so, to say that it was the duty of defendant to do so. It would seem that, if the defendant used the same precautions used by citizens of Lincolnton, it would discharge its duty. While it is true that this court has, following the Supreme Court of the United States, and probably a majority of the state Supreme Courts, held that, except in very rare and exceptional cases, negligence is a question of fact, and the measure of duty is the conduct of the prudent man, we think that it is still the duty of the judge to explain to the jury the law in the light of the testimony. Russell v. R. R., 118 N. C. 1098, 24 S. E. 512; Hinshaw v. R. R., 118 N. C. 1047, 24 S. E. 426. We have no purpose to question or shake the doctrines as laid down in those and later cases. In the application of the rule the most careful and anxious attention and desire to keep true to the line cannot always secure results satisfactory to minds approaching cases from opposite points of view, and often pre-conceived mental bias. In this case there was no conflicting evidence. The jury had a full and intelligent description of the conditions, a judge of marked ability and clearness of judgment heard the testimony, and, if there had been no evidence of the way in which owners of property in the same town protected their houses from fire, the jury would have had nothing, save their own experiences and their individual opinions as to what a prudent man would have done in respect to property situated as was the defendant's to protect it from fire, other than the damage incident to the passing of engines. What may have been the duty of the court in instructing the jury in such condi-

tion of the evidence is not presented in this case. We are of the opinion that the defendant was entitled to have the jury told that the measure of duty was the care taken by prudent citizens of Lincolnton in that respect of their property. Defendant's exception in that respect must be sustained. His honor should have told the jury that there was no evidence showing that the delay in shipping was the proximate cause of the destruction of the property. The inquiry would thus have been narrowed to the question of negligence in respect to the means provided for "fighting fire." What would have been the liability of the defendant if the freight had been delayed beyond the number of days fixed by the statute it is unnecessary to suggest. We have not considered the exceptions directed to the first issue.

There must be a new trial.

(127 N. C. 306)

STALCUP v. STALCUP et al.

(Supreme Court of North Carolina. Dec. 17, 1904.)

HUSBAND AND WIFE—CONVEYANCES—CHARACTER OF ESTATE—ENTIRETY—TENANTS IN COMMON.

1. A conveyance to husband and wife, if nothing else appears, vests in the grantees an estate in entirety, whether the consideration was furnished partly by both, or all by one of them.

2. Where the grantor of certain land agreed to make the conveyance so that one-half of the land should be conveyed to the purchaser and the other half to his wife, each having furnished one-half of the consideration, the purchaser and his wife took as tenants in common, and not as tenants by the entirety, though the deed by mistake conveyed the land to the husband and wife as tenants by the entirety.

Appeal from Superior Court, Cherokee County; Long, Judge.

Action by J. T. Stalcup against W. R. Stalcup and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

E. B. Norvell and Ben Posey, for appellant. J. F. Ray, for appellees.

MONTGOMERY, J. The plaintiff, who is the only child and heir at law of his deceased mother, claims a one-half interest in the tract of land described in the complaint. It is alleged in the complaint that in 1893, whilst the plaintiff's mother and P. S. Stalcup were husband and wife, P. S. Stalcup bought, with money of his own and his wife's, the land, and took a bond for title in his own name; that the bond for title ought to have been so executed as that one half of the land should be conveyed to the plaintiff's mother and the other half to P. S. Stalcup, but that, when the bond was drawn and executed, neither

§ 1. See Husband and Wife, vol. 26, Cent. Dig. §§ 73-75.

the plaintiff's mother nor P. S. Stalcup being present, by mistake, oversight, and ignorance on the part of the draftsman, and also on the part of the bargainor and the bargainee, it was drawn and executed so as to make it appear that P. S. Stalcup was to receive a deed as the sole bargainee, when the real intention of the makers of the bond for title, as well as P. S. Stalcup's, was that the bond and deed should show that P. S. Stalcup was to be the owner and bargainee of only one half of the land, and the mother of the plaintiff the other half. It is also alleged that the purchase price was paid for the land, the one-half of which with the money of the mother of the plaintiff, and for one-half of the land; that P. S. Stalcup died, and afterwards the bargainor, through mistake and oversight, executed a deed to the defendants, W. R. Stalcup, Burgess Jacobs, and Nancy Stalcup, the devisees under the will of P. S. Stalcup.

On the trial, Lovingood, the bargainor, a witness for the plaintiff, testified that, when P. S. Stalcup approached him to buy the land, he said he wanted it for himself and his wife; that he wanted the bond to show that he was entitled to one-half, and that his wife was entitled to one-half, as one-half of the money they were paying for the land was his and one-half hers; that witness said further that when the bond was executed neither Stalcup nor his wife was present, and that Stalcup "wanted it to show up that he and his wife were equal in the land—he in one-half and she in one-half." He said further: "I delivered this paper to P. S. Stalcup, and he was not satisfied because it did not show that his wife was to have a half of it, and I persuaded him to let it alone till the deed was made, and I would make it tell in the deed as he had directed. It was to show that they were 'halves'; that each paid half and had half."

Upon the defendants' motion to the demurrer to the evidence, the plaintiff was nonsuited. There was error in the judgment of nonsuit. If a deed be made for land to husband and wife (and it is immaterial if the purchase money be furnished one part by the husband and another part by the wife, or all by one of them), if nothing else appears, they take an estate in entirety; that is, they hold the land under the old common-law expression, "Per tout et non per my." That was so because of the relation between the parties, they being in law but one person and each having the whole estate as but one person. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790, 28 Am. St. Rep. 562; *Ray v. Long*, 132 N. C. 891, 44 S. E. 652. But in the case before us the plaintiff has shown by competent evidence that the bond for title should have been drawn and executed so as that, when the deed should be made, on the payment of the purchase price, the bargainor should have conveyed to the wife, Mrs. Stalcup, one half

of the land, and to the husband the other half. The deed was not to be made to the husband and wife, simply acknowledging the purchase money, but was by express agreement to be made so as to declare that one half of the purchase money had been paid by the husband and the other half by the wife, and that for that consideration one half interest in the land was to be conveyed to the wife and the other half interest to the husband. Such a deed would have created the husband and wife tenants in common. This rule of law does not conflict at all with *Ray v. Long*, supra, but is in conformity to that decision. In 15 A. & E. Enc. of Law, 848, it is said: "But it has been held that, in consequence of the theoretic unity of husband and wife, lands granted to husband and wife jointly during coverture cannot be held by them as tenants in common or as joint tenants, notwithstanding the terms of the grant. The prevailing doctrine in modern times, however, is that when lands are granted to husband and wife, and it appears from words of the grant that the intention was to create a joint tenancy, or a tenancy in common, they will take and hold as joint tenants or tenants in common, and not as tenants of the entirety;" and many cases from several states are cited to support the text.

Error.

(137 N. C. 249)

LANCE v. TAINTER et al.

(Supreme Court of North Carolina. Dec. 17, 1904.)

DEED—ACKNOWLEDGMENT—RECORD—CANCELLATION.

1. A deed of trust acknowledged before the grantee named therein as notary public is void.
2. Where the acknowledgment of a deed is void, the registration thereof is also void.
3. Bankr. Act July 1, 1898, c. 541, § 67a (80 Stat. 564 [U. S. Comp. St. 1901, p. 8449]), provides that "claims which for want of record or for other reasons would not have been valid liens as against the creditors of the bankrupt, shall not be liens against his estate," and section 70e (80 Stat. 565 [U. S. Comp. St. 1901, p. 3452]) provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided." *Held*, that a trustee in bankruptcy may maintain an action to cancel, as a cloud on title, a deed made by the bankrupt, which was void for defective acknowledgment, probate, and registration.

Connor, J., dissenting.

Appeal from Superior Court, Madison County; Long, Judge.

Action by N. J. Lance, trustee in bankruptcy, against A. C. Tainter and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. T. Crawford, for appellants. Gudger & McElroy, for appellee.

¶ 1. See Acknowledgment, vol. 1, Cent. Dig. §§ 104, 106, 107.

OLARK, C. J. This is an action by the plaintiff, as trustee in bankruptcy of two bankrupts, to have canceled a deed in trust executed by them jointly, because it was acknowledged by both grantors, and privy examination of their wives was taken, before the trustee named in said deed, who was a notary public. The trustee in the deed being an interested person, the acknowledgment and privy examination before him were absolutely void. *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, and cases cited; 1 Devlin, Deeds, §§ 476, 477; 1 Cyc. 553, and notes.

The acknowledgment being a nullity, so was the probate by the clerk based thereon, and the registration. *Long v. Crews*, supra; *Barrett v. Barrett*, 120 N. C. 129, 26 S. E. 691, 36 L. R. A. 226; *Todd v. Outlaw*, 79 N. C. 235; *Robinson v. Willoughby*, 70 N. C. 358; 1 Devlin, supra, § 478.

Code, § 1254, provides that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth." The bankrupt law of 1898, section 67a (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), provides that "claims which for want of record or for other reasons would not have been valid liens as against the creditors of the bankrupt, shall not be liens against his estate," and section 70e (30 Stat. 565 [U. S. Comp. St. 1901, p. 3452]) provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred." It follows, therefore, that this instrument, not having been legally acknowledged, probated, nor registered, is invalid against the creditors of the bankrupt, and should be canceled as a cloud upon the title which might injuriously affect the administration of the estate in the plaintiff's hands. The demurrer that the complaint did not state a cause of action was properly overruled.

No error.

CONNOR, J., dissents.

(137 N. C. 247)

GRIFFIN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Dec. 17, 1904.)

TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

1. Where, in an action for injuries to a passenger in alighting from a train, there was no evidence that plaintiff was commanded or invited by the porter to alight while the train was in motion, it was error to charge that if plaintiff attempted to jump from the train as it was moving into a station, and was injured, he could not recover, unless he "was commanded or

invited by the porter to alight from the train while it was in motion."

2. Where defendant's train was standing still when defendant's porter requested plaintiff to alight, an instruction that if the porter invited or commanded plaintiff to get off when the train was moving, and plaintiff, in obedience to such invitation, attempted to alight, and was injured, he was entitled to recover, was error.

On petition for rehearing. Dismissed.

For former opinion, see 46 S. E. 7.

MONTGOMERY, J. This case is before us again on a petition to rehear. The petition must be dismissed, whatever might be the opinion of the court upon the matter discussed therein, for the reason that there was a serious error in the trial below, and one which we were not inadvertent to when the case was originally heard in this court. 46 S. E. 7. It is this: The defendant, amongst other things, asked the court to instruct the jury that "ordinarily it is negligence to jump from a moving train, and if the jury find from the evidence that the plaintiff attempted to jump from the defendant's train as it was moving into the station at Palmyra, and was injured in so attempting to jump off, then you will answer the first issue 'No.'" His honor repeated this instruction to the jury, but added the words, "unless the plaintiff was commanded or invited by the porter to alight from the train while it was in motion." The instruction as it was asked ought to have been given, without the modifying or qualifying language which followed. There were witnesses who testified that they saw the plaintiff jump off the car while it was going three or four miles an hour, and before it reached the station. The qualification which his honor added had no evidence to support it. There was an allegation in the complaint that the porter invited or told the plaintiff to get off when the train had nearly stopped, and was moving very slowly, but the plaintiff, in his evidence, testified over and over again that, when the porter spoke to him to get off, the car had stopped.

The same error was repeated by his honor in his charge in chief, when he told the jury: "If you find from the evidence, the burden of proof being upon the plaintiff, that the plaintiff purchased a ticket from Kelford to Palmyra from the defendant's agent at Kelford; that he entered the defendant's train at Kelford as a passenger, and as such rode upon the defendant's train to Palmyra; that, shortly before the train reached the station at Palmyra, the porter announced the station; that the plaintiff then left his seat and walked to the door of the car, and stood in the door until the car he was on passed the station; that, as the car the plaintiff was on passed the station, the porter invited or commanded the plaintiff to get off; that the train was then moving; and that the plaintiff, in obedience to the command or invitation of the porter, attempted to alight from the train, and was thrown to the ground and

injured—you should answer the first issue 'Yes.' The train was not in motion. It was standing still. It could not have been negligence, therefore, on the part of the defendant, if the porter had asked the plaintiff to alight when the car was standing still. But under the instruction of his honor the jury were left to consider the defendant's negligence on the theory that the porter had asked the plaintiff to alight when the train was in motion.

Petition dismissed.

(137 N. C. 306)

CURTIS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 17, 1904.)

APPEAL—MOTION TO DISMISS—FAILURE TO DOCKET APPEAL.

1. Though an appeal was not docketed seven days before the beginning of the call of a district to which it belongs, as required by court rule 5 (24 S. E. iv), if it be docketed at the first term after trial below, and before motion to dismiss, it will not be dismissed.

Appeal from Superior Court, Swain County.

Action by W. A. Curtis against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Heard on motion to dismiss. Denied.

A. J. Franklin, for appellant. Moore & Rollins and A. B. Andrews, Jr. for appellee.

CLARK, C. J. This is a motion to dismiss this appeal (1) because not docketed seven days before beginning the call of the district to which it belongs, as required by rule 5 (24 S. E. iv); (2) because the record was not printed in the time required by rule 34 (43 S. E. v); (3) because the appellant has not printed and filed a brief in time required by rules 28 and 34 (28 S. E. v; 43 S. E. v). It is only necessary to quote what was said upon an identical motion in *Benedict v. Jones*, 131 N. C. 474, 42 S. E. 909: "The uniform ruling of this court * * * may be thus summed up: An appeal must be docketed not later than the termination of the next term of this court beginning after the trial below [with the exceptions specified in the proviso to rule 5, 128 N. C. 634, 24 S. E. iv]. If not docketed at such term by the time required for hearing at such term, the appellee may docket a certificate under rule 17 (28 S. E. v) then, and at any time during the term, if before the appellant docket the transcript, and have the appeal dismissed. But if the appellee is dilatory, and the appellant docket the transcript at that term, before the appellee moves to dismiss, though too late to secure a hearing, then the appeal will not be dismissed. *Packing Co. v. Williams*, 122 N. C. 406, 29 S. E. 366; *Smith v. Montague*, 121 N. C. 92, 28 S. E. 137." And citing other cases.

Here the appeal was not docketed at the required time, but it was docketed at this

term—the first term beginning since the trial below—and, being docketed before the appellee moved to dismiss, the latter's motion came too late. As the case consequently goes over to the next term for hearing, the record and brief are only required to be printed at next term at the specified time before the call of the district to which the appeal belongs.

Motion denied.

(137 N. C. 269)

FRANCIS v. REEVES et al.

(Supreme Court of North Carolina. Dec. 17, 1904.)

DEED OF TRUST—BONA FIDE PURCHASERS—DEBTS OF DECEASED PERSON—HUSBAND AND WIFE—AGENCY OF HUSBAND—PRESUMPTIONS—EVIDENCE.

1. Where a deed of trust was made by a devisee more than two years after the grant of letters on his testator's estate, to secure a loan made by the lender on the faith of the devisee's title to the land, the lender was a purchaser for value, and acquired a title good "even as against creditors" of the testator, under the express provisions of Code, § 1442, unless she had notice of an alleged outstanding debt.

2. No presumption arises from the relationship of husband and wife that the husband is the agent of his wife.

3. An agent negotiating a loan from a married woman told her that he would look up the title and incumbrances on the property offered as security, after which the woman's husband was to verify the agent's examination as to records, which the husband subsequently did, before the trust deed securing the loan was executed. Held insufficient to show that the wife appointed her husband as her agent in making the loan, so as to bind her by his knowledge of facts affecting the grantor's title to the land covered by the deed.

Appeal from Superior Court, Haywood County; E. B. Jones, Judge.

Action by T. L. Francis against W. T. Reeves, administrator, and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This action is prosecuted by the plaintiff against the defendants W. T. Reeves, administrator of K. Reeves, deceased, V. S. Lusk and wife, and others, for the purpose of subjecting certain lands, or the proceeds thereof in the hands of Mrs. Lusk, to the payment of a judgment recovered against the defendant administrator of K. Reeves. The record shows that during the year 1886 A. J. Reeves executed his note to the plaintiff, with Kindred Reeves as surety, for \$650. Plaintiff indorsed the note to one Herren, who indorsed it to Garrett. The surety, K. Reeves, died in 1886, devising his property, including the real estate described in the complaint, to his three sons, W. T., A. J., and R. C. Reeves. Failing to name an executor, W. T. Reeves was appointed administrator c. t. a., and qualified in 1888. He did not advertise for claims. In 1898 Garrett sued the principal, W. T. Reeves, administrator, and the plaintiff on his indorsement, and recovered judgment. The other parties being insolvent, the plaintiff

paid the judgment and took an assignment thereof. He afterwards recovered judgment against W. T. Reeves, administrator, on said judgment. George H. Smathers testified as follows: "That some time in 1890 A. J. Reeves applied to him to secure a loan, and at the time he had a number of claims and judgments against the said Reeves for collection, and was anxious to secure a loan. Reeves was to pay him \$25 as a fee to secure the loan. That he went to Asheville, and saw Col. and Mrs. Lusk. Went first to Col. Lusk, and he said the money belonged to his wife, and that I would have to see her. That he did see her, and she said that she had had trouble about loaning money, and wanted to know if the loan was absolutely secure, and I told her that there would be no trouble about it, and she consented if the title should prove all right, and that there was no incumbrance on the land. That he told Col. and Mrs. Lusk that he would come back and look up the title and incumbrances, and Col. Lusk was to come out afterwards and verify his examinations as to records, which he did before the trust deed was executed. That he had heard of the note testified to by Reeves, and told A. J. Reeves that the matter would have to be settled, or rather, Reeves told him about the note at the time he applied for the loan. That Reeves told him that his father owed nothing at the time of his death, but was surety on this note, but that the note had been adjusted; that it had been transferred from Francis to Herren, and from Herren to Garrett, and that Garrett had given it to W. T. Reeves' wife as an advancement; and that he told W. T. Reeves that it was not necessary to advertise if his father owed no debts, but told him the safer plan was to follow the law, and that he was sure that Reeves said there was no debts. That A. J. Reeves made the statement before the loan was made that the Francis note had been adjusted, or had been given by Garrett to Reeves' wife. That his recollection is that the matter was discussed in the presence of Col. Lusk. That he stated to Col. Lusk that there was no debts against the estate, but that K. Reeves had signed a note as surety, but that Garrett, the party holding the note, had given it his daughter, wife of W. T. Reeves, and that after this conversation he and Col. Lusk got down the Code, and read section 1442, and afterwards Col. Lusk considered the loan safe, and the loan was made, and I was named as trustee. Think that the loan was made about this time, but don't know whether the deed was drawn that day. That he said to Col. Lusk, 'I suppose your wife wants you made trustee,' and he said, 'There was nothing said about it, and, as you will be here, I guess you had better be trustee,' and said that he would come out when I had prepared an abstract. That he thinks that he went to Asheville to deliver the notes and assure them that the

loan was all right, and that he turned notes over to one or the other of them. That note was not paid at maturity, and some time thereafter Mrs. Lusk instructed him to sell. Then Col. Lusk told me to scare the interest out of him; that they did not want to sell the property. That Reeves made some payments in checks and some in money, and that he sent it in, but most of the payments were made directly to Col. Lusk. That after he received the notice to sell, it was two or three years before the sale was made. Col. Lusk bid off the land for Mrs. Lusk, and the deed was made to her. That Col. Lusk told him that he was bidding it for her, and that he knew that it was Mrs. Lusk's money, but, after the land was sold and bought for Mrs. Lusk, he went to Asheville and had a talk with Mrs. Lusk, and she said, 'You and Col. have got me in trouble again,' and that he told her that he thought that the land was worth more than she gave." It was admitted that the deed was made to Smathers more than two years after the issuing of letters to W. T. Reeves on the estate of K. Reeves. At the conclusion of the testimony his honor, upon the defendants' motion, directed judgment of nonsuit. Plaintiff excepted and appealed.

Crawford & Hannah, for appellant. G. A. Shuford, for appellees.

CONNOR, J. The excellent brief filed by counsel for appellant states that there are only two questions presented by the appeal: (1) Is there more than a scintilla of evidence that V. S. Lusk had knowledge of the note signed by K. Reeves, or information which put him upon inquiry as to the note at the time the deed of trust was executed and the loan made? (2) Is there more than a scintilla of evidence that V. S. Lusk was the agent of Mrs. Lusk in making the loan?

We concur with his honor upon both questions. The deed of trust was made more than two years after the grant of letters, and Mrs. Lusk made a loan upon the faith of the security. She is a purchaser for value, and her title is therefore good, "even as against creditors," unless she had notice of the outstanding debt. Code, § 1442. There is no suggestion that she had personal knowledge of any fact sufficient to put her upon inquiry. Reversing the order of the questions as they are put in the brief, we inquire whether there is any evidence that Mr. Lusk was her agent in the transaction. The answer to this question depends upon the construction to be placed on the testimony of Mr. Smathers. It is clear that there was no express contract between Col. Lusk and his wife by which she made him her agent. It is conceded that by her conduct, if unequivocal and understood by the parties—that is, the wife and the other contracting party—that she recognized him as her agent, she must be bound by his acts. It would seem,

however, that no presumption arises by the reason of the relationship that he is the agent of his wife. 1 Am. & Eng. Enc. 958. The agency must be proven. Rhinhard on Agency, 51. "The husband may act as agent of his wife, but, in order to bind her, he must previously be authorized to do so, or his act must, with full knowledge, be notified." McLaren v. Hall, 26 Iowa, 297. "The wife may constitute the husband her agent, but, to establish this, the evidence must be clear and satisfactory, and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation of wife." Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235. We do not find any evidence that Mrs. Lusk appointed her husband agent to examine the title to the land. Mr. Smathers said to her that he would go back to Waynesville and look up the title and incumbrances, and Col. Lusk was to come out afterwards and verify his examination as to records, which he did before the trust deed was executed. This appears to have been Mr. Smathers' suggestion. The testimony falls short of evidence proving an agency.

Affirmed.

(70 S. C. 183)

SENTELL v. SOUTHERN RY.

(Supreme Court of South Carolina. Nov. 23, 1904.)

WITNESS—IMPEACHMENT—RAILROADS—PERSON ON TRACK—QUESTION FOR JURY—INSTRUCTIONS.

1. An agent of a party may be contradicted, after foundation laid, by showing that at another time he made statements as to the matters in issue in contradiction of his testimony, though such statements were no part of the *res gestæ*.

2. Plaintiff's decedent was killed while sitting on the end of a cross-tie, with his head in his hands, and his feet in a path along the track, which had been used as a path for many years without objection by the railroad company. He could have been seen by the engineer for some distance before he was struck. *Held* proper to submit to the jury the question whether the deceased was a licensee, so that the engineer was bound to keep a lookout as to him.

3. A charge of a court, based upon a hypothetical statement of facts, is not a violation of the constitutional provision against a charge on the facts.

Appeal from Common Pleas Circuit of Edgefield County; Joseph A. McCullough, Special Judge.

Action by Rena A. Sentell, administratrix of James C. Sentell, against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

E. M. Thomson and J. W. DeVore, for appellant. J. W. Thurmond, Wm. P. Calhoun, and Croft & Tillman, for respondent.

POPE, C. J. James C. Sentell, by occupation a carpenter, aged about 64 years, while

sitting upon a cross-tie of the Southern Railway Company, on the 28th day of May, 1900, in the county of Aiken, S. C., was struck by a railway train, to wit, a passenger train of defendant's railway, on its way from Augusta, state of Georgia, through the city of Columbia, S. C., on its way to the north, and instantly killed. After the plaintiff was appointed the administratrix of the estate of the said James C. Sentell, deceased, her deceased husband, she brought her action against the defendant to recover for herself and her three children the sum of \$1,999 as damages, because she alleged that her said husband's death had been caused by the negligence of defendant. The action was once before this court on the question of the right of the court of common pleas to amend the summons and complaint by striking out the word "the" from the summons and complaint; this court holding that such amendment was legitimately allowed. 67 S. C. 229, 45 S. E. 155. After its return to the circuit court, and after the amendments were made and the defendant had filed its amended answer, the action came on for trial on its merits before Special Judge Joseph A. McCullough and a jury. The verdict of the jury was in favor of the plaintiff in her representative capacity for \$1,999. When judgment was entered thereupon, the defendant appealed to this court on the following grounds, to wit:

"(1) Excepts because the presiding judge erred in allowing plaintiff's attorney, over the defendant's objection, to ask J. T. McPherson, the engineer, and a witness for defendant, the following question: 'Did you not say to, or in the presence of, Barton, on Broad street, in the city of Augusta, December after the killing, in substance the following: "I saw the man on the track when I first turned the curve. When I passed the dip, was looking for him to get up;"' and in allowing the witness to answer the same; and further erred in allowing the plaintiff to put up Barton, a witness for plaintiff, to contradict the said J. T. McPherson—whereas, the said testimony was incompetent and irrelevant, being no part of the *res gestæ*, and not being within the scope of the said engineer's agency, and was further incompetent for the purpose of contradiction.

"(2) Excepts because the presiding judge erred in overruling the defendant's motion for a nonsuit, which was made upon the following grounds: (1) There is no testimony tending to show such negligence on the part of the defendant as would make it liable for killing the deceased; nor is there any testimony tending to show any negligence of the defendant in the operation of its locomotive and train; no evidence that the engineer saw deceased was in such a position that he was unable to take care of himself in time for the engineer to have stopped the train. (2) And, further, that all

the evidence for the plaintiff is capable of but one inference—but one inference can be drawn from all the testimony—and that is that the deceased came to his death by reason of his own negligence in going upon defendant's track under the circumstances as detailed by plaintiff's witnesses.

"(3) Excepts because the presiding judge erred in charging the jury as follows: 'So, then, you will ascertain, first, what relation did the intestate sustain towards this railroad company, because, in order to determine whether or not the railroad company owed the intestate any duty, and whether or not that duty was breached, depends upon the relation the intestate stood towards the railroad company. Now, what was that? You are to ask yourselves that question, and answer in the light of the testimony, was it that of a trespasser?' The error consisting in leaving it to the jury to determine what relation the deceased, Sentell, sustained towards the defendant company; it being submitted that it was the duty of the court itself to determine and charge the jury what such relation was, especially in this case, where the facts were undisputed that the deceased was sitting upon the end of a cross-tie on defendant's track, where he had no legal right to be, and was therefore a trespasser.

"(4) Excepts because the presiding judge erred in charging the jury as follows: 'There is another relationship, what I call "licensee," and I do that in order that you may draw the distinction. I charge you that the definition of licensee, as I shall endeavor to give you, is this: where one goes upon the track, not as a trespasser, but upon some warrant or authority by knowledge, acquiescence of the railroad, and by permission of the railroad, either expressed or implied. Now, if the railroad company, or the owner of the premises, knew—can't you see, knew—that people were accustomed to go upon these premises, and acquiesced in that custom, why, then, a greater degree of care would be due such person than a naked trespasser. The law says, whenever people are accustomed to going upon my premises, I shall take care not to expose them to extraordinary hazardous risk. If they are licensees, they take my premises as they find them. I am not required to enter into elaborate preparation, but if there are hazards there that they don't know I should warn them.' The error being: (1) Such charge was inapplicable, and to defendant's prejudice, because under the undisputed evidence the deceased was a trespasser, and only the law with reference to the duty of the defendant towards a trespasser should have been declared. (2) Under the undisputed evidence that the deceased was sitting upon the end of a cross-tie on the defendant's railway track it was error to charge that he could acquire any legal right by license to occupy such place. Such right cannot be legally acquired. (3)

The deceased could not have been a licensee, because there was no evidence showing knowledge, acquiescence, or permission on the part of the railroad company, which would entitle him to sit upon the end of a cross-tie on defendant's track.

"(5) Excepts because the presiding judge erred in charging the jury as follows: 'You have heard a great deal about "lookout." What does that mean—the duty of the railroad to keep a lookout? That means this: Take all the facts and circumstances under consideration, would a man of ordinary prudence and reason be expected to keep a lookout under those circumstances; in other words, take into consideration the character of the country, take into consideration the surrounding circumstances, and ask yourself the question, would ordinary care and foresight and prudence require a reasonable lookout to be kept under those circumstances? Suppose a reasonable lookout had been kept, was it negligence in not seeing this particular man; would an engineer of ordinary foresight, ordinary reason and prudence, if he had been keeping a reasonable lookout, have discovered the presence of this man, if he was upon the track, in time to have stopped the train, and thereby avoid the injury? In determining that take into consideration the surrounding circumstances; take a man of ordinary firmness and reason, a man who has other duties to perform, and say whether or not such a man, by the exercise of ordinary firmness and reason, would have discovered this man upon the track, if he was there, in time to have stopped his train and thereby avoid collision?' The error being: The undisputed evidence showing the deceased to be a trespasser, the defendant was not required to keep a lookout for him; no duty arose until his presence and danger were known and appreciated, and then it was not to wantonly or willfully injure him. The charge exacted more than the law required.

"(6) Excepts because the presiding judge erred in charging the jury plaintiff's second request, which was as follows: 'If the jury find from the evidence that the deceased, James Sentell, was killed by a train on defendant's railroad, and at such time he was in apparently helpless condition; and if they further find that at the place of such killing, the public, by the permission of the railway company, had been accustomed without objection from the defendant to travel for more than twenty years—then it would not excuse the defendant simply to show that their agent in charge of said train did not see the deceased in time to avoid the killing, for under such circumstances it may be the duty of the defendant to keep a reasonable lookout at such places to discover any apparently helpless person who may be upon the track.' The errors being the same as specified under exception 4; and, further, it was a charge upon the facts, in violation of

article 5, § 26, of the Constitution of this state.

"(7) Excepts because the presiding judge erred in charging the jury plaintiff's fourth request, which was as follows: 'If persons have long been accustomed to use the track of a company for a passageway at certain localities, the company is charged with notice of such usage, and is under obligation to exercise reasonable care in keeping lookout at such places, among other things, for apparently helpless persons.' The errors being the same as specified under exception 4."

1. We think the presiding judge did not fail in the discharge of his duty, as here pointed out. The witness J. T. McPherson was defendant's witness. He had been examined with great care by its counsel. His testimony was important to the defendant. On cross-examination he was subjected to this test, namely, had he ever made an admission of a state of facts in contradiction of his testimony. The effect was, not to give testimony as to the *res gestæ* of the killing of James C. Sentell, but it was to discredit his testimony by showing that J. T. McPherson had made a statement at variance with his sworn statement. In the case of *Mason v. Southern Railway*, 58 S. C. 75, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826: "When the witness Pettus was on the stand, he was asked if he did not say to Mason, the father of the child, when the train backed to the place where the collision took place, at the time Mason climbed up in the cab, that he thought it was a dog or a chicken on the track, and that he did not have time to stop then. He answered, 'No.' The foundation was properly laid for contradicting the witness, and the testimony was at least admissible for that purpose." It must be borne in mind that the integrity of the witness alone is in the balance. It is always important that the witness should speak the same words, so far as his meaning on the accuracy of the statement are concerned, in regard to occurrences which he details. If he has made a statement at another time inconsistent with his testimony on the trial, it is perfectly competent on cross-examination to ask him if he did not at a certain time and place make to Mr. Blank a different statement, carefully stating what the statement was. The contradiction was necessarily made by producing Mr. Barton, the gentleman to whom Mr. McPherson made his statement, in Augusta, Ga. It is not contended that such contradictory statement is worth anything except to impeach McPherson's character for truthfulness. This exception is overruled.

2. This exception relates to the refusal of the acting circuit judge to grant the motion for nonsuit as made by defendant. We have examined the testimony as affected by the first subdivision of this exception. We find that there was some material testimony introduced by the plaintiff tending to show

negligence by the defendant. Whether the engineer saw, or was bound to see, James C. Sentell in his position alongside of defendant's track, had some support, even if Sentell was a naked trespasser.

3. It makes no difference if the trend of the testimony was that Sentell was a naked trespasser, the defendant owed him a duty, viz., that he should not be treated by defendant without some regard to the dictates of humanity. There was positive testimony that the engineer could have seen Mr. Sentell in plenty of time to have stopped the train before reaching him, and thus have saved his life. All in all, there was testimony tending to show negligence. Therefore the special judge ought to have refused the motion for nonsuit.

4. The circuit judge properly left the attitude of James C. Sentell to the defendant to the jury. Granted that the deceased was sitting on the end of a cross-tie of defendant's track, it was in testimony that for more than 20 years the defendant had allowed passers to walk alongside its track. The people had been treated with great courtesy by the railroad, but, having treated them with this kindness for more than 20 years, the railroad company must treat them with care. Not that these foot travelers could claim a right to occupy the track as against the railroad's use of this property. This court, in the case of *Jones v. R. R. Co.*, 61 S. C. 556, 39 S. E. 758, made these remarks in discussing a nonsuit, and, while we have already passed upon the nonsuit in this appeal, yet the language of Mr. Justice Jones in the case we have just cited is well worth a repetition here: "The fourth exception alleges error in the refusal of the motion for nonsuit, which motion was based on the ground that the evidence showed that the plaintiff's intestate was a trespasser when injured, and there was no evidence of gross or willful misconduct of the defendant in the management of its train. The general rule undoubtedly is that a railroad company owes no duty to a bald trespasser on its track, except not to do him any wanton or willful injury. *Smalley v. Southern Ry. Co.*, 57 S. C. 243, 35 S. E. 489, and authorities therein cited. Ordinarily, the mere failure to keep a lookout for adult trespassers that may be on the track is not evidence of negligence to the trespasser, because negligence involves a breach of duty to the injured person, and the railroad company owes no such duty to the adult trespasser. It is the trespasser's duty to look out for himself, and to give the railroad company a clear track by getting out of the way. If, however, the servants of the railroad company should discover a trespasser upon the track, and should then fail to observe or use ordinary care, under the circumstances, to avoid running him down, this would be evidence from which a jury might infer that the injury was the result not of mere inad-

vertence, but of a conscious failure to observe due care, or of wantonness or willfulness." (Italics ours.) "In this case, however, the complaint alleged that the track where the injury occurred 'traversed a populous part of the city of Anderson, and is much frequented by people passing to and fro along said railroad, which fact was well known to the defendant and its agents and servants and employes,' and there was some evidence tending to establish such allegations which made it proper to submit the case to the jury." (These latter allegations were in the complaint in the case at bar, and there was some testimony tending to establish such allegations, which made it proper to submit the case to the jury.) "If such allegations be true, then the circumstances were such as to call for a higher degree of care to avoid injury than if the plaintiff's intestate was a bald trespasser. Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent of such use by the company, yet, if there was evidence tending to show knowledge of an acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons on the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the (railroad) company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care, under the circumstances, to avoid injury." We have reproduced so much of the case of *Jones v. Railroad*, supra, in order to show that the circuit judge in the case at bar has followed the principles recognized and approved in the *Jones Case*, supra, and hence there was no failure on his part when he did not assume to decide the question of trespasser, but properly submitted it to the jury. This exception is overruled.

5. We think, under the authority of *Jones v. Railroad*, supra, the presiding judge was correct in charging the jury as to a licensee. The trend of the testimony was to show that for more than 20 years the railroad company had acquiesced in the use of the walk alongside of its track, and certainly had not forbidden its use by pedestrians; also the feet of the intestate were on the path of that walkway when he was stricken by the train of defendant, though it is true he was seated on a cross-tie of the track. When the intestate, Mrs. Jones, was killed, in *Jones v. R. R. Co.*, supra, she was walking on the trestle, and yet the charge of the circuit judge called the attention of the jury to the fact that under the consent, either express or implied, she was there as a licensee. This exception is overruled.

6. We do not think the presiding judge erred in speaking of a lookout by telling the jury what it meant, and under what circumstances a defendant should exercise this duty. Did not ordinary care require this duty of defendant in its acquiescence in the use of its track by pedestrians? Again, we refer to the extracts we have made from the case of *Jones v. R. R. Co.*, supra. This exception is overruled.

7. This exception in large measure has been passed upon in our views touching the third and fourth exceptions. No harmful legal harm—resulted to defendant from the charge of the judge, based upon a hypothetical statement. There was no violation of the mandate of the Constitution forbidding judges charging upon the facts. See *Jenkins v. Railway Co.*, 58 S. C. 373, 36 S. E. 703.

8. We do not think there was any error in the presiding judge in charging plaintiff's fourth request. We have already passed upon these matters, especially in disposing of appellant's fourth ground of appeal. It is overruled.

It is the judgment of this court that the judgment of the circuit court is affirmed.

WOODS, J. (concurring). In concurring in the opinion of the Chief Justice, I do not understand it is held to be the duty of a railroad company to stop its train because the engineer sees a man sitting on a cross-tie in front of the train, even at a place where the public are accustomed to travel with the knowledge and implied consent of the railroad company. Ordinarily, the engineer may well assume that such person is in possession of his senses, and will get out of the way of the train. But in this case there was some evidence that the deceased was sitting bent over, with his face in his hands, in an attitude indicative of a helpless physical condition, and that by proper watchfulness the engineer would have observed the significant posture, and been put on notice of the helplessness of the man he was approaching in time to stop the train. Whether this helpless condition of the deceased was due to drunkenness, which would warrant a finding of contributory negligence, or to a sudden attack of illness, was, under the evidence, a question of fact for the jury.

(70 S. C. 125)

HARKEY et al. v. NEVILLE et al.

(Supreme Court of South Carolina. Nov. 11, 1904.)

WILL—CONSTRUCTION—ESTATE CONVEYED.

1. Where testator devised certain land to his wife for her life, and at her death to his daughter-in-law for and during her life, and, in case of her death without issue, then to certain named heirs, it is not a conveyance of a fee conditional to such daughter-in-law by implication, under Civ. Code 1902, § 2464, providing that when, in any will, an estate is limited to take effect on the death of any person without

heirs of the body, such words shall not mean an indefinite failure of issue, but a failure at the death of such person; such daughter-in-law then having a son alive, who has since died.

Appeal from Common Pleas Circuit Court of Oconee County; Dantzler, Judge.

Action by Wm. C. Harkey, Thos. R. Colston, Miles Oswald Colston, and Harry Edgar Colston against Louisa M. Neville and J. D. McMahon. From the circuit decree, plaintiffs appeal. Reversed. —

Jaynes & Shelor, for appellants. S. P. Dendy, for respondents.

POPE, C. J. Louisa M. Neville, claiming to be the owner in fee simple of a tract of land containing 226 acres, situate in the county of Oconee, in the state of South Carolina, contracted with and sold to her co-defendant, J. D. McMahon, all the pine timber trees standing on said tract of land, for 20 cents a cord, for her own use, benefit, and behalf, and that the said defendant J. D. McMahon has proceeded with a force of hands to fell some 30 or 40 cords of said pine timber trees standing on said lands, under the contract with said codefendant, Louisa M. Neville. The plaintiffs deny that Mrs. Louisa M. Neville is the owner in fee simple of said 226 acres of land, but allege that she is only a life tenant of the said tract of land. Both the plaintiffs and defendants claim through the last will of one Robert Stribling, who departed this life on the — day of May, 1877. A preliminary injunction was granted by his honor Judge Dantzler, whereby the defendants were restrained from cutting any pine or other timber on said 226 acres of land. The action was brought on for trial before Judge Dantzler, who decreed that the said defendant Louisa M. Neville was the owner in fee simple of said 226 acres of land, and therefore had the right to make her contract with her codefendant, J. D. McMahon. The plaintiffs' complaint was dismissed. The plaintiffs have appealed from said decree on the grounds:

"(1) Because his honor erred in finding as matters of fact as follows: 'After the death of the testator, his widow, Ruthy P. Stribling, died, and his daughter-in-law Louisa M. Stribling intermarried with one William J. Neville, and one child was born of that marriage. During the lifetime of such child the said Louisa M. Neville, née Stribling, alienated the real property described in said will, and afterwards acquired title thereto, and now claims to own the same in fee absolutely in her own right.' Whereas the testator died in 1877, and the widow in 1902. That subsequently to the death of the testator, but more than eighteen years before the death of the widow, Louisa M. Stribling intermarried with William J. Neville. Of this marriage, on June 2, 1884, a son was born, who died on June 6, 1888. On June 14, 1884, Louisa M.

Neville executed a deed to William J. Neville, as trustee, conveying her estate for the benefit of herself and her heirs. That William J. Neville died in June, 1899. That, by reason of the trust deed aforesaid, Louisa M. Neville now claims to own in fee the tract of land described in said will absolutely, in her own right. And his honor erred in not so finding.

"(2) Because his honor erred in his construction of the will of Robert Stribling, deceased, dated April 28, 1877, whereby he construed item 4 as giving to Louisa M. Neville a fee conditional estate in the tract of land therein described, whereas he should have held that she took only an estate for life under said will.

"(3) Because the well-settled rule of law in the construction of wills is that the intention of the testator is to be obtained from his own words, and not from words implied or supplied dehors the instrument; and his honor erred in holding that Louisa M. Neville took a fee conditional estate by implication.

"(4) Because the express estates given by the will are, first, life estate to the widow; second, life estate to the daughter-in-law; and, third, remainder in fee to niece and nephew upon the death of the daughter-in-law without issue living at the time of her death; and his honor erred in not so holding.

"(5) Because it is manifest from the language of the will the intention of the testator was that, after the termination of the life estate given to the widow and daughter-in-law, the remainder in fee should be vested in the niece and nephew in case of the death of the daughter-in-law without issue living at the time of her death; and his honor erred in not so holding.

"(6) Because a fee conditional occurs where an estate of freehold is limited to a person, and the same instrument contains a limitation by way of remainder of the same legal or equitable character to the heirs of his body or his issue, to whom upon his death the estate is to descend per formam doni, from generation to generation, until the line of descent becomes extinct; and his honor erred in not so holding.

"(7) Because, in order to create a fee conditional, there must be either words of inheritance and procreation, or words indicating an intention that the estate should pass indefinitely, on the general or special line of the first taker, to one and the heirs of his body, in the proper and apt form of language to create such an estate; and his honor erred in implying or supplying these words in the will of testator.

"(8) Because, after the act approved December 24, 1883 (Laws 1883, p. 430), no estate in remainder, whether vested or contingent, could be defeated by a deed of feoffment with livery of seisin, and his honor erred in not so holding.

"(9) Because the deed purporting to have

been made by Louisa M. Neville on the 14th day of June, 1884, to William J. Neville, trustee, could not operate to defeat the estate in remainder of the niece and nephew in said premises, the act then declaring that no estate in remainder, whether vested or contingent, could be defeated in this manner; and his honor erred in not so holding.

"(10) Because the deed purporting to have been made by Louisa M. Neville to William J. Neville, trustee, was not such an alienation as at common law could operate to defeat an estate in remainder; the widow being in possession of the land, and remaining in possession thereof as life tenant until her death, in 1902, about seventeen years thereafter, William J. Neville never having possession of said premises; whereas, there must be both a deed and a corporal transfer of the soil from one to another, taking effect in present, or not at all; and his honor erred in not so holding.

"(11) Because the deed being made to W. J. Neville, as trustee, for the benefit of Louisa M. Neville, and her heirs—the trustee having nothing to do, and not passing, as feoffee, into the actual enjoyment of the fee—it was as if Louisa M. Neville, the life tenant, had made a deed to herself, and of her estate in the premises; and his honor erred in not holding the same ineffectual to destroy the contingent remainder of the niece and nephew.

"(12) Because said deed on its face shows that Louisa M. Neville conveyed only the right, title, interest, and estate which he took under the will of testator, after the termination of the life estate of the widow, Ruthy P. Stribling, of, in and to said premises; it was a conveyance to take effect in future, the interest thereby conveyed being the life estate of the grantor, after the termination of the life estate of the widow, Ruthy P. Stribling, which did not transpire until the widow's death, in 1902, four years after the death of the trustee, who never exercised any acts of ownership or dominion over said premises; and the execution of said deed does not constitute such alienation of a fee conditional estate as at common law operates to defeat the estate in remainder."

We will now address ourselves to these exceptions, and, in doing so, will first take up the second to the seventh, inclusive. Before entering into the discussion of the exceptions, it may be well to give some facts not disputed:

The testator, Robert W. Stribling, died in May, 1877, leaving a will. His family, at the time of his death, and for years before his death, were his wife, Mrs. Ruthy Stribling, his widowed daughter-in-law, Louisa M. Stribling, his nephew, William C. Harkey, and his niece, Susan E. Harkey. He had no children of his own. His wife was made by him his sole executrix. His will was as follows:

"1st. I desire my body to be decently interred in the earth from whence it came.

"2d. I desire all my just debts and funeral expenses to be paid as soon as practicable after my death.

"3d. It is my will and desire that my nephew, William C. Harkey, now living with me, provided he shall remain with me as in the past, if I shall so long live, or in case of my decease, with my wife, Ruthy P. Stribling, until he attains to the age of twenty-one years; then it is my will and desire that he, my nephew, the said William C. Harkey, shall have one good horse, bridle and saddle, and the sum of fifty dollars in money.

"4th. The tract of land whereon I now live, situate, lying and being in the County of Oconee and State aforesaid, on the Conneross Creek, waters of Seneca River, and adjoining lands of E. S. Foster, W. T. Jaynes, L. D. Stribling, A. G. Sligh and others, containing two hundred and twenty-six acres, more or less, and also all other real estate that I may be seized and possessed of at my decease, together with all the residue of my personal estate, after the payment of my just debts, funeral expenses and legacy as above directed, I will, bequeath and devise to my beloved wife, Ruthy P. Stribling, for and during the period of her natural life, for the joint use of herself and my daughter-in-law, Louisa M. Stribling, giving unto my said wife full power to sell and dispose of such parts of my personal property as may be required for her comfortable support and maintenance during her life, and from, upon and immediately after her death, I will, bequeath and devise all my said estate, both real and personal, unto my affectionate daughter-in-law, Louisa M. Stribling, widow of my son, Robert B. Stribling, deceased, for and during her natural life, and, in case of her death without issue, then one-third of my estate in fee unto my nephew, the said William C. Harkey, and his heirs forever, and the remaining two-thirds thereof in fee to my niece, Susan E. Harkey, and her heirs forever.

"5th. I do hereby nominate, constitute and appoint Ruthy P. Stribling sole executrix of this, my last will and testament.

"Witness my hand and seal, this 28th day of April, A. D. 1877. Robert Stribling. [L. S.]"

Testator's widow, Mrs. Ruthy P. Stribling, caused the will to be admitted to probate, qualified as sole executrix thereof, and possessed herself of the testator's lands and personal property. The daughter-in-law, Mrs. Louisa M. Stribling, lived with her mother-in-law until she married one William J. Neville. On the 2d June, 1884, she gave birth to a son. On the 14th day of June, 1884, she executed a deed of said lands (226 acres) to William J. Neville, as trustee. The following is a copy of said deed, to wit:

"The State of South Carolina: Know all men by these presents: That I, Louisa M.

Neville, of the county of Oconee and State aforesaid, for and in consideration of the natural love and affection which I have and bear to my husband, William J. Neville, and my son, Robert D. Neville, and for the further consideration of five dollars to be paid by the said William J. Neville, of said county and State, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, unto the said William J. Neville, all my right, title, interest and estate which I have by virtue of the will of Robert Stribling, late of the county and State aforesaid, after the determination of the life estate to Ruthy P. Stribling, the widow of the said testator, of and to the following real estate, that is to say, in all that piece, parcel or tract of land, situate, lying and being in the county of Oconee and State aforesaid, on Conneross Creek, waters of Seneca River, adjoining lands of E. S. Foster, W. T. Jaynes, L. D. Stribling, A. G. Sligh and others, containing two hundred acres, more or less, being the real estate mentioned and described in the will of said Robert Stribling, deceased. Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

"To have and to hold all and singular the premises hereinbefore mentioned unto the said William J. Neville, his heirs and assigns forever; in trust, nevertheless, for the use, benefit and behoof of myself and my heirs forever. And I hereby bind myself, my heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said William J. Neville, his heirs and assigns, against me and my heirs, and all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof."

On the ——— day of June, 1886, the son of Mrs. Louisa J. Neville died. She has never borne any other child or children, and is now 63 years of age. Mrs. Ruthy P. Stribling died in the year 1902, and thereupon Mrs. Louisa M. Neville occupied the said plantation. This suit was begun in 1903. Testator's niece, Miss Susan E. Harkey, intermarried with one Thomas R. Colston. Of this marriage, Miles Oswald Colston and Henry Edgar Colston were born, and Mrs. Susan E. Colston, née Harkey, died, leaving her husband and two sons, her heirs at law. William J. Neville died in 1899. The contest here involves the construction of the fourth clause of Robert Stribling's will. By said clause a life estate is first carved out for the widow, Mrs. Ruthy P. Stribling. This life estate ended in 1902, on the death of the first life tenant. Next, a life estate for Mrs. Louisa M. Neville, which life tenant is still alive and in possession.

Did the birth of the issue to Mrs. Louisa M. Neville in 1884 clothe her with a fee conditional in said lands, so as to enable her to convey said lands on 14th June, 1884, to a

trustee for herself and her heirs, and thereby invest her with the fee-simple estate in said lands? It is very clear that the testator did not directly convey any estate in said lands to the son of Mrs. Louisa M. Neville. Did the testator by implication create a fee conditional? We know that there has been some confusion in the law of the state touching a fee conditional by implication. See the cases of *Bulst v. Dawes*, 4 Rich. Eq. 423, and *Addison v. Addison*, 9 Rich. Eq. 58. In one of those cases the Court of Errors held that a fee conditional "is such an estate as is to descend indefinitely in the line of the first taker." Such is the idea of law writers, but what is meant by a "fee conditional by implication" is such a disposition by a testator when his intention of a devise to the issue is necessary in order to make sense. As an example, in the case of *Addison v. Addison*, supra, when the language of the testator, Allen B. Addison, was, "I give in trust to George A. Addison and Dr. Edward J. Mims, for the sole benefit of my son, Joseph A. Addison, during his natural life, the following property, that is: my mill place, on Shaw's Creek," etc. "But if my said son, Joseph A. Addison, should die without leaving any child or children, or representatives of child or children, in that case my will is, that the above property be equally divided between my son, George A. Addison, and my daughter, Emeline C. Mims, or their children. * * *" J. A. Addison had a son born after the death of testator, which son survived said J. A. Addison. It was held by the court "that J. A. took an estate in fee conditional in the realty by implication, which descended to his son. * * *" In order to do this, it was necessary to hold that the language of testator implied a greater estate in J. A. Addison than the actual devise, which was for life, and that, although there was no direct devise to the issue of J. A., yet that was what was meant by the testator, as fixed by the language used. It must be remembered in this connection that the testator, Allen B. Addison, died in May, 1850, which was three years before the General Assembly of this state enacted the following statute, to wit, section 2464 of the Civil Code of South Carolina of 1902: "Whenever in any deed or other instrument in writing, not testamentary, hereafter executed, or in any will of a testator hereafter dying, an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body, or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person." Thus, in the fourth clause of the will of Robert P. Stribling, the act of 1853, just quoted, will be read after the life estate of Mrs. Ruthy P. Stribling, as follows: "For and during her natural life, and in case of her death without issue living at the time of her death, then one-third of my estate in

fee unto my nephew, William C. Harkey, and his heirs forever, and the remaining two-thirds thereof in fee to my niece, Susan E. Harkey, and her heirs forever."

We feel that the testator was obliged, under the law, to mean in his will a life estate to Louisa M. Neville, unless her issue should be living at her death, in which event the issue of her body then living would receive the estate, and the nephew and niece, William and Susan, would not take any part of the estate, for, as the law would by implication supply "issue" to the life tenant, it would be such issue as would survive the life tenant, Lucy M. Neville, whose only child or issue died in the year 1886, and she is now too old and infirm to bear other issue.

But suppose effect could be given to the deed the said Lucy M. Neville granted in 1884 to her husband, William J. Neville, of said tract of land. It must be plain that such effort on the part of the said Lucy M. Neville to change her relation to the estate in said lands was utterly futile, not because W. J. Neville was her husband, but because she could not change her relation to that land by making a deed to herself. It is true, she used the name of a trustee in her deed, but she placed the performance of no duties upon such trustee. He was merely to hold such property for Lucy M. Neville and her heirs. It was well said by the late Chief Justice McIver in *Faber v. Polce*, 10 S. C., at page 389, in discussing the same question: "The rule undoubtedly is that when there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the statute of uses executes the use and carries the legal title to the cestui que use. *Ramsey v. Marsh*, 2 McCord, 252, 13 Ark. Dec. 717; *Jenney v. Laurens*, 1 Speers, 356; *McNish v. Guerard*, 4 Strob. Eq. 66." Whatever estate Louisa M. Neville conveyed to W. J. Neville in trust for her was her legal estate. By the law, the trustee having no duty to perform, the legal estate *eo instante* was carried back to the said Louisa M. Neville. Such being the case, there was an entire failure on her part to effect the title. It might be said that Lucy M. Neville so considers her effort to convey the title as futile, for she now treats the same land as under no trust.

It follows, therefore, that the decree of the circuit court must be reversed, for if Lucy M. Neville has only a life estate in the tract of land, she has no right to allow her codefendant to fell the timber in said 226 acres of land, and that after her death the said 226 acres of land will revert to the plaintiffs.

It is the judgment of this court that the judgment of the circuit court be, and the same is hereby, reversed, and the action is remanded to the circuit court to carry this judgment into effect.

JONES and WOODS, JJ., concur in the result.

GARY, A. J. (concurring). The will must be construed as if the testator had inserted in it the provisions of the act of 1853 set out in the opinion of Mr. Chief Justice POPE. The limitation over after the life estate of Mrs. Louisa M. Neville should read as follows: "and in case of her death without issue living at the time of her death, then," etc. If this controversy had arisen under a will which became effective prior to the act of 1853, the case of *Addison v. Addison*, 9 Rich. Eq. 58, shows that the language of the will would have been sufficient to create an estate in fee conditional by implication. But the court in the case just cited recognized the principle that words equivalent to those mentioned in the statute would prevent the life estate from being enlarged into a fee conditional by implication. In that case the court says: "It follows that if, in this litigation, we must construe the words of the will describing the event on which the estate was to go over as equivalent to dying without issue living at the death of Joseph, his life estate cannot be enlarged by implication." The words of the will which would have been sufficient to create a fee conditional by implication are restricted by the words "living at the time of her death," which prevent the vesting of such an estate in the life tenant, as they show that it was not the intention of the testator that the issue should take in indefinite succession, which is a prerequisite for the implication of a fee conditional. Since the act of 1853, we do not see how a life estate can be enlarged into a fee conditional by implication.

In his opinion, Mr. Chief Justice POPE says: "We feel that the testator was obliged, under the law, to mean in his will a life estate to Louisa M. Neville, unless her issue should be living at her death, *in which event the issue of her body then living would receive the estate*, and the nephew and niece, William and Susan, would not take." Italics ours. We cannot concur in this proposition, as the principle is stated by numerous authorities in this state, that issue cannot take as purchasers by implication.

For these reasons, we concur in the conclusion announced in the leading opinion, that the judgment of the circuit court should be reversed.

(70 S. C. 178)

STACY v. CHEROKEE FOUNDRY & MACHINE WORKS.

(Supreme Court of South Carolina. Nov. 18, 1904.)

CORPORATIONS—COMPENSATION OF TREASURER—APPEAL—REVIEW.

1. Where a director of a corporation is elected treasurer for one year, and at the expiration of his term notifies the directors that he cannot again serve for the same compensation, and is re-elected without any settlement as to his salary, and continues in the employ of the corporation for the ensuing year, he can recover what his services are worth.

2. Findings of fact by circuit court on appeal from a magistrate's court cannot be reviewed by the Supreme Court.

Appeal from Common Pleas Circuit Court of Cherokee County; Townsend, Judge.

Action by F. G. Stacy against the Cherokee Foundry & Machine Works. From circuit order reversing magistrate's judgment, defendant appeals. Affirmed.

J. C. Otts, for appellant. J. C. Jeffries, for respondent.

POPE, C. J. This appeal involves the right of the plaintiff to recover from the defendant the sum of \$88, as compensation for his services as treasurer of the defendant company from 25th February, 1902, to last days of January, 1903, a period of 11 months. The suit was commenced and tried before a magistrate, whose judgment was against the plaintiff, who appealed therefrom, and secured the verdict of the magistrate reversed, and a judgment in his (plaintiff's) favor for the sum of \$88. The defendant now appeals, and we will consider these grounds of appeal in their order, up to the sixth:

"(1) Because the circuit judge erred, as a matter of law, in holding (in his honor's opinion) that the plaintiff was entitled to recover because he was led to believe before the services were rendered that he would be paid; and it is respectfully submitted that, under the law, where a director performs services clearly outside of his duty as a director, that his salary must be agreed upon by the directors, or the properly constituted authorities, before the services are rendered, and that it is not sufficient, where the trustee relation exists, as in case of a director, for him to be led to believe that he will be paid for his services." It is made to appear from the record that the office of treasurer of the defendant was expressly provided for in the by-laws of the defendant corporation, and that another person had held that office before the 25th February, 1901, receiving a salary, but that the board of directors of the defendant company elected the plaintiff treasurer on the date last mentioned, and in the year 1902 a salary of \$75 was paid the plaintiff for his services. In February, 1902, the plaintiff was again elected to this office, but no definite sum was provided as salary.

The plaintiff did tell them he would not serve for less than \$100. At the trial the plaintiff sought to show that by the minutes his salary was fixed at the rate of \$100 per annum. In lieu of this position, he endeavored to show by testimony that his services were worth the said sum of \$88 for 11 months' service as treasurer. This being a law case, the conclusions of the circuit judge on questions of fact are not reviewable by us. If, however, it should be insisted that the conclusion of law of the circuit judge is unsound, we remark that our own case of *Bowen v. R. Co.*, 34 S. C. 217, 13 S. E. 421, abundantly sustains the circuit judge. This exception is overruled.

"(2) Because the circuit judge should have found from the testimony that no salary was agreed upon by directors before the services were rendered, or even after the services were performed, and, if such agreement was made at the end of the first year's services, it could not apply or be construed as warranting a payment for services already rendered, but could only apply to services to be rendered subsequently to time of such agreement, if made." We do not think the circuit judge committed any error as here complained of. It was a question of fact. We are not allowed to consider any questions of fact.

"(3) That if any attempt was made to fix a salary for the plaintiff, and even if such salary was agreed upon at the end of first year, it was illegal for the services to be rendered for the last year, because, under the testimony of the plaintiff, there was not a quorum of the board of directors, exclusive of the claimant, present when such salary was discussed; and he should have held, as a matter of law, that such agreement, even if made, was illegal, because a majority of the board of directors, exclusive of the plaintiff, were not present at the time, as testified by the plaintiff." The record fails to disclose that this question was considered by the circuit judge. His judgment was based upon the testimony, and he found that the plaintiff was fully entitled to be paid \$88. A quorum of the board of directors was there. The plaintiff was elected treasurer by a full board. His predecessor in office received a salary in excess of that paid plaintiff, as to which he was entitled to be paid. This exception is overruled.

"(4) Because the circuit judge should have found from the testimony that the services of the plaintiff were not performed under such circumstances as would show that it was well understood not only by the plaintiff, but by the proper corporate authorities, that his services were to be paid for, and that, as a matter of law, unless such was well understood by both parties, he could not recover." We think the circumstances of this case show conclusively that plaintiff was entitled to the compensation claimed by him. This exception is overruled.

We will next consider the fifth exception:

"(5) Because the circuit judge should have found from the testimony that the service performed the first year by the plaintiff was without any claim for or expectation of salary, in that the plaintiff testified that no salary was mentioned by any one until after he had served a year; and, if such was a fact, under the law, he could not recover." We do not understand that the plaintiff is now suing for his first year's salary. That has been paid. So that the question whether his services as treasurer were not to be paid for during or on account of his first year's salary is a matter with which we are not now concerned. This exception is overruled.

We will now pass upon exception 6, through exception 13, inclusive:

"(6) Because the circuit judge erred in not finding from the testimony and law governing this case that the \$75 paid himself as treasurer was for his services the second year, and that he had no legal right to apply such payment for services done and performed before anything was said about salary or compensation.

"(7) Because the circuit judge erred in not holding that, where no salary is fixed, none can be collected by an officer of a corporation who is also a director, because of the trust relation existing on his part.

"(8) In not holding that an officer of a corporation who is also a director cannot claim compensation legally on an implied contract, nor can he recover upon a quantum meruit.

"(9) Because the circuit judge erred in not finding from the testimony that there was no agreement to pay plaintiff any salary before his services were rendered.

"(10) Because the circuit judge erred in not holding that if plaintiff was entitled to a salary, under the testimony, for the second year, or eleven months of the second year, that he was not entitled to recover because of the payment to himself of the \$75 paid himself by check on February 27, 1902, which, under plaintiff's testimony, should have been applied to his salary for the last year's services, because, under plaintiff's testimony, nothing was said about salary or compensation until the beginning of the second year's services, and there could be no legal claim for services prior to claim for salary for work admitted to have been performed prior to any agreement or claim of salary.

"(11) Because the circuit court erred in passing upon the reasonableness of the salary claimed, when that was not an issue under the plaintiff's exceptions on appeal from the magistrate's findings and rulings.

"(12) Because the circuit judge's judgment is not based upon the exceptions to the magistrate's judgment, to wit: He did not hold that plaintiff is entitled to recover under an implied contract, as contended in his second exception; he did not hold that he was entitled to salary, although a director, as contended in the third exception; he did not

hold that he was entitled to recover, because that the \$75 paid himself on February 27, 1902, was for salary for the previous fiscal year; and he did not base his findings that the plaintiff was entitled to recover upon a quantum meruit.

"(13) Because the circuit judge erred in not sustaining the magistrate's findings on the facts, and in reversing the magistrate, unless the preponderance of the testimony was against the findings of the magistrate."

The sixth exception cannot be sustained by us. We cannot deal with the testimony.

We have this to say in regard to the position that a salary cannot be collected by a director, when elected to an office in the corporation, if the salary is not first fixed: that such a doctrine would be far-reaching.

As to the position in the eighth exception, it is met by the case of *Bowen v. R. Co.*, supra.

The balance of the exceptions relate to weight of testimony. This being a law case, we cannot pass upon them.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

(70 S. C. 102)

LASSITER et al. v. OKEETEE CLUB et al.
(Supreme Court of South Carolina. Nov. 10, 1904.)

NONSUIT—EJECTMENT—EVIDENCE—INSTRUCTIONS—PLEADING.

1. Where, in an action to recover land, there was evidence of possession by plaintiffs and their grantors under color of title for more than 20 years, it was not error to refuse a nonsuit.

2. In an action to recover possession of land, it is not prejudicial to defendant to instruct that any verdict would not affect the rights of persons not parties.

3. In an action to recover land, a complaint alleging that defendant had from time to time, while in possession, cut and sold from it large numbers of trees, and appropriated the proceeds to its own use, and demanding damages, sufficiently pleads damages for withholding possession.

Appeal from Common Pleas Circuit Court of Beaufort County.

Action by J. R. Lassiter and others against the Okeetee Club and J. B. Bostick. From judgment for plaintiffs, defendants appeal. Affirmed.

W. N. Heyward and A. McIver Bostick, for appellants. B. A. Hagood and W. A. Holman, for respondents.

POPE, C. J. This action was begun on — day of October, 1901. Its object was the recovery by the plaintiffs of the defendant Okeetee Club the 1,500 acres of land described in the complaint as the tract of land known as the "New River Rice Plantation" or the "Guerard Plantation." The defendant J. B. Bostick, it was alleged, was the agent of the Okeetee Club in charge of that plan-

tation. The complaint described the land as being embraced in a plat thereof made by John Norton, deputy surveyor, bearing date the 30th of April, 1837, and lying in Beaufort county, in this state.

The action came on for trial before Judge Aldrich and a jury. After the testimony offered by plaintiffs was closed, the defendants moved for a nonsuit. The circuit judge held that there was some testimony, and refused the nonsuit. The defendants excepted, and then offered their testimony. The verdict of the jury was for the plaintiffs for the land sued for and \$250 damages. After entry of judgment the defendants appealed on the following grounds:

"(1) That the presiding judge erred in refusing the motion for a nonsuit, and in holding and deciding that color of title in plaintiffs was supported by some testimony as to possession, whereas he should have held that plaintiffs had failed to show chain of title back to the state, or for twenty years, to presume a grant, and that there was no evidence of possession sufficient to presume title or any right of possession in plaintiffs from any source whatsoever, but, on the contrary, that the evidence negated the possession of the disputed lands by plaintiffs, by showing affirmatively that defendants were in possession of the disputed lands held by them for more than twenty years, sufficient to presume title in them.

"(2) That his honor also erred in not granting the nonsuit on the further ground that the evidence failed to show any limits or definite location as to the portions of disputed lands held by defendants; it clearly appearing from plaintiffs' testimony that considerable portions of the disputed lands were in possession of others, not parties to the action, and were not possessed or claimed by the defendants.

"(3) That his honor erred in charging the jury that others, not parties defendant in this action, would not be prejudiced by any verdict in this action, thus implying that a verdict might be found against the defendants for lands not in their possession nor claimed by them, which instruction tended to mislead the jury to the prejudice of defendants.

"(4) That his honor erred in admitting testimony as to damage from cutting timber; there being no allegation as to any amount of damage in plaintiffs' complaint, and therefore no cause of action stated for such damage.

"(5) That his honor erred in submitting to the jury the matter of damage for cutting, selling, and appropriating proceeds of timber, in the absence not only of such issue raised by the pleadings, but also of any evidence upon which a verdict for damages could be based.

"(6) That his honor erred in submitting to the jury the question of damage for detention of lands, and in charging them that,

should they find that plaintiffs were entitled to recover the lands described in the complaint, or any part thereof, they might also find damages for the detention of said lands, such as annual rentals, use, etc., in the total absence of any such issue in the pleadings, and of any evidence whatsoever to support such a verdict.

"(7) That the verdict of the jury and the judgment thereon was erroneous and unsupported by testimony, in that the contradicted testimony of both plaintiffs and defendants showed that a very considerable portion of the lands recovered in said judgment was never in possession of defendants, nor claimed by them, and, further, in that there was nothing either in the pleadings or the evidence to support a judgment for damages of any kind from any source whatsoever."

We will first pass upon the first and second grounds of appeal, relating as they do to motion for nonsuit. The language of counsel in making their motion for nonsuit was as follows: "Mr. Bostick: We ask for a nonsuit on the ground that the plaintiffs have not made out title, and have not shown any facts from which title can be presumed. Further, they have not defined our possession, and that is material. They have to show that we are in possession of and withholding their land." After argument, the judge held as follows: "The Court: The question is whether the color of title is supported by any testimony as to possession, and I think it is. I will have to overrule the motion." It must always be kept in mind that in a law case, as contradistinguished from a case in chancery, the Supreme Court is not allowed to pass upon disputed questions of fact. We cannot for a moment entertain a discussion of the weight of testimony. All this court is allowed to do on questions of nonsuit is to search the record to see if any material testimony exists. Now, in the case at bar it appears in the testimony that one John Bell Guerard held in his possession this tract of land in controversy (the whole of said Guerard's New River rice plantation contained 600 or more acres of land), and that one John Norton, deputy surveyor, made a plat of these lands in the year 1837, and that this identical plat of this land was in the possession of John Bell Guerard in 1837, and that of his son, George Henry Guerard, in 1855, in which year he died intestate, survived by his widow, Mrs. Guerard, and his five children, Sophie Guerard, Alice Guerard, William C. Guerard, George Henry Guerard, and Mrs. Louisa C. Heyward. Of these, the widow, Mrs. Guerard, died intestate in 1858, and the daughter, Sophie Guerard, during the war between the states (1861-65), unmarried, intestate, so that in the year 1865 the surviving children held title to this land. In 1881 these lands were purchased by H. M. Comer & Co.; they receiving deed from all the surviving children of George Henry Guerard,

who died in the year 1855, and also receiving the plat made by John Norton, deputy surveyor, in 1837. Henry M. Comer & Co. held the land until 1899, when they conveyed the same by deed to the plaintiffs, and turned over to the plaintiffs their deeds and the plat of this "New River Rice Plantation" or "Guerard Plantation," made by John Norton, as deputy surveyor, in the year 1837. All the records of Beaufort county were destroyed by the Union forces prior to 18th February, 1865. It was also testified that the defendants ousted the agent and servants of plaintiffs from some of the land in dispute. It was also testified that the defendants cut some six or seven pine trees on the lands of plaintiffs. Such being the testimony, although the defendants offered testimony to disprove the same, the circuit judge did not err when he refused to grant the nonsuit, because the Guerards held this land from 1855 to 1881—26 years—and they were the grantors to H. M. Comer & Co., and H. M. Comer & Co., after holding the lands from 1881 to the year 1899, a period of 18 years, conveyed by deed to the plaintiffs, who now hold, as alleged owners, said lands, all covered by the plat made by John Norton, deputy surveyor, in 1837. We must therefore overrule both of these grounds of appeal.

3. We will now consider the third ground of appeal, relating as it does to the charge. We do not think the charge of the circuit judge is justly liable to any criticism, as here contended. It is always the duty of a trial judge to keep the minds of the jury free from any possible bias arising from the absence of parties whose rights it was barely possible the jury might feel were endangered while not parties to the action. This was what the circuit judge tried to guard against, and we do not see how the defendants were injured thereby. This ground of appeal is dismissed.

4 and 5. It seems that the plaintiffs, in their complaint, alleged as follows: "Fifth. That the defendant the Okeetee Club had from time to time since the 21st day of November, 1899, and while in possession of said land, cut and sold from same large numbers of trees, and appropriated the proceeds from the sale thereof to their own use and benefit. Wherefore, the plaintiffs demand judgment against the defendants (1) for the possession of said premises; (2) for \$1,500, the plaintiffs' damages by withholding of the same, together with the costs." In the body of their complaint, the plaintiffs have alleged that the defendant cut and sold from same a number of large trees, and appropriated the proceeds from the sale thereof to their own use and profit. In the case of *Balle v. Moseley*, 13 S. C. 439, this court has held that the omission of a prayer for relief in the complaint does not make it demurrable. In the case just cited it is held that "demand for relief is not part of the cause of action. *Pom. on Rem.* § 580." If such be the law, then ob-

jection cannot be sustained as here made. These exceptions are overruled.

6. The complaint sets out the wrongs which the plaintiffs demand should be redressed by the defendants. Testimony was received on the issues set out in the complaint. The circuit judge stated the law controlling the same. No reversible error is involved. This ground of appeal is overruled.

7. The objections here presented relate to the sufficiency of the testimony. In a law case we are powerless to consider them. This ground of appeal is overruled.

It is the judgment of this court that the judgment of the circuit court is affirmed.

JONES and WOODS, JJ., concur in the result.

(70 S. C. 160)

FARMERS' & MECHANICS' MERCANTILE & MFG. CO. v. SMITH.

(Supreme Court of South Carolina. Nov. 17, 1904.)

JUDGMENT—VACATING—PLEADING—VERIFICATION.

1. Under Code Civ. Proc. 1902, § 195, authorizing a circuit judge to vacate a judgment when defendant shows an excusable neglect for failure to answer, there is no error of law in an order setting aside a judgment by default, where, before default, a second summons and complaint were served personally, and defendant's family was so sick at the time the answer should have been served that defendant was unable to leave home to consult his attorney.

2. Where a complaint is not sworn to on a proceeding to set aside a judgment on default under Code Civ. Proc. 1902, § 195, it is unnecessary that defendant swear to the proposed answer.

Appeal from Common Pleas Circuit Court of Lexington County.

Action by the Farmers' & Mechanics' Mercantile & Manufacturing Company against S. R. Smith. From order granting defendant leave to file answer, plaintiff appeals. Affirmed.

McFaddin & Jennings, for appellant. W. H. Sharpe and G. T. Graham, for respondent.

POPE, C. J. This appeal involves the right of a circuit judge to vacate a judgment when the defendant shows an excusable neglect for failure to answer, under section 195 of our Code of Civil Procedure of 1902. The record here discloses, among others, the following facts: The summons and complaint were served by the sheriff of Lexington county, in this state, on the 1st day of October, 1902. The defendant called to see plaintiff's attorneys on the 20th day of October, 1902, on which day the plaintiff's attorneys caused the defendant to be served with another summons and complaint while in their office. After such service the de-

defendant showed a copy of the summons and complaint served upon him on 1st October, 1902. The defendant on that day received notice that his son was quite ill in Lexington county, in this state, and he went at once to his son's bedside. This son was very ill, and during his son's illness two other members of defendant's family were ill from typhoid fever. The defendant in this way failed to reach his attorney, W. H. Sharpe, Esq. This attorney afterwards sought the right to answer, which was declined by plaintiff's attorneys. On the 24th day of February, 1903, judgment by default was taken before Judge Klugh. On the 20th April, 1903, notice was given by W. H. Sharpe, Esq., as defendant's attorney, to set aside default judgment. On the 8th day of June, 1903, this motion was made upon affidavits tending to show the illness in defendant's family before the time to answer had expired; that defendant was one of the best citizens of Lexington county; that defendant's attorney was in attendance upon the session of the Legislature as State Senator from about 9th January, 1903, till its close, some time in the latter part of February, 1903; that the family physician knew that defendant's wife and their two children had typhoid fever, and were quite ill; therefore that defendant's attorney, by letter written on November 15, 1902, asked leave to answer, which was declined; that there was a correspondence between the parties litigant, or rather the attorneys for plaintiff and defendant; that some conversations were had, during which the genuineness of the note was in question. After a hearing, Judge Townsend passed the following order, omitting titles, as follows:

"This is a motion to set aside a judgment taken by default against the defendant in the above-entitled action on the ground of excusable neglect. The main facts are as follows, as near as I can recollect, which was admitted at hearing, and which I get from the papers used at the hearing: The defendant, S. R. Smith, was served with the summons, and probably the complaint, on the 2d day of October, 1902. There was some sickness in the family, and he had not answered on the 20th of October. On the last-mentioned day—that is, 20th October—there being then two days more before the expiration of the time to answer, the defendant passed through Columbia on his way to Newberry, and was in the office of plaintiff's counsel. On the 20th October, three days after the expiration of the time to answer (which was on the 22d October), the defendant passed back through Columbia on his way home from Newberry. Whilst in Columbia plaintiff's counsel talked with him, and served him with another copy of the summons, as of the same date as the first copy, and the defendant said that he would see the plaintiff company about the case before he left the city. But before he did see

the company, or had an opportunity to see it or its representative, he received a message from his home that his son was very sick, and he hastened home at once, and failed to see the plaintiff. Up to this point I do not think that defendant's neglect was excusable, because he was in Columbia, as already stated, on the 20th October, two days before the expiration of the time for answering. Why he did not answer at that time does not appear. The service of another copy of the summons on him, however, on the 25th October, and the unexpected sickness in his family, already mentioned, and the letter of plaintiff's counsel to defendant, dated 27th October, in which they told him that 'we [they] would hold the papers ten days from that date,' was calculated to confuse the defendant. For, in the first place, this fresh copy of the summons, which was served on the defendant on the 20th October, no doubt contained the provision that he must answer the complaint twenty days from its service, and two days afterwards, to wit, on 27th October, the plaintiff's counsel wrote him that they would hold the papers ten days from that date. These two papers, viz., the new copy of the summons and the said letter, were well calculated to convey to the defendant the idea that he had another ten days or twenty days to answer. Then, when we consider the severe illness of his family, as shown by the affidavits, which rendered it next to impossible for him to leave them during other ten or twenty days, I think the default of the defendant was reasonable and natural, and that his neglect to answer was excusable. The service of the second summons was well calculated to convey the idea that the failure to answer the first summons had been condoned. The letter of 27th October was calculated to convince the defendant that he had at least ten days to answer. It is therefore ordered, adjudged, and decreed that the said judgment by default obtained in this action against the defendant, S. R. Smith, be, and is hereby, set aside and vacated, and that the defendant have twenty days from the filing of this order to answer the complaint herein, if he be so advised."

The plaintiff now appeals from this order. Its first ground of appeal is as follows: "(1) Because his honor erred in holding, 'The new copy of the summons and the said letter were well calculated to convey to the defendant the idea that he had other ten days or twenty days to answer,' when, it is respectfully submitted, plaintiff's attorneys did not know at the time of such second service that defendant had ever been served with the summons and complaint in said case, and told defendant they would not rely upon the second service after they ascertained that service had already been made, and when the express language of the letter of plaintiff's attorneys to defendant of date October 27, 1902, was advice that he

had made default in answering the complaint."

Before proceeding to discuss the exceptions, we would say that an inspection of the case shows that the circuit judge has confused his dates, as shown by his decretal order. The summons and complaint were served on the 1st day of October, 1902, and not on the 2d day of said month. The 20th day of October, 1902, when the defendant went to plaintiff's attorney's office, was two days before the time to answer, and not three days after such expiration of time to answer. The service of second summons and complaint was on the 20th day of October, 1902. These are clerical errors, and would make the decretal order inconsistent if not corrected.

Now let us examine the first exception. We do not think the circuit judge was in error in holding that the service of a second summons and complaint, together with the plaintiff's attorney's letter of date 27th October, 1902, in which letter such attorney spoke of holding up the papers for 10 days after the latter date, were calculated to confuse the mind of the defendant, who is a layman. Hence we will have to decide against this exception.

We will next notice the second exception, which is as follows: "(2) Because his honor erred in holding, 'I think the default of the defendant was reasonable and natural, and that his neglect to answer was excusable,' when, it is respectfully submitted, the defendant had made default by failing to answer on or before the 22d day of October, 1902, and when his honor had distinctly held that 'up to this point [referring to the 25th day of October, 1902] I do not think defendant's neglect was excusable'; the assignment of error being that his honor had no right to grant such order on the ground of excusable neglect occurring after the expiration of the twenty days allowed for service of the defendant's answer." We have already shown that Judge Townsend up to this point did not hold that on the 25th October, 1902, defendant's neglect was excusable, but only up to the 20th October, 1902. Hence the point of defendant here made is untenable. This exception is overruled.

We will now pass upon the third exception, which is: "(3) Because his honor erred in holding, 'The service of the second summons was well calculated to convey the idea that the failure to answer the first summons had been condoned, and the letter of 27th October was calculated to convince the defendant that he had at least ten days to answer,' when, it is respectfully submitted, plaintiff's attorneys did not know at the time of such service that the defendant had ever been served, and afterwards told defendant they would not rely upon the second service after they had ascertained that service had already been made; and

it is respectfully submitted plaintiff's attorneys could not condone the failure to answer the first summons when they did not know that the same had been served." We have before held that Judge Townsend made no mistake. The second summons and complaint were calculated to affect a layman's (such was defendant) mind. This exception is therefore overruled.

We will next consider the fourth exception, which is as follows: "(4) Because his honor erred in refusing to dismiss defendant's motion upon the ground that the showing made by defendant as to his having a valid defense to plaintiff's cause of action was insufficient, in that (a) his proposed answer was not verified; (b) nor was there in the affidavit of defendant, nor in that of anybody else in the showing made, a verified statement by him that the matters and things stated in defendant's proposed answer were true; (c) nor was there any statement under oath as to what defendant's proposed defense was." The plaintiff's complaint was not verified; hence the defendant did not verify his answer. But he submitted his affidavit that his defense was meritorious. The circuit judge no doubt considered this matter. There is evidence in the "case" that this particular point of objection was brought to the attention of the circuit judge, but still nothing in section 195 requires the proposed answer to be sworn to. This exception is overruled.

We will now dispose of the fifth exception: "(5) Because his honor erred in holding the defendant's neglect was excusable, and in setting aside the judgment in this cause and granting leave to defendant to answer plaintiff's complaint." Section 195 of the Code of Civil Procedure of 1902 provides: "The court * * * may in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." These matters are by law submitted to the discretion of the circuit judge. Of course, any mistake in law by the circuit judge may be corrected by this court on appeal, but we find no error of law involved in this appeal. This exception is overruled.

It is the judgment of this court that the judgment of his honor Judge Townsend herein is affirmed.

(70 S. C. 145)

RAMSEUR v. WHELOHEL

(Supreme Court of South Carolina. Nov. 13, 1904.)

ACTION—WHO MAY BRING.

1. Each holder of a claim is its owner, and must take care of his own rights, and another party cannot sue thereon without purchase or assignment.

Appeal from Common Pleas Circuit Court of Cherokee County; Dantzler, Judge.

Action by D. S. Ramseur against J. V. Wheelchel in magistrate court. From order of circuit court affirming magistrate's judgment, defendant appeals. Modified.

Butler & Osborne, for appellant. N. W. Hardin, for respondent.

POPE, C. J. The plaintiff brought his action in the magistrate's court of Cherokee county, in this state, to recover \$91.15 and costs. The claim embraced the following items: "(1) For \$50 for surgical operation by D. S. Ramseur on Alexander Craig (col.), amputation of both legs and attention to head. (2) For \$25 favor Dr. J. T. Darwin for assisting in above operation. (3) For medicine furnished for Alexander Craig by Cole and Turner, \$2.15. (4) For lodging for said Craig furnished by Grace Jolly, \$8. (5) For burial expenses of said Craig favor Henry Cherry, \$50. (6) For nursing said Craig one night by Dave Alexander, \$1." The testimony showed that each claimant had sued for himself before the county commissioners, and each lost, as claims against Cherokee county. Therefore plaintiff sued without having paid or having the claims assigned to him. The magistrate rendered judgment in favor of plaintiff. An appeal was taken by defendant, which came on to be heard by Judge Townsend, who overruled all grounds of appeal and affirmed the magistrate's judgment. The defendant now appeals to this court on the following grounds, to wit: "It is respectfully submitted that his honor the presiding judge erred in the following particulars: (1) In not sustaining defendant's first ground of appeal, as follows: 'Because the magistrate erred in not sustaining the defendant's motion for a nonsuit, it appearing from plaintiff's evidence that there was no liability upon defendant's individuality in this action, and the contract, if any, was with him as an official, and the magistrate should have so held.' It being respectfully submitted that the magistrate erred in said ruling, and the circuit judge should have sustained said ground of appeal. (2) Error in not sustaining defendant's second ground of appeal, as follows: 'Second. Because said magistrate erred in holding, against the preponderance of the testimony, that the defendant was indebted to plaintiff in any amount whatever; it being respectfully submitted that plaintiff's testimony showed that plaintiff's contract, if any, was with the defendant as an official, and not as an individual, and therefore defendant was not liable to plaintiff in any amount,'—and his honor erred in not so holding. (3) Error in finding and rendering judgment for the plaintiff for the full amount sued for, when it appeared, according to plaintiff's own testimony, that all of said claim, except the sum of \$50, belonged to other parties and not to plaintiff."

1, 2. We are satisfied from the testimony submitted that the circuit judge committed no error as by these grounds complained of, and they are therefore overruled.

3. We are satisfied that the circuit judge was in error in giving plaintiff judgment against the defendant for any claims except his own. Each holder of a claim is its owner, and must take care of his own rights, if any. The plaintiff is not their guardian.

It is the judgment of this court that the judgment must be reversed, and a new trial granted, unless the plaintiff shall remit all but \$50 on the judgment in 10 days after the remittitur reaches the circuit court; and, if the remittitur is so entered, then the judgment for \$50 is affirmed.

(70 S. C. 187)

BRYANT v. CITY COUNCIL OF ORANGEBURG et al.

(Supreme Court of South Carolina. Nov. 12, 1904.)

MUNICIPAL CORPORATIONS—INJURIES TO PEDESTRIAN—BICYCLE ON SIDEWALK.

1. The city of Orangeburg is not liable for injuries to a pedestrian by being run over by a bicycle ridden rapidly along the sidewalk, under a charter providing that for willful violation and neglect of duty the mayor and aldermen shall be liable criminally, besides being liable for damages.

2. Civ. Code 1902, § 2023, providing that any person injured through defects in any streets, or by defects of anything under control of a city, may recover in an action therefor, a city is not liable for injuries to a pedestrian on a sidewalk by being run over by a bicycle, though there was no ordinance prohibiting the use of sidewalks by bicycle riders.

Appeal from Common Pleas Circuit Court of Orangeburg County; Aldrich, Judge.

Action by Marguerite Bryant, by her guardian ad litem, against the city council of Orangeburg and the city of Orangeburg. Demurrer sustained and complaint dismissed, and plaintiff appeals. Affirmed.

The following is the circuit decree:

"The plaintiff is a little girl seven years old, and resides with her father on Russell street, in the city of Orangeburg, S. C. On November 4, 1902, she was a pupil in the graded school of said city, and while returning from said school to the home of her parents, walking on the eastern side of the sidewalk on Railroad street or avenue, one John Siders, who was riding a bicycle at a high rate of speed longitudinally upon and along said sidewalk, ran against, struck, knocked upon the ground, and severely injured the plaintiff. Her right leg was broken above the ankle, and she received other severe bodily injuries, in consequence of which she was made sick and caused to suffer great bodily pain, and has since remained lame and disabled. The plaintiff, by her guardian ad litem, instituted this action against the defendants, whereof she seeks to recover of the defendants, as damage for

the injuries sustained by her as above stated, \$5,000.

"There are two causes of action alleged in the complaint, each for \$5,000. The first is based upon the negligence, and the second upon the willful negligence, of the defendants. Each cause of action alleges, in substance, that the sidewalks are under the management and control of defendants; that it is the duty of defendants to keep the same in good order, free from obstructions and dangers, and in a safe and secure condition at all times for the use and benefit of the traveling public; that the defendants, not regarding their duty in the premises, and of their neglect of duty, mismanagement, carelessness, and negligence, did permit persons to use the sidewalks as a bicycle track, and to ride bicycles on and upon all portions of said sidewalks, regardless of the rights, security, and convenience of pedestrians who are accustomed or compelled to use said sidewalks, and who have a lawful right so to do. Both of the causes of action are stated in apt and correct language, and the only questions before the court are raised by the demurrer of the defendants. The complaint should be read as a part of this decree.

"The defendants demur to the first cause of action upon the ground that it does not state facts sufficient to constitute a cause of action: '(1) Because, under the laws and statutes of South Carolina, municipal corporations are not liable for damages under circumstances such as are set forth in the said first cause of action. (2) Because there are no statutes improvising a liability for damages upon municipal corporations under the facts set forth in said alleged first cause of action of the plaintiff's complaint, and, in the absence of an enabling statute, the defendants, being a municipal corporation, are not liable. (3) Because it is not alleged that plaintiff's injury was caused by reason of a defect in any of the streets, causeways, or bridges of the defendants, and that such defect was occasioned by the neglect or mismanagement of the defendant, or by reason of defect or mismanagement of anything under the control of the defendant corporation in making repairs of its streets.' Defendants demur to the second cause of action upon the ground just stated, and I need not repeat the same. Defendants further demur to both causes of action upon the ground that the facts and circumstances set forth in both of said causes are the same, and that the plaintiff had improperly united the said alleged two causes of action in the same complaint, and also upon the ground that it does not appear that the defendants are responsible in damages, because there is no legislative enactment making municipal corporations generally, or the defendants in particular, liable under such facts as are stated in either or both of the said causes of action in plaintiff's com-

plaint, and, in the absence of such legislative enactment, the defendant, being a municipal corporation, is not liable.

"I think that it is well settled law in this state that a municipal corporation is not liable to an action for damages predicated upon the nonfeasance or misfeasance of the officers in regard to their public duties, unless expressly made liable by statute. In the well-considered case of *Gibbes v. Town Council of Beaufort*, 20 S. C. 218, it is held: 'We regard it settled in this state that a municipal corporation instituted for the purpose of assisting the state in the conduct of local civil government is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made so liable by statute.' *White v. City Council of Charleston*, 2 Hill, 572; *Coleman v. Chester*, 14 S. C. 290; *Black v. City of Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young v. City Council of Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843; *Bramlett v. City of Laurens*, 58 S. C. 60, 36 S. E. 444.

"The learned counsel for plaintiff contends that the city of Orangeburg is liable in the case at bar under the provision of the twenty-fifth section of its charter, and also under section 2023 of the Civil Code of 1902. The charter of the city of Orangeburg is an act entitled 'An act to incorporate the city of Orangeburg' (18 St. at Large, p. 525); and the twenty-fifth section of said act, upon which the plaintiff relies, is found on page 530 of said volume, and reads: 'That for the willful violation or neglect of duty, malfeasance, abuse or oppression, the said mayor and aldermen, jointly and severally, shall be liable to indictment in the court of general sessions, and upon conviction shall be fined in a sum not exceeding five hundred dollars, or being imprisoned not exceeding twelve months, besides being liable for damages to any person injured.' There is no doubt but that this section makes the mayor and aldermen liable for indictment for the willful violation or neglect of duty, malfeasance, abuse, or oppression, but the words 'besides being liable for damages to any person injured' neither refer to nor include the city of Orangeburg. This section makes the mayor and aldermen not only liable to a criminal prosecution for the offense therein stated, but also liable in damages, in a civil action, to any person injured by the willful violation or neglect of duty, malfeasance, abuse, or oppression of the said mayor and aldermen, jointly and severally. The charter of the town of Barnwell contains a section similar to the twenty-fifth section of the charter of Orangeburg. Mr. Chief Justice McIver, than whom a more learned, careful, or painstaking justice never adorned the courts of this state, wrote the opinion in *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315,

49 Am. St. Rep. 843. He had before him the charter of the town of Barnwell, and doubtlessly read said section, and the inference is that he did not give it the construction now urged by counsel of plaintiff.

"Again, section 1991 of volume 1, Code of Law of South Carolina of 1902, provides: 'For any wilful violation or neglect of duty, malpractice, abuse or oppression, the mayor or aldermen so offending shall be liable to punishment by a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days, besides being liable for damages to any person injured by such neglect, malpractice, abuse or oppression.' The section just cited was enacted in 1896, and appears as section 20 of 'An act to provide for the incorporation of towns of not less than one thousand nor more than five thousand inhabitants.' 22 St. at Large, p. 74. We find the same section appearing as section 21 of 'An act to provide for the incorporation of cities of more than five thousand inhabitants,' approved February 19, 1901 (23 St. at Large, p. 657). Section 1991 appears in article 4 of chapter 49 of the Civil Code of 1902, entitled 'Municipal Corporations.' The caption of article 4 is provisioned common to towns and cities containing over one thousand inhabitants. So that ever since 1896 we have had general laws practically the same as the twenty-fifth section of the charter of the city of Orangeburg, and yet we have a number of recent decisions which sustain and affirm the 'well-settled law,' as above stated. See *Bramlett v. Laurens*, 58 S. C. 63, 36 S. E. 444, decided in 1900, and *Hutchison v. Summerville*, 66 S. C. 442, 45 S. E. 8. I am of the opinion and conclude, as a matter of law, that said section 25 of the charter of Orangeburg does not authorize or sustain this action.

"The plaintiff also relies upon section 2023 of the Civil Code of South Carolina of 1902, which reads: 'Any person who shall receive bodily injury or damage in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation within the limits of any town or city, may recover in an action against the same the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceed the ordinary weight: provided, the said corporation shall not be liable unless such defect was occasioned by the neglect or mismanagement: provided, further, such person has not in any way brought about any such injury or damage by his or her own negligent act or negligently contributed thereto.' Said section 2023 is taken from the act of 1901, p. 667, where it appears as section 22 of 'An act to provide for the incorporation of cities of more than

five thousand inhabitants.' 23 St. at Large, p. 648. It also appeared as section 1582 of the Revised Statutes of 1893, being the act approved in December, 1892, entitled 'An act providing for a right of action against a municipal corporation for damages sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of such municipal corporations.' 21 St. at Large, p. 91. I don't think that said section 2023 sustains the plaintiff's cause. In the very recent case of *Hutchison v. Summerville*, 66 S. C. 448, 45 S. E. 10, the court says, 'The statute received judicial construction in *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843;' and in *Barksdale v. City of Laurens*, 58 S. C. 413, 36 S. E. 661. In the last-mentioned case the court says, 'The title of said act of 1892 is, "An act providing for a right of action against a municipal corporation for damages sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of such municipal corporation." This act was construed in the case of *Dunn v. Barnwell*, 43 S. C. 401, 21 S. E. 315, 49 Am. St. Rep. 843, wherein the court held, by the term "mismanagement," as used in the clause, "or by reason of defect or mismanagement of anything under control of the corporation," meant mismanagement in making repairs on the streets, so that the corporation should be held liable not only for neglect in making repairs on the streets, but also for mismanagement of anything under the control of the corporation in making such repairs.' The municipality is liable not only for its neglect in failing to make repairs on the streets, but likewise for its negligence in making such repairs. In other words, it is liable for its negligent nonaction as well as for its negligent action in making repairs. 'It would practically destroy the effect of the statute to sustain the proposition for which the appellant contends.' There are a number of cases which discuss the subject under consideration, but I will only refer to *Acker v. Anderson*, 20 S. C. 495; *Brown v. Laurens County*, 38 S. C. 282, 17 S. E. 21; *Mason v. Spartanburg County*, 40 S. C. 393, 19 S. E. 15, 42 Am. St. Rep. 887; *Parks v. Greenville*, 44 S. C. 172, 21 S. E. 540; and cases cited in the first part of this decree.

"I am of the opinion and conclude, as matter of law, that said section 2023 does not give to the plaintiff a right of action for damages under the facts alleged in the complaint. The question now before this court has been decided in several of the states. In the case of *Jones v. City of Williamsburg*, 34 S. E. 883, 97 Va. 722, it was held by the Supreme Court of Appeals that 'a city is not liable to a person for injuries resulting from being struck by a bicycle ridden on the sidewalk, or the failure to pass an ordinance prohibiting such use of the sidewalks.' This case is also reported in 47 L. R. A., at page 294. The Supreme Court of Georgia, in the case

of *Tarbutton v. Town of Tennille*, 110 Ga. 90, 35 S. E. 282, held: "There is no obligation upon the authorities of a municipal corporation, towards any one of its citizens, to exercise the legislative discretion with which they are invested to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the town. Such matters are left to their discretion, and a right of action does not accrue to one who was injured by a person riding a bicycle on the sidewalk because the authorities had failed to prohibit such riding." I think that the demurrer of defendants, as stated in the first, second, third, and last grounds of demurrer to both causes of action, as alleged in the complaint, is well taken, and should be sustained. Wherefore it is ordered, adjudged, and decreed that the demurrer of the defendants to both causes of action alleged in the complaint herein be, and hereby are, sustained, and that the said complaint be, and hereby is, dismissed, with costs."

James F. Izlar and Raysor & Summers, for appellant. Wm. L. Glaze, for respondents.

WOODS, J. All the questions made by this appeal have been fully discussed by the decree of the circuit court. We adopt that decree, for the reason that any further discussion could be only a repetition or elaboration of the views therein expressed.

The judgment of this court is that the judgment of the circuit court be affirmed.

(70 S. C. 108)

WELBORN v. DIXON.

(Supreme Court of South Carolina. Nov. 10, 1904.)

PLEADING—MOTION TO ELECT—PAROL EVIDENCE—DEED—MORTGAGE—FAILURE TO RECONVEY—DAMAGES—EQUITY.

1. Where the allegations of a complaint are appropriate to more than one cause of action, the remedy is by motion to elect.

2. Parol evidence is admissible to make certain the description in an agreement to "deed back to J. said piece of land, containing twenty-seven acres."

3. That a deed was intended as a mortgage may be shown by parol.

4. On payment of a debt secured by a deed, the grantor is entitled to reconveyance.

5. Where land is conveyed to secure a debt, with an agreement for reconveyance, and on payment of the debt the grantee fraudulently refuses to reconvey, he may be made to respond in punitive as well as compensatory damages.

6. Plaintiff conveyed certain land to secure a debt under a contract with the grantee to reconvey on payment thereof. The grantee thereafter sold the land. Held that, on tender of debt and refusal to reconvey, the grantor may sue in equity for the proceeds, but cannot recover punitive damages.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Anderson County; Aldrich, Judge.

¶ 1 See Mortgages, vol. 35, Cent. Dig. § 98.

Action by J. Welborn against J. W. Dixon. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an appeal from an order overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The complaint contains two causes of action, the first of which is thus alleged:

"(1) That prior to the ——— day of March, 1902, plaintiff was the sole owner in fee simple of a tract of land in county and state aforesaid, containing twenty-seven acres, more or less, just outside the town of Pelzer, conveyed to him by Sarah M. Allen by deed of September 10, 1897, recorded in the office of R. M. C. for said state and county, in Book QQQ, at page twenty, which is here referred to for full description of said land.

"(2) That on March 15, 1902, the plaintiff, having borrowed money of defendant, and purposing to secure the payment of the debt, executed to him a deed to said land, and both together executed at the time of the execution of the said deed a written contract, a copy of which is as follows: 'State of South Carolina, County of Anderson. Articles of agreement entered into this 15th day of March, 1902, between J. W. Dixon and J. W. Welborn, witnesseth: That provided J. W. Welborn shall pay to J. W. Dixon on or before November 1st, 1902, the sum of three hundred and eighty-five dollars, the said J. W. Dixon agrees to deed back to J. W. Welborn said piece of land, containing 27 acres, more or less, and to pay him ten per cent. interest on said amounts, and all costs. [Signed] J. W. Dixon. [L. S.] J. W. Welborn. [L. S.] Witnesses: [Signed] A. G. Pinckney, L. B. Roberts.' Said deed was an ordinary fee-simple warranty title, like in all respects to the usual form of such titles.

"(3) That the amount of the plaintiff's debt to defendant, together with principal, interest, and all charges, never exceeded the sum of three hundred and eighty-five and $\frac{00}{100}$ dollars (\$385.00), and the purpose and understanding of the parties to the agreement was that the papers hereinabove referred to should constitute a mortgage upon said land to secure the payment of said debt.

"(4) That some months before November 1, 1902, defendant, in utter disregard of his contract to reconvey to plaintiff, in willful fraud of his said agreement, and in flagrant, deliberate, and wanton violation of plaintiff's rights in the premises, sold and transferred and conveyed said land to a third party; thus putting it out of his power to carry out his contract aforesaid.

"(5) That a few days prior to November 1, 1902, plaintiff, by his attorney, made defendant a legal tender of the sum of three hundred and eighty-five and $\frac{00}{100}$ dollars (\$385.00) to secure a reconveyance from him of said land, but defendant, as plaintiff is in

formed and believes, refused said tender, stated that he had sold said land to Mr. J. W. Williams, and that he could not and would not reconvey it to plaintiff, and declared, as he had done repeatedly, that he would spend a thousand dollars on the matter rather than let defendant have anything out of it. And he has subsequently refused and still refuses to carry out said contract, in violation both of the spirit and letter thereof. All to plaintiff's damage two thousand dollars."

The second cause of action contains substantially the same allegations as the first, except the following, instead of paragraphs 4 and 5 of the first cause of action, to wit:

"(9) On information and belief, plaintiff says as follows: Some months prior to November 1, 1902, defendant, in willful fraud of the rights of plaintiff, and with the deliberate, wanton, and willful purpose of defrauding him, of violating the trust that arose under the facts of the case, and of fraudulently converting to his own use the whole proceeds of his sale of said land, in fraud of plaintiff's rights therein, did sell, transfer, and convey said land to Mr. J. W. Williams for the sum of six hundred dollars, in cash and chattels, and did collect and appropriate to his own use all of said cash and chattels, refusing to account to plaintiff for any part thereof, and declaring that he would spend one thousand dollars in this matter before defendant should have one cent. Plaintiff was prepared before November 1, 1902, to pay to defendant the said sum of three hundred and eighty-five dollars (\$385), and a few days before that time he got the money, and made, through his attorney, a lawful tender of the full amount due defendant, but he refused, has since refused, and still refuses to accept the same and account to plaintiff for the proceeds of his unauthorized dealing with said land, or any part thereof, all to plaintiff's damage two thousand dollars. Wherefore plaintiff prays judgment against the defendant for two thousand dollars and the costs of this action."

The grounds of demurrer to the first cause of action are as follows:

"(1) Because the contract set out in paragraph 11, the refusal of performance of which is made the basis for the first cause of action, is void under the statute of frauds, in that it appears on the face thereof that said agreement for the sale of the land is too indefinite, in that the agreement set out does not so describe the property as to be identified by the court, and it is submitted that an action for damages does not arise from the breach of a void agreement.

"(2) Because it appears upon the face of said complaint that said cause of action alleged therein is not founded upon a tort, where some right of person or property is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obli-

gations; that whatever rights plaintiff has in the premises arise solely *ex contractu*, by a breach, rescission, or refusal of defendant to perform the alleged executory civil agreement for the sale of land, and no facts are alleged and no damages are shown, as arising from the natural results of a breach of said agreement, and defendant submits that an action for exemplary damages does not lie for the breach of an executory agreement for the sale of land.

"(3) Because it appears upon the face of the complaint that the defendant has rescinded or refused to perform the alleged agreement for the sale of land set out in paragraph 11 of said complaint; and since such refusal or rescission is not a tort, in law, sounding in punitive damages, and no facts appearing in the complaint that plaintiff has been damaged from the natural results of the alleged refusal to perform said agreement, it is submitted that plaintiff cannot maintain said cause of action."

The grounds of demurrer to the second cause of action are substantially the same as the foregoing.

Tribble & Prince and Quattlebaum & Cochran, for appellant. B. F. Martin and G. B. Green, for respondent.

GARY, A. J. (after stating the foregoing facts). We do not deem it necessary to consider the assignments of error in detail, but will state the principles that will dispose of all the exceptions.

We will first consider whether there was error in overruling the demurrer to the first cause of action. A complaint is not subject to demurrer if its allegations show that the plaintiff is entitled to any relief whatever, even though it may be different from that to which the plaintiff supposes he is entitled. *Ladson v. Mostowitz*, 45 S. C. 388, 23 S. E. 49; *Strong v. Wier*, 47 S. C. 307, 25 S. E. 157; *Conner v. Ashley*, 49 S. C. 478, 27 S. E. 473. When the allegations of the complaint are appropriate to more than one cause of action, the remedy is not by demurrer, if any of the allegations are sufficient to constitute a cause of action, but is thus stated in *Cartin v. Ry. Co.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829: "If two causes of action were set forth in the complaint without being separately stated, the defendant, it is true, had the right to make a motion that the complaint be made more definite and certain, or, if allegations were made which were unnecessary to sustain the cause of action stated in the complaint, to make a motion to strike out such allegations as irrelevant and as surplusage. *Pom. R. & R. R.* §§ 447, 451. If the defendant waived said objections by failing to make such motions, then the plaintiff had the right to the relief to which all the allegations showed he was entitled. The plaintiff, where the allegations of the complaint are appropriate to either of the two causes

of action, may be required, upon motion of the defendant, to make his election as to the cause of action upon which he will proceed to trial." Citing *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 469; *Hammond v. R. R.*, 15 S. C. 10; and *Hellams v. Switzer*, 24 S. C. 39. Under such circumstances, this court will not undertake to say what particular cause of action the plaintiff has attempted to set forth, and to which he should be confined in determining the sufficiency of the complaint. This would be an election of remedy by the court instead of the plaintiff. The case of *Cartin v. R. R.*, supra, has been affirmed in a number of subsequent cases, the most recent of which is *Marion v. Charleston*, 68 S. C. 257, 47 S. E. 140.

The words in the agreement, "deed back," show that it had reference to the land which had been conveyed by the plaintiff to the defendant; and, as the description of the land could be made certain by referring to that conveyance, the agreement was not subject to the objection set forth in the ground of demurrer numbered 1. That must be regarded as certain which can be made certain.

We do not, however, regard this question of vital importance, for, even if said agreement was too indefinite, the complaint would not be demurrable on that ground, as the land which the complaint alleges was conveyed by the plaintiff to the defendant by way of mortgage to secure the payment of a loan is particularly described in the first paragraph of the complaint. Even if there was no written agreement for a reconveyance, the plaintiff would be entitled to a reconveyance upon showing that the deed was intended as a mortgage, and that he had complied with his part of the contract. These facts could be shown by parol testimony. *Brownlee v. Martin*, 21 S. C. 392.

We will next consider the nature of the complaint. There are allegations of the complaint that the defendant committed a breach of the contract. The appellant, however, contends that this is not sufficient to constitute a cause of action, by reason of the fact that the complaint does not allege damages arising from the breach of the contract. We do not take appellant's view of the fact that the complaint doesn't allege damages arising *ex contractu*. The complaint alleges that the plaintiff sustained damages to the amount of \$2,000. This allegation has reference to all the wrongful acts of the defendant set forth in the complaint, including the alleged breach of contract. Furthermore it is at least questionable whether it was necessary to allege specifically such damages as were the direct and natural result of the alleged wrongful act, when they are claimed in the demand for relief. *Levi v. Legg*, 23 S. C. 282; *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797. In an ordinary action for damages arising *ex contractu*, the plaintiff is only entitled to recover such as are the

direct, natural, and proximate result of the breach of the contract. *Sitton v. MacDonald*, 25 S. C. 68, 60 Am. Rep. 484. The allegations of the complaint that the plaintiff and the defendant entered into the contract therein set forth, and that the defendant committed a breach thereof, from which the plaintiff suffered damage, were in themselves sufficient to constitute a cause of action.

There are allegations also not only appropriate to an ordinary action for damages arising *ex contractu*, but showing that the breach of contract was accompanied by a fraudulent act. In the case of *Lee v. Lee*, 11 Rich. Eq. 574, the court quotes with approval the following language from *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927: "To insist on what was really a mortgage as a sale is, in equity, a fraud, which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be." Under the allegations of the complaint, it was a fraudulent act on the part of the defendant when he intentionally disposed of the land as the owner thereof, knowing that it was conveyed to him by way of mortgage, and that it belonged to the plaintiff, but, of course, subject to the mortgage.

The question, then, is presented whether, in an action arising out of a breach of contract, attended with a fraudulent act, the defendant is liable for exemplary damages. There is no doubt as to the general principle that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages, and that he is only liable for such damages as are the natural and proximate result of the wrongful act. When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled, certainly in this state, that the defendant may be made to respond in punitive as well as compensatory damages. In a note on page 214 of *Sedgwick on Damages* (3d Ed.), the author recognizes that punitive damages are recoverable in this state. He says: "In South Carolina the question has been discussed at large, and the ground distinctly taken that, even in cases of *assumpsit*, damages will be given on the ground of fraud." He then comments on the case of *Rose & Rodgers v. Beatie*, 2 Nott & McC. 538. Commenting on the text, which states a different rule from that prevailing in this state, that author, in a note on page 217, says: "I am far from desiring to express any opinion in favor of the doctrine of the text. On the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent or malicious breach of contract, as well as for any other willful wrong.

Damages are given by the civil law in many cases of this kind. So they are in Louisiana, the jurisprudence of which state is very much fashioned on the great Roman original." Since the distinction in forms of action has been abolished, there is stronger reason for allowing exemplary damages in actions for breach of contract, attended with fraudulent act, than when the case of *Rose & Rodgers v. Beatie*, 2 Nott & McC. 538, was decided. In *Rose & Rodgers v. Beatie*, 2 Nott & McC. 538, an action of assumpsit was brought to recover damages upon the sale of cotton alleged to have been fraudulently and falsely packed by wetting the cotton in the center of the bales. It was sent to Liverpool and sold as sound cotton at the then current price. After the sale the fraud was discovered, and the cotton returned and resold as damaged, at a considerable loss. The defendants contended that, if liable at all, the plaintiffs could only recover the price paid at Charleston, with interest. The court said: "Assumpsit is nomen generalissimum, under which a great variety of special cases are embraced. It includes every case by simple contract, whether in the nature of a warranty, a promise to pay money, or an undertaking to do or perform any act, from whence a promise, either express or implied, can arise. The damages to be recovered must always depend upon the nature of the action and the circumstances of the case. The difference of opinion which seems to exist on the subject, I apprehend, has arisen from confounding the distinctions between the different forms of assumpsit. In an action for money had and received, the actual amount of money received (with interest in some cases) should be the measure of damages. In an action for goods or any specific chattel sold and delivered, the value of the thing sold; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud, and other cases merely sounding in damages, the jury may give a verdict to the whole amount of the injury sustained or imaginary damages. * * * In Bacon it is said: 'If there are any circumstances of hardship, fraud, or deceit, the jury may consider of them, and proportion and mitigate the damages as they please.' 2 Bacon, tit 'Damages.' And Lord Mansfield says 'that fraud alone may be ground for an assumpsit where there is no express undertaking, as where a person sells property as sound, knowing it to be otherwise.' *Stewart v. Wilkins*, Doug. 18." After commenting on certain cases, the court uses this language: "I apprehend that, after all these cases, it can no longer be considered (as has been somewhat confidently asserted in this case), that (even) vindictive damages may not be given in an action of assumpsit, and surely it will not be denied that the plaintiff may recover the amount of the loss which he has actually sustained." See, also, *Garrett v. Stuart*, 1 McCord, 514.

In *D'Orval v. Hunt*, Dud. 180, it was held that for the breach of an executory contract, without fraud or imposition, the jury can only give such damages as fairly and naturally result from it, and which can be measured by a pecuniary standard; thus showing that the measure of damages is different when there is fraud.

The allegations of the complaint are also appropriate to an action of tort committed with a fraudulent and malicious intent. The following definition of a tort is set forth in 26 Enc. of Law, 72 (1st Ed.): "The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by mere breach of contract, or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either in the absence of contract, or in consequence of a relation which a contract had established between the parties." Italics ours. The complaint alleged a tort when it stated that the defendant sold the land which he held as a security for the repayment of the loan in consequence of the relation which the contract had established between the parties. The further allegation that the tort was committed with a malicious and fraudulent purpose made the defendant liable for exemplary damages as well as actual damages. *Chiles v. Ry.*, 69 S. C. 332, 48 S. E. 252.

The next question for consideration is whether the second cause of action set forth in the complaint was subject to demurrer. The only question that has not been disposed of in considering the first cause of action is whether the defendant became liable, under the allegations of the complaint, for the proceeds of the land. The allegations of the complaint show that the defendant occupied a fiduciary relation in regard to the land, and that the sale thereof was in violation of his trust. The plaintiff therefore had the right either to follow the land or the proceeds of the sale, just as in other cases when the trustee sells the trust estate in violation of the trust. In order, however, that the proceeds arising from the sale of the land may be declared to be impressed with a trust, it will be necessary to invoke the aid of the court in the exercise of its chancery powers, as the legal title to the land was in the defendant. In such case punitive damages cannot be awarded on the equity side of the court. *Bird v. R. R.*, 8 Rich. Eq. 46, 64 Am. Dec. 739; *Busby v. Mitchell*, 29 S. C. 447, 7 S. E. 618.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (dissenting). By reference to the complaint it will be seen that the plaintiff sets up two separate causes of action. The defendant demurred to the complaint as to each cause of action separately, on the ground that it failed to state facts sufficient to constitute a cause of action. The circuit

court overruled the demurrer, and the defendant appeals.

In the first cause of action the plaintiff alleges his conveyance of a tract of land to defendant as security for a loan of \$385; the written agreement of the defendant to reconvey on payment of the debt by November 1, 1902; the understanding that the two papers should constitute a mortgage; the defendant's conveyance of the land to another before November 1, 1902, in willful and fraudulent breach of his contract and violation of plaintiff's rights; tender of plaintiff's debt before maturity; defendant's refusal to reconvey, accompanied by a declaration that he would spend a thousand dollars rather than let plaintiff have anything out of the transaction. On these facts the plaintiff alleges and claims \$2,000 damages. In his second cause of action the plaintiff sets out the same facts as in the first, and alleges in addition that the defendant, under the contract, became a trustee of the property; that his sale to another was for the consideration of \$600, which he converted to his own use, refusing to account to the plaintiff for any part of it; and that this sale was made with the deliberate and willful purpose of defrauding the plaintiff, to his damage \$2,000.

It will be observed the essential difference between the two causes of action is that in the second a breach of trust is alleged, and the amount realized for the land is mentioned, while in the first the fraudulent breach of contract to reconvey is set up, without mention of a trust, and without any intimation of the value of the land. Manifestly, therefore, the plaintiff, in stating his two causes of action, meant in the first to complain of the fraudulent breach of contract to reconvey the land, disregarding the breach of trust, and leaving that for the gravamen of his second cause of action. It is also clear that the first cause of action is intended to be for punitive as distinguished from compensatory damages, because no value is set on the land which the defendant had agreed to reconvey to the plaintiff, nor is it alleged to be of value greater than the debt for which it was pledged, and without such excess of value there could be no actual damage. The first cause of action should therefore be regarded, as the pleader clearly intended it, distinctly for punitive damages based on a fraudulent breach of contract. Even if there were doubt as to whether the plaintiff meant to sue for the tort or for breach of the contract, every intendment is in favor of regarding the action *ex contractu*. 4 Ency. P. & P. 915.

I consider first the question raised by the demurrer to the first cause of action—whether punitive damages are recoverable for a fraudulent breach of contract. This question was answered in the negative by this court in *McClendon v. Wells*, 20 S. C. 520, and the views there expressed are in accord with those of other courts and of text-writ-

ers. *Wood's Mayne on Damages*, §§ 45, 46; note to *Spellman v. R. Co.*, 28 Am. St. Rep. 874; 12 A. & E. Ency. Law, 20; 3 *Parsons on Contracts*, 179; 2 *Sutherland on Damages* (3d Ed.) 890; 13 Cyc. 113; *Hurxthal v. Boom Co.* (W. Va.) 44 S. E. 520, 97 Am. St. Rep. 968. Citation of the numerous cases referred to in these authorities is omitted. The only generally recognized exception to the rule is an action for breach of a marriage contract.

In accordance with this view, where one who has contracted to convey land fraudulently refuses to convey, or by his own act fraudulently puts it out of his power to convey, the measure of damages is the value of the land at the time the contract should have been performed, less the contract price. *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; *Todd v. Gamble*, 52 L. R. A. 242, note; *Foley v. McKeegan*, 66 Am. Dec. 107, and note. Though the precise question here under discussion was not involved, the difference in damages arising from tort and breach of contract is recognized in *Devereux v. Champion Cotton Press Co.*, 17 S. C. 73, and *Colvin v. Oil Co.*, 66 S. C. 66, 44 S. E. 380.

In *Sedgwick on Damages* the statement is made that South Carolina is out of line with other jurisdictions on this subject, and *Rose v. Beatie*, 2 Nott & McC. 538, is cited as establishing the doctrine in this state that punitive damages may be recovered for fraudulent breach of contract. In this the learned author has fallen into error. *Rose v. Beatie* was an action of assumpsit to recover damages upon a sale of water-packed cotton made by defendant to plaintiffs in Charleston. The plaintiffs shipped the cotton to Liverpool and sold it, and upon discovery of the fraud it was returned to their Liverpool correspondent, and resold at public auction as damaged cotton, at considerable loss. "The presiding judge instructed the jury that the defendant was liable, and that they might give a verdict for the whole amount of damage that the plaintiffs had sustained, which was the difference between the two sales in Liverpool, with interest." As to the damages, the sole question involved in the appeal was whether the defendant was liable for the price paid to him in Charleston, or for the difference between the two sales made in Liverpool. The court sustained the circuit judge in adopting the difference between the two sales in Liverpool as the only just and true measure of damages. The court says: "It cannot be seriously contended that the seller should merely refund the money which he had received, and leave the purchaser to pay the costs of transportation across the Atlantic and all the incidental expenses. The expenses of exportation and original purchase money ought not to be the rule, because a depression of price in the foreign market might reduce the actual loss, by reason of

the fraud, below those expenses, and the seller ought not to be answerable for a loss to which he had not contributed. Upon the principle of reciprocity, as well as of good faith, the parties ought to be placed upon the same footing they would have been if there had been no deception, and that is the effect of this verdict." It will be borne in mind that when this case was decided practically all cotton was shipped out of the state, and the seller would be regarded as having in view the export cost of transportation and resale to be incurred by the buyer when he made the sale. The damages allowed were therefore well within the rule of *Hadley v. Baxendale*, 9 Exch. 341. The court undertook to do nothing more than place the plaintiffs in the same financial condition they would have occupied if the fraud had not been committed. Punitive damages were not claimed or allowed, and the case, therefore, could not involve the question here under discussion. It is true, Judge Nott, in the course of his decree, does intimate an opinion that vindictive damages, or, as he curiously calls them in one place, "imaginary damages," may be allowed in an action of assumpsit; but no such question was involved in the case, or in *Farland v. Bouchell*, Harp. 83, where the same judge again refers to the subject. These dicta are entitled to great consideration as the views of an eminent judge, but they are not binding, and should not be allowed to overthrow a doctrine so long established by the overwhelming weight of authority and reason.

In giving compensation for breaches of contract, the utmost that the law undertakes is to place the parties in the financial condition they would have been in if the breach had not occurred. It is true, fraud always merits punishment, but the courts regard it unwise and impracticable to attempt to punish a fraudulent breach of contract by requiring the defaulter to pay to the other party more than he has lost by the breach. The advantage of punishing the fraud would be more than counterbalanced by the disastrous uncertainty in the administration of the law of contracts which would surely result. If the plaintiff in this case is allowed to recover punitive damages for the defendant's willful and fraudulent failure and refusal to keep his promise to reconvey, then the defendant would have been entitled to punitive damages if the plaintiff had willfully and fraudulently refused to repay the money borrowed, and this would hardly be contended for. I think the demurrer to the first cause of action should be sustained.

As we have seen, the second cause of action stands on different ground. Here the gravamen is violation of the trust relation which grew out of the contract, in that the defendant sold the land conveyed to him as a security. The allegations here present an action for tort founded upon contract.

We now consider whether punitive damages may be recovered under this cause of action. "The damages in actions of tort founded upon contract must be estimated in the same way as they are estimated in breach of contract, for a man cannot, by merely changing the form of his action, put himself in a better position." *Moak's Underhill on Torts*, 102; *Wood's Mayne on Damages*, 70, note. This rule has no application to common carriers of passengers, and some others charged with public duties, but we are not now concerned with this exception.

Even in actions on the case for deceit, based on false representations as to existing facts inducing one to enter into a business contract to his prejudice, the measure of damages is usually the resulting pecuniary loss, when such loss can be readily ascertained. To allow more than this as vindictive damages, as said by the Supreme Court of Michigan, would be "to abandon a certain rule which would do complete justice for an uncertain one that can hardly fail to do injustice." *Warren v. Cole*, 15 Mich. 273. *Parker v. Walker*, 12 Rich. Law, 138, was an action for deceit; the deceit consisting in selling to plaintiff a tract of land, when the defendant knew he had no title to 56 acres of the 120 which he undertook to sell. The plaintiff, subsequent to the sale, and before the action was commenced, perfected his title to all but 10 acres by obtaining a grant from the state at a cost of \$10. Under the instruction of the court, the jury found a verdict for the pro rata value of all the land to which defendant had no title. Judge O'Neill, delivering the opinion of the Court of Appeals, held that the allegation of deceit was sustained by the proof, and, in the absence of any other measure of plaintiff's loss, the pro rata value of the 56 acres to which defendant had no title would have been the true measure of damages; but, inasmuch as the plaintiff had perfected his title to all but 10 acres at an expense of \$10, he could only recover that sum and the pro rata value of the 10 acres actually lost. The same doctrine is stated with force in *Durfee v. Newkirk* (Mich.) 47 N. W. 351.

It is important to observe, therefore, that whether we have regard to the first cause of action, for the breach of contract, or to the second cause of action, for the tort growing out of the breach of contract, in this case the damages are capable of actual, definite ascertainment. They depend entirely on the value of the land. The loss of the land is the sole element of damage, and the value of the land, less the debt, is the obvious and only damage which plaintiff has suffered.

In this state punitive damages are regarded as made up of two elements—punishment of wrong, and vindication of private right, by requiring payment for outrage, oppression, or indignity, which it is felt should be atoned for by compensation, but which can-

not be expressed by computation. This court has recently held in a number of cases that such damages are founded on the right of the party injured, and not on the discretion of the jury. *Beaudrot v. Ry.*, 69 S. C. 160, 48 S. E. 106. Under the facts alleged here, if punitive damages are allowed, the court would award them to the plaintiff altogether as punishment of the defendant, for the injury to plaintiff is entirely pecuniary, and actual damages would fully vindicate his rights. The plaintiff has no right to punishment of the defendant, when he may be fully compensated for the wrong done to himself without such punishment.

I have endeavored to show that punitive damages are not recoverable, under the facts alleged here, either for the breach of contract, which is the gravamen of the first cause of action, or for the violation of the trust relation which grew out of the contract, which is the gravamen of the second cause of action. In the second cause of action, however, plaintiff alleges the defendant sold for \$600 the land pledged to him for a debt of \$385, and refused to pay over or account to him for the purchase money. This fact, coupled with the others alleged, is manifestly a sufficient statement of actual damage, and for this reason the demurrer to the second cause of action cannot be sustained. This cause of action being *ex delicto*, it may be that, though no punitive damages could be recovered, yet, as they are claimed, actual damages could be recovered under the act of 1898 without any allegation of actual damage. As actual damages are alleged, however, this question under the act of 1898 does not arise.

The defendant's objection, that the agreement to reconvey set out in the complaint is void under the statute of frauds, because it does not identify the property, cannot be sustained. The agreement was to "deed back to J. W. Welborn said piece of land, containing twenty-seven acres, more or less." This was equivalent to saying that the contract related to the same tract of 27 acres of land conveyed by the plaintiff to defendant, and the complaint alleges that the land is fully described in the deed.

In my opinion, the demurrer to the first cause of action should be sustained, with leave to the plaintiff to move to amend as he may be advised, and the demurrer to the second cause of action should be overruled.

(56 W. Va. 348)

TOWN OF PHILLIPI v. KITTLE.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

SUPREME COURT OF APPEALS—JURISDICTION IN CRIMINAL CASES.

1. This court is without jurisdiction to entertain a writ of error from the judgment of the circuit court discharging a prisoner from prosecution under a municipal ordinance for public drunkenness and disorderly conduct, even

though the validity of such ordinance may be involved.

(Syllabus by the Court.)

Error to Circuit Court, Barbour County; John Homer Holt, Judge.

V. Wirt Kittle was convicted of violating an ordinance of the town of Phillipi. On appeal the conviction was reversed, and the town brings error. Dismissed.

Samuel V. Woods and J. Hop. Woods, for plaintiff in error. W. T. George, for defendant in error.

DENT, J. V. Wirt Kittle was, by the mayor of the town of Phillipi, on the 12th day of May, 1903, found guilty of public drunkenness, contrary to sections 3 and 59, ordinance 4, of the town, and fined \$10 and costs. Kittle appealed to the circuit court, which, on hearing, held such ordinance invalid, reversed the judgment, and discharged the prisoner. The town obtained a writ of error to this court. Kittle moves a dismissal thereof for want of jurisdiction.

It has been held that such proceedings are criminal in their nature, and that the town is the representative of the state in the prosecution thereof. *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152. In defining the jurisdiction of this court in criminal matters, section 3, art. 8, of the Constitution, provides that: "It shall have appellate jurisdiction in criminal cases where there has been a conviction for felony or misdemeanor in a circuit court, and where a conviction has been had in any inferior court and been affirmed in a circuit court, and in cases relating to the public revenue the right of appeal shall belong to the state as well as the defendant, and such other appellate jurisdiction in both civil and criminal cases, as may be prescribed by law." Section 230, c. 50, Code 1899, allows an appeal to any person convicted of an offense against a municipal ordinance. *Charleston v. Beller*, 45 W. Va. 47, 30 S. E. 152. But neither this nor any other section or statute allows an appeal or writ of error in such case to the town or state. Hence this court is wholly without jurisdiction to entertain this writ, and it must be dismissed, as improvidently awarded. No costs allowed.

(56 W. Va. 336)

LE COMTE v. CARSON et al.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

EQUITY—JURISDICTION—ESTOPPEL—LEASE—REFORMATION—BOUNDARY—ESTABLISHMENT—ORAL AGREEMENT.

1. Though equity will not entertain a suit only to settle boundary and title to land, yet, when there is an independent ground giving equity jurisdiction, it will entertain the suit and pass on the title or boundary, as incidental to other relief.

2. When one takes a position in a judicial proceeding, and a decree is made conformable

¶ 1. See *Boundaries*, vol. 3, Cent. Dig. § 123.

thereto, and another party relies upon it, and acquires property under the decree, he that takes such position is estopped from afterwards claiming contrary to such position to the prejudice of the other party.

3. Where a decree directs the lease of a tract of land for oil and gas, and the lease under it contains a line or boundary different from that authorized by the decree, omitting a part of the tract, either from fraud or mistake—the lessee being ignorant of the physical effect of the line, as a fact—equity will reform the lease.

4. To make valid an oral agreement to fix a line between two contiguous tracts of land, there must be doubt and uncertainty as to the true place of the line; else the agreement is void. Where there is, in fact, under the facts, such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid, without other consideration than the settlement of disputed boundary.

(Syllabus by the Court.)

Appeal from Circuit Court, Hancock County; H. C. Hervey, Judge.

Bill by A. C. Le Comte against Martin L. Carson and others. Decree for plaintiff, and defendants appeal. Affirmed.

John R. Donehoo and E. E. Erskine, for appellants. Erskine & Allison, for appellee.

BRANNON, J. Martin L. Carson and Samuel H. Carson were owners of a tract of 140 acres, 1 rood, and 27 poles of land in Hancock county, which they acquired by two deeds from the devisees of Wilcoxon. It is called the "Wilcoxon Tract." Samuel H. Carson, died leaving a widow, Amanda I. Carson, and infant children, of whom Amanda became guardian. The two Carson brothers made an oil lease to Murray for 40 acres of the tract. A. C. Le Comte, after this lease, and after the death of Samuel H. Carson, negotiated with Martin L. Carson and Amanda Carson, guardian of the children of Samuel H. Carson, for an oil lease for the unleased residue of the Wilcoxon tract. To secure good title for the interest of the infants, it was agreed that a petition should be filed in the circuit court of Hancock county by said guardian against said infants to secure a decree enabling the guardian to sell or lease the oil and gas interests of the infants; and such petition was filed, and such decree was obtained. The petition stated that Martin L. and Samuel H. Carson had derived title to the tract from said Wilcoxon devisees, and stated said former lease to Murray of part of the tract, and prayed a decree to give her authority to lease and sell the oil and gas in "the said unleased 100-acre tract." The petition stated that Martin L. Carson owned one-half, and averred that, to accomplish a lease, it would be necessary that he join in it; and the decree asked by the petition was one giving authority to the guardian to join in a lease with Martin L. Carson. The decree, in terms, provided for such joint lease. The petition distinctly alleged that he consented to join in such proposed lease. He was made a par-

ty, and filed an answer distinctly admitting the facts stated in the petition as true, and stating that the averments of the petition that he would join in any lease or sale the guardian might make were true, and he agreed in the answer to so join. The decree allowed the leasing of "the tract and premises described in the bill." Under the decree the guardian and Martin L. Carson executed to Le Comte a lease of oil and gas. This lease, in its description of the land, does not give the boundary by magnetic calls, as in the deeds by which the Wilcoxon devisees conveyed the tract to the Carsons, but bounded it by adjoining tracts, saying that on the south it was bounded "by the county road leading from Fairview to Frankfort." The boundary shown by the deeds from the Wilcoxens to the Carsons does not bound on or call for this road, but crosses it, and leaves a strip or parcel south of and on the other side of the road from the body of the land, of 4 acres, 2 roods, and 2 poles. In other words, this call cuts off that strip from the body of the land, and thus excludes it from the lease. James Carson, father of Martin L. and Samuel H. Carson, owned a tract of 182 acres adjoining the Wilcoxon tract on its south, and thus adjoining said strip, which 182-acre tract is called the "Carson Home Farm." James Carson willed this 182-acre tract to five of his sons; one of them being said Martin Luther Carson, and Samuel H. Carson being another. Some days before the lease from the guardian and Martin L. Carson to Le Comte, Martin L. Carson and E. A. Freshwater took from the James Carson devisees and Amanda I. Carson, as guardian of the infant children of Samuel H. Carson, an oil lease for 35 acres of the James Carson 182-acre home farm, giving its northern boundary as the Fairview and Frankfort Road; thus including the said strip in the 35-acre lease. This strip of 4 and a fraction acres is the bone of controversy in this case between Le Comte, on the one side, and Martin L. Carson and Freshwater, on the other. This lease to Carson and Freshwater was on record before the lease to Le Comte was made. James Carson had a son called "Mack." He got no part of the home farm under his father's will, but his father gave him leave to occupy a house on that farm under an oral lease, and confirmed it in his will till a legacy to that son should fall due. This lease or license included a few acres of land around the house, part of said home farm. It is claimed, and some evidence goes to show, that James Carson told Mack that he might make use of the controverted strip, and that Mack fenced in with his other land about one-third of this strip, and cultivated it and planted fruit trees on it. The balance of the strip was left in woods, without any fence separating it from said road, but a fence cut it off from the home farm. The defendants in this present case set up that, at the time

of the guardian's proceeding in the circuit court to lease the land, said disputed strip was not a part of the Wilcoxon tract, but had been eliminated from it. They say that in 1880 there was a dispute as to the lines between the Wilcoxon tract and the James Carson home tract, and that in that year James Carson and his two sons, owners of the two tracts, orally agreed that the Fairview and Frankfort Road should be thereafter the boundary, and that this oral agreement had been ever since acquiesced in, and operated to give the disputed strip to the 182-acre tract. Under the lease of the 35 acres to Martin L. Carson and Freshwater, an oil well was bored within 2 feet and 3 inches of the south line of the Wilcoxon farm, and thus within that distance of said disputed strip—a part of the derrick of the well resting on the strip—and they began work for boring another well on the strip. Le Comte then filed a bill in equity, claiming that the insertion of the call for the Fairview and Frankfort Road in the lease to him was a fraud upon him, chiefly worked by Martin L. Carson in giving the draftsman of the lease that road as part of the boundary, and causing its insertion in the lease, he (Le Comte) not knowing that a part of the tract was thus excluded from the lease; that at any rate the lease misrepresented the decree authorizing the lease, and did not give him the rights he bargained for before the decree, and which the decree intended to confer. The bill asked that Carson and Freshwater be enjoined from further drilling the well which was on, or the derrick of which encroached on, said strip of 4 acres, 2 rods, and 2 poles, of the Wilcoxon tract; that the lease to Carson and Freshwater be held void so far as it covered said strip, and that they be enjoined from interfering with Le Comte's use of said strip; and that the lease to Le Comte be reformed, and a new lease executed, including all the Wilcoxon tract not leased to Murray. A decree was pronounced enjoining Carson and Freshwater perpetually from drilling or operating for oil or gas on said strip, and from interfering with Le Comte in his drilling and operating on said strip. Carson and Freshwater appeal.

Counsel for the appellants contest the jurisdiction of equity to entertain the case, because it is only a suit involving adverse titles or boundary, of which equity will not take jurisdiction, on principles stated in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895. The ready answer to this objection is found in that and many other cases—that the rule that equity will not hold a case to try adverse titles to land is that it applies only “when the plaintiff has no equity against the party claiming adversely to him.” When there is another ground for jurisdiction, independent of a trial of the hostile titles—one which alone gives jurisdiction—equity takes it, and tries the whole case. Here the bill alleged fraud in

the execution of an erroneous lease, or a mistake in its drafting, and failure to execute intent of the parties and to conform to the decree, and prayed a reformation of the lease; these being proper grounds for equity jurisdiction, to undo a fraud, correct a mistake, reform a deed.

On the merits: We can safely say that Le Comte, who came just then from Ohio, and was a stranger in Hancock county, did not know the location of the lines, the physical boundary of the land, so far as to know that the call for the Fairview and Frankfort Road inserted in the lease would leave out a part of the Wilcoxon tract. He did know that such call was being inserted in the lease, but that did not tell him that it would lose him the strip in controversy. Suppose he had the deeds to the Carsons before him, giving the magnetic calls S., 55 E., and S., 75¼ E.; how could he say whether or no the road conformed to those calls? But Amanda Carson and Martin L. Carson well knew that that road call did not conform to the calls of the deed. Amanda says, as a witness, that she well knew it, but was not allowed to say so, and admits under oath Le Comte's right to the disputed territory. Martin L. Carson directed this road call to be put in the lease, and does not pretend ignorance of its departure from the calls of the deed, or of its leaving out the disputed strip. He intentionally omitted it. Le Comte knew nothing, practically, of the boundary. Martin L. and Amanda knew all about it. He relied on them to give true bounds, and had right to do so. He had in the preliminary contract bargained with them that for his large bonus of \$5,000 he would get all the Wilcoxon tract, except that before leased to Murray. He dreamed not that any part of the tract, as owned by the lessors, would be cut out. Why did not Martin L. Carson tell him that the boundary did not cover the strip? Carson must have known that Le Comte relied on getting all except the part under Murray's lease. Consider the record of the proceeding to lease the land. The guardian's petition asked that the tract, except that leased to Murray, be leased, and described the land as that conveyed to the Carsons by two certain deeds, and filed them; and they give boundaries not calling for the said road, but crossing it, and including in the tract this disputed parcel, as even Martin L. Carson does not deny, and as the petition for appeal confesses. That was the land which the petition asked for leave to lease. Those very deeds, and those very calls in them, are parts of the petition descriptive of the land. By his answer, Martin L. Carson agreed to the leasing of all the land covered by the calls of those deeds, save the Murray lease. He said that the petition properly described the land. He made no exception in his answer of that strip. If he had any claim to it as part of the other tract, why did not his answer set it up and

exclude it from the contemplated lease? I should regard this answer as an estoppel forbidding him from harming Le Comte. He neither in nor out of court warned Le Comte of the exception of this strip. *N. & W. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. "An admission in a judicial proceeding, whether direct, or by inference from the position assumed, the belief sought, or defense set up, will estop the one who makes it from subsequently asserting any claim inconsistent therewith." 4 Am. & Eng. Dec. in Eq. 304 and 196. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining it, he cannot thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 689, 15 Sup. Ct. 555, 39 L. Ed. 578. To same effect, *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; 11 Am. & Eng. Ency. L. (2d Ed.) 446; opinion in *Weston v. Ralston*, 48 W. Va. 186, 36 S. E. 446. Martin's interest now is to keep the strip in his own lease. He agreed to the prayer of the bill, asked it, got his prayer, and cannot now retract. He asked that the land be leased by the description in those deeds.

To what is Le Comte entitled, tested by the decree? It adjudged that it would promote the infants' interests to lease "the tract and premises described in the bill." We have seen what that was. It decreed that Carson join in such lease, because he consented to do so. It is true that the guardian, in her report of the lease, filed it, and the decree of confirmation confirmed that particular lease, and, as it bounded the lease on the road, it is limited by it; but the decree did not authorize a lease of only a part, and, besides, the report told the court that the lease was "in all respects in accord with said decree," and the decree of confirmation proceeded upon that idea. Le Comte relied upon it and accepted the lease on the faith of it, and neither he nor the court knew the physical fact that the road call departed from the deed call, and left out the disputed piece of land. It would take a survey to tell it. We can say that the court intended and Le Comte intended to lease and acquire all the land which the decree authorized to be leased. It thus seems that the omission from this lease of the land in controversy was a wrong on the part of the lessors—in law, a fraud on Le Comte. Is Le Comte entitled to relief on the theory of mistake, in that the lease does not carry out intent? In such case the mistake must be mutual, and it may be said that, as the lease bounds by the road, Martin L. Carson did not intend to lease by the lines of the deed, though Le Comte did. Were that all, there would be doubt; but the record of the guardian's proceeding, and Carson's answer assenting to the lease proposed,

make a contract between the lessors and the lessee, and the lease does not execute it, and Le Comte has right to have it executed by the reformation of it to conform to the decree of lease, to which both the guardian and Carson assented. And if he deem it essential, he can yet ask a new lease, as the court has not in terms decreed such reformation.

Next as to the defense that the land in dispute had ceased to be part of the Wilcox tract, and become part of the home farm, by an agreement between Carson and his two sons, This cannot avail Martin Luther Carson, because of the estoppel above stated. But how as to Freshwater? How as to Carson, if he were not so estopped? One answer to this defense is that the oral agreement is of no force, for want of consideration. True, where there is uncertainty as to location of a boundary line between coterminous owners, and a dispute based on colorable uncertainty, there may be a valid agreement resting on that uncertainty to fix a line, and no other consideration is needed. It is then held not a sale or conveyance by word, prohibited by the statute that requires a writing or deed for the sale or conveyance of land, as it merely defines or locates the line. But where there is no such uncertainty, no dispute based on uncertainty, but the true line is known or readily ascertainable, it is nothing but a transfer without that consideration, and, unless written, is void. As an agreement, it has no consideration to call for enforcement, and the statute requires a writing because it is a transfer of land—simply a transfer. 4 Am. & Eng. Ency. L. (2d Ed.) 860, 861. "In order to the validity of a parol agreement establishing a boundary, it is necessary, however, that there be doubt and uncertainty as to its true location." 5 Cyc. 932; *Pasley v. English*, 5 Grat. 141. The evidence in this case shows no uncertainty. If James Carson ever made any claim to this strip, there is not the least show of how he claimed. Indeed, there is no showing of controversy, save a mere declaration by one or two witnesses. There is no uncertainty as to the boundary of the Wilcox tract or the home farm apparent. There is clearly no basis for any agreement which, of its own force as an agreement, can operate to take from the Wilcox farm this strip.

Further, even if there had been such uncertainty of boundary, the evidence does not show that the agreement was executed by actual possession, for our law is stated thus in *Teass v. City*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802: "Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately and accompanied by possession according thereto." No possession was taken immediately, nothing done to execute the agreement. It is true, Mack Carson, in an indefinite way, says he heard this agree-

ment, and "they" told him to clear out the strip; but it is not clear, on the whole evidence, that what he did was to execute the agreement. What did he do? He cleared a part of the strip and fenced it—one-third of it—and left the balance out in common, not fenced. There being no color of title, possession of part would not be possession of the entire strip. At most, it would only extend to the part fenced in.

But in any view, there ought to be clear, convincing evidence to prove an agreement to take away land; and the competent evidence is not clear, is wholly unsatisfactory, unconvincing. So the circuit judge held, and we do not see that he is wrong. There is a witness who says Samuel H. Carson admitted the agreement. There is another who says he claimed the strip. Two papers go to repel the existence of such agreement. The will of James Carson describes the home farm as 182 acres conveyed to him by a certain deed. It does not cover the strip. An unrecorded deed from Samuel H. Carson to Martin L. and James A. Carson for Samuel's interest in this land, in describing the land, follows the call of the deeds by which Martin and Samuel acquired the land, and declares that those calls make a line running with the James Carson home farm. This is a declaration and admission by Samuel and Martin L. Carson in October, 1887, seven years after the pretended oral agreement, that the strip was a part of the Wilcoxen tract. I have used the words "pretended agreement," for it does seem to one reading the voluminous case that this agreement is hatched out lately to answer the necessity of this case.

The statute of limitation does not seem to enter into the case. It could only arise as to the little piece cultivated by Mack Carson, but it is not clear that it was held with the intent to claim title—a necessary element of the statute.

We are told that the possession of the fraction of this strip was notice to Le Comte of adverse claim, as possession is notice. It would go no further than the fraction. There was no possession of the balance. Possession is notice of a claim, but it does not create title, or make no title a good one. It is notice only of such right as the party has. If the oral agreement were clear and valid, it would be notice of it, but it is not clear and good.

The fact that the lease of the defendants was prior in time and recorded before Le Comte's lease is immaterial. If the defendants' lease passed no title, what does its priority of date amount to? A record of a deed that passes no title does not operate as notice to affect an adverse claimant of the true title. It has no application to an adversary owner of another right, but only between prior and later purchasers or creditors of the same title.

Decree affirmed.

(56 W. Va. 227)

W. & T. ALLEN & CO. v. MAXWELL et al.
(Supreme Court of Appeals of West Virginia.
Nov. 16, 1904.)

APPEAL — REVIEW — ASSIGNMENTS OF ERROR — FINDINGS OF COMMISSIONER — NOTE — CONSTRUCTION.

1. Syllabus, point 3, Reger v. O'Neal, 10 S. E. 375, 33 W. Va. 159, 6 L. R. A. 427, syllabus, point 3, Fry v. Feamater, 15 S. E. 253, 36 W. Va. 454, and point 1 of syllabus, Woods v. Ward, 37 S. E. 520, 48 W. Va. 652, reaffirmed and applied.

2. M. was indorser for the firm of S., B. & Co., of which firm L. was a member. Said firm, as well as L. individually became insolvent; and M. being required, as such indorser, to pay near \$2,000, and not being able to raise all the money for the purpose himself, L. loaned him \$805, for which M. executed to L. the following writing: "\$805. Due W. H. Lipscomb eight hundred and five dollars, borrowed money, to be repaid when collected off of Stone, Bowman & Co. out of drafts which I have had to pay for them. This March 9th, 1888. Witness my hand and seal. W. B. Maxwell. [Seal.]" M. recovered a decree against S., B. & Co., August 2, 1890, for \$958.06, interest and costs. Held, M. could only be liable to L. or his assignee upon said note to the extent of his actual collections from said S., B. & Co.

3. Where a party takes an appeal from specified parts of a decree, giving notice to all parties to the suit that he will only have such parts of the record copied into the transcript as will present to the appellate court such matters so specified as he desires to have reviewed, and that it is not his purpose or intention to appeal from any other part of the decree, the appellate court will not consider an assignment of error by one of the appellees, long after the submission of the cause, concerning another part of the final decree, and having no relation to the parts of the decree appealed from.

4. When an appeal is taken from specified parts of a decree set out in a written notice which states that no other part of the decree will be appealed from by the appellant, and such specified parts are independent and involve only the rights of the appellees named in such specified parts of the decree, such appeal does not bring up for adjudication the whole decree.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by W. & T. Allen & Co. against W. B. Maxwell and others. Decree for plaintiffs, and defendants appeal. Reversed in part.

C. O. Strieby, for appellants. W. G. Conley, W. T. Ice, Jr., and D. H. Hill Arnold, for appellees.

McWHORTER, J. W. & T. Allen & Co. at the May rules, 1899, filed their bill in the circuit court of Tucker county against W. B. Maxwell, C. O. Strieby, trustee, John J. Adams, and others, creditors of W. B. Maxwell, alleging that for many years they had been engaged in the wholesale clothing business in Philadelphia, and had sold goods to one W. H. Lipscomb, who was engaged in the mercantile business at St. George, Tucker county; that said Lipscomb became largely indebted to plaintiffs and numerous other creditors; that in April, 1888, he made an assignment of his property to the defendant Maxwell, as trustee, for the benefit of all his creditors; that Maxwell pro-

ceeded to act under said deed of assignment, and collected from the property so coming into his hands and possession sums of money largely in excess of the amount necessary to pay the entire indebtedness of said Lipscomb; that a suit was instituted in said Tucker county circuit court by the W. H. Smith Hardware Company against said Lipscomb and others for the purpose of settling the accounts of said Maxwell as such trustee; that orders of reference were had and executed therein, and, among other things, it was ascertained and decreed that there was due plaintiffs the sum of \$361.41, with interest from the 23d day of November, 1897, until paid, which said Maxwell was directed therein to pay, and which he had failed to pay, and plaintiffs were advised the same was a lien on the said Maxwell's estate from the date of the decree, and making said cause of the W. H. Smith Hardware Company against Lipscomb and others part of their said suit; that Maxwell never gave bond as trustee, and therefore plaintiffs were compelled to look to him personally for the payment of the claim; that Maxwell was largely indebted to other creditors, who were made parties to the suit as far as known; that on the — day of April, 1899, said Maxwell made a general assignment of all his property, both real and personal, to one C. O. Strieby, trustee, requiring in said deed said trustee to give bond in the penalty of \$10,000 before taking possession of the said property; and praying that the cause be referred to a commissioner of the court to ascertain the property, real and personal, owned by said Maxwell, and liens against the same, to whom owing, the amount and priorities thereof, and to settle the accounts of C. O. Strieby, trustee, and for the appointment of a special receiver to take charge of said property, and that the court direct him to proceed with the said property in such manner as would best subserve the interests of all persons concerned therein; and asking that the creditors named, and all other persons interested in the estate of Maxwell who would come in and contribute to the costs of the suit, be made parties, and for general relief; exhibiting with their bill the deed of trust made by Maxwell to Strieby, trustee. The defendant Maxwell and Strieby, C. H. Maxwell, and W. H. Lipscomb filed their several answers, to which general replications were entered.

On the 16th of June, 1899, the cause was heard upon the bill and answers and replications thereto, when the court decreed that the trust estate should be disposed of as speedily as possible, and, by consent of parties, authorized and directed C. O. Strieby to dispose of the property with the least possible delay, in pursuance of and under the deed of trust of April 3, 1899, and hold the funds arising therefrom subject to the further order of the court, and referred the

cause to Jeff Lipscomb, one of the commissioners of the court, who was directed to ascertain and report the estate theretofore owned by W. B. Maxwell, and conveyed to Trustee Strieby, the character and nature of the title thereto, the liens thereon, their character, amounts, priorities, and to whom owing, and to state the accounts of the said Strieby, trustee, so far as they had progressed at the time of the completion of said report, etc. The commissioner filed his report, dated the 10th day of November, 1899, to which report the defendant W. B. Maxwell filed 17 exceptions, and the defendant C. O. Strieby filed 3 exceptions thereto, the third of which exceptions adopted each and every exception made by W. B. Maxwell. On the 21st day of June, 1900, the cause was heard upon the papers, proceedings, and decrees theretofore filed, had, and entered, and upon the report and exceptions thereto, when the court overruled all the exceptions, except the fifteenth exception of the defendant Maxwell, and as to one item mentioned in the seventh exception of said Maxwell, which were sustained, and the commissioner's report confirmed in all other respects, except "as to the item of \$833.10 reported as due G. F. Phillips, next friend of Ann E. Phillips, all questions relating thereto being reserved for the future order of the court therein, and as are also reserved all questions pertaining to the lands purchased by the said W. B. Maxwell and C. W. Minear jointly at tax sales, and for which no settlement has yet been made, and which were not at the time of filing of the report of Commissioner Lipscomb in a condition to settle"; and the court, proceeding to ascertain the rights of parties, decreed, among other things, that there was "due C. W. Minear \$317.30; C. H. Maxwell, \$2,728.42, subject to the credit of a note by C. H. Maxwell, executed to W. B. Maxwell, dated the 15th day of December, 1891, for the sum of \$52.50; Mary C. Cameron's heirs, \$128.02; A. J. Lipscomb, \$563.11." These are the only claims contested here in this cause by the appellant Strieby, trustee.

The fifth exception taken by defendant W. B. Maxwell and the trustee, Strieby, to the report of the commissioner, is the allowance of the claim of \$317.30, and claimed to be erroneously carried into the decree in favor of C. W. Minear without a settlement therewith of the amount overpaid to said Minear; the said \$317.30 being only Minear's side of the account. On the 16th of October, 1899, W. B. Maxwell and C. W. Minear had a partial settlement, and made a statement thereof in writing, signed by both of them, wherein they say: "Balance due C. W. Minear, \$317.30, which is to be allowed by Jeff Lipscomb, com'r in the case of W. & T. Allen & Co. vs. W. B. Maxwell. In this settlement we did not include the W. H. Lipscomb matter in controversy, or the matters in difference relative to land bought for taxes, men-

tioned in the 8th and 9th items of the answer of said Maxwell filed before the commissioner in said case, and said matters are left open for settlement." Item 8 referred to the amount overpaid by mistake in the case of W. H. Smith Hardware Company against W. H. Lipscomb, June 26, 1895, about \$800; and the ninth item, to one-third profits made on delinquent land purchased in 1895, about \$300. The overpayment to Minear is recognized in the decree entered on the 23d of November, 1897, in the case of W. H. Smith Hardware Company against W. H. Lipscomb, and the right reserved therein to the said Maxwell to recover back from Minear any amount so improperly paid to him. Commissioner Lipscomb, in making up his report, leaves wholly unsettled between said Maxwell and Minear the matters of difference in the eighth and ninth items mentioned. The answer of Maxwell alleged the partnership of Minear, Hamilton, and himself for the purchase of delinquent lands, and as such partners they did invest a considerable amount of money in the purchase of lands at tax sales, and that Minear afterwards purchased the interest of Hamilton, thereby giving him two-thirds and Maxwell one-third, and that Minear held the funds of the copartnership, and from which Maxwell had never received anything; and the answer of Maxwell on this matter was not traversed, and Maxwell's testimony supports this answer. In his testimony, W. B. Maxwell makes the following statement: "C. W. Minear debt, claiming the sum of \$555.02. On yesterday Mr. Minear and myself, by the consent of C. O. Strieby, trustee, took up all the matters of account between us, except the eighth and ninth items of my account of offsets; the eighth item being for \$600 charged as amount overpaid to said Minear in the case of W. H. Smith Hardware Company against W. H. Lipscomb, etc., and the ninth item being a charge for \$300 for one-third the profits on delinquent land purchased in 1895. Mr. Minear and myself did not attempt to settle these two items. He was not willing to settle the eighth item, and, upon looking over matters between us relative to the ninth item, I concluded it was not proper for me to settle same. I found that Mr. Minear had in his hands somewhere about \$400 of the proceeds of sales of lands acquired at the tax purchase, of which one-third is due to myself, and the remainder to Mr. Minear and Mr. John Hamilton. I also found that there are a number of the parcels of land purchased by us which were not redeemed, and which I think, roughly estimating the value of the same, are worth somewhere from \$600 to \$1,000, and I left the whole matter to be settled by the trustee. One-third of this land which has not been disposed of is mine. Mr. Minear said to me that he had received sufficient money to satisfy all partnership liability, so that the money in his hands and notes and lands yet on hand are practically subject

to a division among the parties, except that there are some unpaid taxes against the land. Mr. Minear and myself made a note in writing, and signed it, showing that, as to the matters settled, there is a balance due him as of yesterday of \$317.30. Included in the matters settled is a note of J. W. Minear of \$50, and a note of his own of \$55, which are in the hands of Mr. Strieby, trustee, and are to be given up and canceled. I now file the memorandum made by Mr. Minear and myself on yesterday, marked 'Exhibit C. W. M.' As I stated, we did not attempt to settle the eighth item of my account, and I now refer to the final decree entered in the case of W. H. Smith Hardware Company against W. H. Lipscomb, etc., as showing my claim in this matter, and request the commissioner to procure and file a copy of that decree as part of his report." The overpayment by Maxwell to Minear is clearly shown from the commissioner's confirmed reports in the case of W. H. Smith Hardware Company against Lipscomb, made a part of the record here, from which it appears that the total amount which passed into the hands of Maxwell, trustee, was \$5,745.24; his disbursements, \$3,531.73, which includes the \$1,722.94 paid to Minear, and without which the disbursements amount to \$1,808.79. A supplemental report made June 24, 1897, and which was unexcepted to, and confirmed by the decree of November 23, 1897, in case of W. H. Smith Hardware Company against Lipscomb, shows further disbursements by said Maxwell, trustee, to the amount of \$688.56, and also reports further claims against said fund to amount of \$2,111.44; making a total of \$4,608.79, which deducted from the receipts, \$5,745.24, leaves the sum of \$1,136.45, the true amount which should have been paid to Minear on the Lipscomb order to pay Minear any surplus after paying the creditors of Lipscomb; being an overpayment of \$586.49. Why this overpayment was not carried into the account between Maxwell and Minear by the commissioner, and also into the decree, does not appear; but the right was reserved to Trustee Maxwell, in the case of W. H. Smith Hardware Company against Lipscomb, to recover back from Minear any amount improperly paid to him. This overpayment of \$586.49, with interest from June 27, 1895, the date of its payment, would have canceled the claim of \$317.30 decreed to Minear, and left the difference which should have been decreed against Minear for the benefit of the creditors of Maxwell in this suit. Maxwell testifies that no part of said overpayment had ever been repaid to him by Minear. The decree in favor of C. W. Minear for the sum of \$317.30 is reversed, set aside, and annulled, and this court, proceeding to enter such decree in that behalf as the circuit court should have rendered, do adjudge, order, and decree that C. W. Minear do pay to the trustee of W. B. Maxwell, for the purposes of said trust, the sum of \$586.49, the amount

overpaid him as assignee of W. H. Lipscomb by W. B. Maxwell, with interest thereon from June 25, 1895, until paid, subject to credit of \$317.30 as of November 19, 1899. The questions pertaining to the lands purchased by W. B. Maxwell and Minear jointly at tax sales, and for which no settlement had been made, were reserved by the circuit court. The sixth exception to the commissioner's report is that "the unsettled matters between said Maxwell and said Minear relative to lands purchased for taxes are neither settled by the commissioner nor reserved so that the same can be settled in the future." The decree of June 21, 1900, complained of, after mentioning certain questions and matters reserved, says: "As are also reserved all questions pertaining to the lands purchased by said W. B. Maxwell and C. W. Minear jointly at tax sales, and for which no settlement has yet been made, and which were not, at the time of filing of the report of Commissioner Lipscomb, in a condition to settle." So that it appears the question was reserved by the decree of June 21, 1900, for the future action of the court. As to the assignment of error in decreeing the sum of \$2,728.42 in favor of C. H. Maxwell because if the matters in difference had been properly settled, a very much less amount would have been due him. The seventh exception to the commissioner's report in writing is that the commissioner failed to allow a credit to W. B. Maxwell of \$150 for part of the funeral expenses of their mother, S. J. Maxwell, and also the item of \$300 for counsel fees in the case of Williams against Maxwell, and also for the loss of 70 acres of land conveyed by C. H. Maxwell to W. B. Maxwell in Randolph county, and the taxes paid by W. B. Maxwell in redemption of the other tracts conveyed by C. H. Maxwell to W. B. Maxwell in December, 1893; claiming that the commissioner does not allow exceptant as much as was paid in redemption of the lands. As to the item of \$150 on account of the funeral expenses of their mother, C. H. Maxwell did make a writing authorizing the commissioner to allow as an offset the \$150, but, in his testimony afterwards given before the commissioner, states that the same is incorrect, and that he should not assume to pay the same, for the reason that his mother, S. J. Maxwell, left abundance of property, both real and personal, to pay all the expenses of her funeral, and that W. B. Maxwell could collect the same from the estate at any time, if he had not already done so; while W. B. Maxwell, in his testimony concerning the same, says, "The next item of \$150 is a little more than one-half my mother's funeral expenses, all of which were paid by me; and, if my brother voluntarily assumes this part of it, I have no objections." This language clearly indicates that W. B. Maxwell felt that he had no legal or just claim against C. H. Maxwell on the account of the funeral expenses, presumably for the reason stated by

C. H. Maxwell—that their mother left ample property to pay such expenses, and he could collect, or possibly had collected, same from her estate. It must be remembered that C. H. Maxwell was living in California, and W. B. Maxwell in West Virginia.

As to the item of \$700 for the loss of 70 acres of land, it appears that J. F. Harding bought the 70 acres on the 30th of November, 1898, for the delinquent taxes of 1891. In his letter, dated November 21, 1893, accepting the proposition of C. H. Maxwell to sell him his land for \$9,000, made on the 23d of October, W. B. Maxwell says: "I have concluded to accept that offer, viz.: \$2,200 'payable at any reasonable time,' and accordingly enclose you my note for that amount, payable on demand. As the matter is going your taxes in Randolph are in arrears, and the first thing we know that land will be lost. When the amounts are all ascertained, I will pay up all taxes now due on all the lands since you bought; you can credit this on my note." W. B. Maxwell was fully aware of the facts in regard to the arrearages of taxes, and had a year from the time of the purchase of the 70 acres by J. F. Harding in which to redeem the land; and the loss by the running of the time which enabled Harding to procure deed for the same was occasioned by the negligence of W. B. Maxwell, who had assumed the duty of its redemption; he being on the ground, while his brother was on the other side of the continent, and resting on the contract of W. B. Maxwell to pay the taxes, and to have credit for same on his \$2,200 note therefor. The excess of the taxes in the way of costs and expenses for the redemption of the other tracts of land was doubtless incurred by the same negligence. The commissioner, in his account, allowed the taxes which were in arrears at the time of the purchase of the land from W. B. Maxwell by his brother. The note of \$52.50 mentioned in the exception to the commissioner's report is allowed by the court in the decree complained of. The item of \$300 for counsel fees in the Williams Case was properly disallowed, the defendant C. H. Maxwell having no interests involved in the said cause in the Supreme Court. He says in his testimony: "The circuit court released me from all liability in the Williams Case, and my interests are not involved whatever in the Supreme Court, as I understand it. Besides, I engaged an attorney (A. J. Valentine) to observe and protect my interests, if any, before the Supreme Court. W. B. Maxwell advised me to do this. I do not, therefore, think this is a just charge against me." And it does not appear from the report of the Williams Case, 45 W. Va. 297, 31 S. E. 909, that it was a case in which C. H. Maxwell should be required to pay attorney's fees with W. B. Maxwell. The commissioner having passed upon the facts referred to him, "his findings will be given

great weight, though not as conclusive as the verdict of a jury, and should be sustained unless plainly not warranted by the evidence. This rule operates with peculiar force in an appellate court when the findings of a commissioner have been approved by the court below." *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427; *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253; *Woods v. Ward*, 48 W. Va. 652, 37 S. E. 520. As to the claim of C. H. Maxwell, there is no error in the decree.

As to the claim of Mary C. Cameron's heirs, the error assigned is merely technical—that no such parties were before the court having a claim in their capacity as the heirs of Mary C. Cameron. The claim is a just one, for money collected by Maxwell as attorney for the heirs of Mary C. Cameron, and not paid over by him. One error assigned is that such of the parties to the cause who are in fact the heirs of Mary C. Cameron are in fact indebted to said Maxwell in a sum largely in excess of the amounts claimed by them in their individual rights. It is shown by the testimony of Attorney L. Hansford that "on or about the 20th day of December, 1891, I first visited Mr. A. B. Parsons at his office, who was the commissioner who had sold the Cameron land; and Mr. Parsons showed me a receipt for the money due the Cameron heirs, amounting, as I now remember it, to \$742.70, bearing date September 7, 1889. I immediately left Mr. Parsons' office and went to Mr. Maxwell's office, asked him for the money, and showed him my authority for acting as counsel for them. His reply to me was that he had never received the money from Mr. Parsons and Mr. Scott, the commissioners, when I had seen, not more than 20 minutes before, his receipt to Parsons for the money. I became thoroughly convinced of the infamous fraud that he had practiced upon his clients. Within a week from that day that I was in his office I received a check from Mr. Maxwell for W. H. Williams' amount, with the statement that he would pay the balance as soon as Mr. Parsons paid him, and I knew at that time he had received the money from Parsons something over a year previous to that time. I even showed him the letters that I had received from two of the heirs to whom the money was due; J. A. Hanson being the party representing all the balance outside of George C. Williams. Myself and Mr. Dayton represents the parties, and he has never paid or offered to pay any part of said debt." W. B. Maxwell also testifies before the commissioners, and files his offsets, which are allowed by the commissioners to the amount of \$425.99, which, deducted from the aggregate of several sums amounting to \$554.01, leaves the amount of \$128.02, amount found by the commissioners against Maxwell, and confirmed by the court. The commissioners left open the claim of Max-

well for \$300 counsel fees paid by him in prosecuting the appeal of Williams against himself in the Supreme Court; and the court properly refused or omitted to allow it as a just offset, as the costs taxed in said cause, amounting to \$343.54, and which included a counsel fee of \$30, were allowed as an offset by the commissioners, and so decreed. The commissioners having passed upon the evidence, and the court having sustained the commissioners' finding, the appellate court will not disturb the decree, unless plainly warranted by the evidence. *Reger v. O'Neal*, *Fry v. Feamster*, and *Woods v. Ward*, *supra*.

It is claimed that "the court erred in decreeing to A. J. Lipscomb, as assignee of W. H. Lipscomb, any sum whatever, and especially in decreeing to him the sum of \$563.11, the alleged balance due upon a note of \$805 dated the 9th day of March, 1888," because said note was barred by the statute of limitations, and that the decree for \$956.06 rendered by the circuit court of Preston county in favor of Maxwell against said Lipscomb and others on the 2d day of August, 1890, was a valid set-off against any balance due upon said note of \$805, and that the sum of \$107.80 found due from W. H. Lipscomb to Maxwell on the 8th day of July, 1896, upon a settlement of the accounts between them as cosureties of Miller, a late sheriff of Tucker county, was a valid offset against said \$805 note; that W. B. Maxwell, W. H. Lipscomb, and A. J. Lipscomb all being before the court, it should have taken up and adjusted all matters in controversy among them which were before the court, and rendered a decree over against said W. H. Lipscomb for the balance justly due from him to said W. B. Maxwell; that it is certain that A. J. Lipscomb is indebted to said Maxwell on account of the purchase money on the property of the Parsons Boom & Lumber Company, and said Lipscomb, Maxwell, W. E. Cupp, special receiver, the First National Bank of Grafton, and C. W. Minear, the parties interested in the settlement of this matter, all being before the court, it was the plain duty of the court to fully adjust and settle this matter among the parties before entering any decree in favor of said A. J. Lipscomb. From the examination of the evidence taken before the commissioner in the matter, it appears that this position of the appellant is well taken. The commissioner has based his statement by which he arrives at the sum of \$563.11 in favor of A. J. Lipscomb solely upon the note dated March 9, 1888, for \$805, subject to a credit of \$400 paid July 1, 1893; showing a balance due of the principal at that date of \$405, and interest to November 19, 1898, \$155.11. This note of \$805 given by Maxwell to W. H. Lipscomb grew out of transactions with Stone, Bowman & Co., of which firm W. H. Lipscomb was a member. Maxwell, as indorser for said firm, on its failure

and the failure of its members had become liable for near \$2,000; and, being unable to raise all of the money to pay off the same, W. H. Lipscomb loaned him \$805, for which Maxwell gave Lipscomb the note as follows: "Due W. H. Lipscomb eight hundred and five dollars, borrowed money, to be repaid when collected off of Stone, Bowman & Co. out of drafts which I have had to pay for them. This March 9, 1888. Witness my hand and seal. W. B. Maxwell. [Seal.]" It appears from the depositions of Maxwell, and also from the depositions of A. J. Lipscomb, that he and A. J. Lipscomb had purchased together in equal shares on February 1, 1896, the property of the Parsons Boom & Lumber Company at a sale thereof made by W. E. Cupp, special receiver, at the price of \$950, and executed their three several notes therefor; that they renewed the notes from time to time, and about the 11th of October, 1897, they borrowed from the First National Bank of Grafton \$500 to pay upon the amount that they owed upon the property; that the special receiver filed in this cause a judgment against him (Maxwell) for \$305.71, and the said Grafton Bank had filed its debt against him for over \$500, which represented the unpaid purchase money of the said property purchased by them together. Maxwell claims that A. J. Lipscomb still owed a balance on his part of said purchase money, while Lipscomb says he paid in full his one-half, and that Maxwell alone is liable for the whole of the unpaid residue; and in his testimony A. J. Lipscomb undertakes to show how he paid the one-half due from him, but only shows three payments directly upon said claim, viz., \$88 paid October 6, 1896, \$50 paid October 17, 1897, and \$149.76 paid March 10, 1899, and states that the last said payment represented his part on the balance due on the property. He mentions a few other small items paid, not on that debt, but supposedly as charges or offsets against any claim Maxwell would have against him. He says: "On December 1, 1897, I paid taxes, \$25.37; expense of sending circular letters, \$6; and expense paid from printing letters, \$5; and taxes paid, \$22.64." The three items which applied directly upon the purchase made on the property amounted to \$287.76, if paid as stated. Lipscomb filed no vouchers showing any of the said items of payment or charges. Maxwell filed a claim or bill of offsets against A. J. Lipscomb, amounting in the aggregate to \$306.47, of which \$242 is "one-half amount paid W. E. Cupp, special receiver for Parsons Boom & Lumber Company, \$484—\$242. The commissioner has entirely ignored, in making up his accounts, all transactions between W. B. Maxwell and A. J. Lipscomb, except the note of \$805, and the credit of \$400 indorsed thereon, and, to arrive at his conclusion showing the indebtedness of Maxwell to Lipscomb, states the following:

"I further report that W. B. Maxwell has filed before me in this cause a judgment rendered by the circuit court of Preston county on the 2d day of August, 1890, a judgment against Stone, Bowman & Co. [of which W. H. Lipscomb was a member] for the principal sum of \$956.06; that on or about October 1, 1896, said Maxwell recovered by compromise from Addison Child the sum of \$425, which should be placed as a credit on the above-stated judgment as of that date, October 1, 1896.

"Relative to this matter I report as follows, to wit:

"Date of note, March 9, 1888; amount, \$805; credit July 1, 1893, \$400.

Balance due as of that date, the principal sum of.....	\$405 00
Interest thereon from that date to Nov. 19, 1899.....	155 11
Total	\$560 11"

So there remain several items of account between A. J. Lipscomb and W. B. Maxwell which were not passed upon by the commissioner, which should have been settled and reported by him. The note for \$805, the balance of which is reported in favor of A. J. Lipscomb as assignee of Wm. H. Lipscomb, was given, as stated on its face, for money loaned by Wm. H. Lipscomb to Maxwell to enable him (Maxwell) to pay off the debts of the firm of Stone, Bowman & Co., as their indorser, and loaned with the distinct understanding that it was not to be paid back to Lipscomb unless collected from the assets of the said firm of Stone, Bowman & Co., of which firm W. H. Lipscomb was a member, and secondarily liable for all the debts of the firm, so that, in effect, it amounted to a loan by said Lipscomb for the purpose of paying a debt for which he was not only liable, but was in fact his own indebtedness. Hence the provision that the money was not to be returned to him unless it should be collected from the funds of the said firm. The only definite amount that is shown to have been collected from said funds is the judgment against Childs in favor of Maxwell, who applied the net proceeds of said judgment, \$400, upon the said debt, and this is the only credit ever given upon said note. Any amount collected from the assets of the said firm of Stone, Bowman & Co. would create a liability for such amount upon said W. B. Maxwell, to be applied as payment on the \$805 note. It would neither be equitable nor right to require Maxwell to pay the note from his individual funds. On examination by his own counsel, the question is asked W. H. Lipscomb: "There has been filed before the commissioner in this cause a paper writing in the nature of a note or duebill dated March 9, 1888, signed by W. B. Maxwell, and made payable to you, for the sum of \$805. Upon the back of said note is a credit indorsed as of July 1, 1893. Under the provisions

of said paper writing, said amount is to be repaid when collected off of Stone, Bowman & Co. Now, please state who indorsed the credit on the back of said note, and whether or not the balance of said note remains due and unpaid?" And he answered: "W. B. Maxwell indorsed the credit, and there has never been a cent paid on the remainder of the note." He further states that his understanding was that Maxwell had collected from Stone, Bowman & Co. the money out of which this money was to be paid, in accordance with agreement in said note or writing. Maxwell testifies (referring to the judgment against Addison Child): "The net amount received by me upon this judgment should be credited upon my Stone, Bowman & Co. debt, and these are all the payments I ever received upon those judgments." The note so containing a condition precedent to its payment, it would be inequitable to hold Maxwell liable therefor beyond the amount collected by him from Stone, Bowman & Co., and A. J. Lipscomb stands in no better condition than his assignor, W. H. Lipscomb. He took the note of \$805 subject to all the equities existing between Maxwell and W. H. Lipscomb.

The decree in favor of A. J. Lipscomb is erroneous, and should be reversed, and the cause recommitted to the commissioner for a full settlement of differences between the said A. J. Lipscomb, W. H. Lipscomb, and W. B. Maxwell, upon the principles herein laid down.

In November, 1904, after submission of this cause, and just after the cause was taken up for consideration, counsel for appellee W. B. Maxwell tendered a brief in the cause, assigning error in said decree in a matter foreign to the purpose of the appeal taken in this cause, and raising a question which was in no wise raised by the appeal, and insisting that it should be passed upon by this court. The deed of assignment made by W. B. Maxwell contains the following provision: "If for any cause said trustee does not realize a sufficient amount from the whole of said property to pay all the debts of said grantor, the amount so realized and received by the creditors who participate in any manner in the proceeds of sale shall stand satisfied and the grantor forever discharged from all liability to them and released therefrom but nothing in this clause shall apply to creditors who refuse or fail to participate in the proceeds of said property;" and further that it was an absolute assignment of "all the property of every kind and description owned and claimed by him, both real estate and personal property wherever situated"; claiming that the following provision in the decree of June 21, 1900, is erroneous, to wit: "And it is further adjudged, ordered, and decreed that said parties to whom debts have heretofore been decreed shall be entitled to their portion of the money so decreed to them, and

may accept the same without in any wise binding themselves by so accepting the same to accept the amounts so received by them in full satisfaction and discharge of their debts as provided in the deed of trust from W. B. Maxwell to C. O. Strieby, trustee, dated April 3, 1899; but the amount so received by them shall only be a credit upon the debts so reported and decreed to them, and shall not be a satisfaction of the same unless they specifically agree to accept the same in full discharge of the same." Citing in support thereof *Clarke v. Figgins*, 27 W. Va. 663 (Syl., point 3); *Hurst v. Leckie*, 97 Va. 550, 34 S. E. 464, 75 Am. St. Rep. 798; *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642; *Williams v. Lord*, 75 Va. 400; *Gordon v. Cannon*, 18 Grat. 387; *Phippen v. Durham*, 8 Grat. 457; *Kevan v. Branch*, 1 Grat. 274; *Quarles v. Kerr*, 14 Grat. 48; *Talley v. Curtain*, 54 Fed. 49, 4 C. C. A. 177. The filing of the brief in this cause by the said W. B. Maxwell at this time is not only contrary to the rules of this court, and could not properly be considered, but the assignment of error is without the purview of the appeal taken in this cause. Before taking the appeal, C. O. Strieby, trustee, appellant, gave notice to the plaintiffs and defendants, including the defendant W. B. Maxwell, that the appeal proposed to be taken from the decree of June 21, 1900, was only "so far as said decree adjudicated the rights of said W. H. Lipscomb, A. J. Lipscomb, C. W. Minear, J. W. James & Co., C. H. Maxwell, George C. Williams, Mortimer G. Williams, Sallie L. Reynolds, T. S. Reynolds, W. H. Williams, Horace D. Williams, Lucy V. Hanson, and John A. Hanson, and will not appeal from any of the other matters adjudicated in said cause, and that, for the purpose of presenting the matter appealed from, I will not have a full transcript of said cause made"—then mentions the portions of the record that he had directed the clerk to include in the transcript, and closes his notice by saying: "And it is not my purpose or intention to appeal from any other part of said final decree, except as aforesaid, and any party to said cause desiring to have any other part of said cause reviewed should take such action as is proper to secure the part of the record pertaining thereto copied as provided by the statute in such cases made and provided." In 2 Cyc. 969, under the title "Appeal and Error," it is said: "Where only a part of a judgment or decree is appealed from, the remainder is unaffected, and may be enforced; and if the appeal from a particular order or judgment does not bring the entire cause into the appellate court, but only sufficient of the record to present the question as to the propriety of the particular order, further proceedings in the conduct of the cause are properly had in the lower court. An appeal from an order upon a motion brings up the motion only, as well as copies of papers on

which it is passed, and does not bring up the action." And authorities there cited. And under the same title. 3 Cyc. 220: "In case of an appeal from a part of a judgment or decree, the appellate court will not review the whole judgment or decree." In *Pac. Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758, it is held: "A party cannot assign as error a particular part of a judgment as to which he has not appealed." And in *Scutt's Appeal*, 46 Conn. 88, where it is held that an appeal to the superior court from the disallowance by the commissioners of an insolvent estate of one of two claims does not carry up for review the allowance of the other. In *Ikerd v. Postlewhaite*, 34 La. Ann. 1235: "The appellate court will not review the whole of a judgment when the appeal is from a part only." And in *Robertson v. Bullions*, 11 N. Y. 243, it is held: "The Court of Appeals cannot review any part of a decree not appealed from." See, also, *Moerchen v. Stoll*, 48 Wis. 307, 4 N. W. 352; *Stanton v. Gohler* (Sup.) 16 Misc. Rep. 383, 38 N. Y. Supp. 64. Where several coplaintiffs or defendants stand upon distinct and unconnected grounds, when their rights are separate and not equally affected by the same decree, the appeal of one does not bring up for adjudication the rights or claims of the others. *Walker's Ex'r v. Page*, 21 Grat. 636. And it is there further held that, where the parties not appealing stand upon the same ground as those appealing, the Supreme Court will consider the whole case, and settle the rights of all parties. And see *Rorer's Heirs v. Roanoke Nat. Bank*, 83 Va. 589, 4 S. E. 820; *Bowlby v. De Witt*, 47 W. Va. 323, 34 S. E. 919.

The decree complained of is reversed as to the claim of C. W. Minear, and a decree entered against Minear as hereinbefore stated, and the decree in favor of A. J. Lipscomb is reversed, set aside, and annulled, and the cause remanded for further proceedings as herein indicated, with costs to the appellant, and the decree is affirmed as to the appellees C. H. Maxwell and Mary C. Cameron's heirs, and in all other respects, with costs and damages to said appellees.

(56 W. Va. 333)

STATE v. SCHMULBACH BREWING CO.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

INTOXICATING LIQUORS—LICENSE—BREWERIES.

1. A brewery which has paid the license tax required by sections 54, 55, c. 32, of the Code of 1899, must have a license under section 62 of said chapter, to entitle it to sell its product at wholesale.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Taveuner, Judge.

The Schmulbach Brewing Company was convicted of selling beer without a license, and brings error. Affirmed.

John A. Howard, for plaintiff in error.
The Attorney General and H. H. Moss, Jr., for defendant in error.

McWHORTER, J. The Schmulbach Brewing Company, a corporation doing business in the city of Wheeling, Ohio county, having paid a manufacturer's license as a brewer, under sections 54 and 55 of chapter 32 of the Code of 1899, was indicted in the criminal court of Wood county for selling without a license therefor. When the case was called for trial the facts were agreed as follows: "The defendant, the Schmulbach Brewing Company is a corporation duly organized, existing, and doing business under the laws of the state of West Virginia, and is engaged in carrying on the business of a brewer of beer. Its brewery is situated in the city of Wheeling, in the county of Ohio, state of West Virginia, and that it sells the beer it manufactures generally throughout the state of West Virginia and elsewhere, and that it pays the license required by sections 54 and 55 of chapter 32 of the Code of 1899, and had such license during the period covered by the indictment in this case. It is further agreed that on the date charged in the indictment the defendant, in the county of Wood, state of West Virginia, sold beer in wholesale quantities to L. L. Moore and J. W. Hoffman, partners under the firm name and style of Hoffman & Moore, in the saloon business, and that at the time it made such sale it had no other license than that hereinbefore mentioned; that is to say, it (the defendant) did not have the license of a wholesale dealer nor of a retail dealer in intoxicating liquors at the time of the sales charged in the indictment, in the county of Wood and state of West Virginia, but did have the license of a manufacturer of beer in the county of Ohio, state of West Virginia, where its brewery is situated, and where the beer sold in the county of Wood to the said L. L. Moore and J. W. Hoffman was manufactured. It is agreed by the defendant, the Schmulbach Brewing Company, and by the state, that the above is a full and true statement of facts in this case, and the defendant waives its right to a trial by jury, and submits this case to the court in lieu of a jury." On the 30th of January, 1902, the case being submitted upon the agreed facts, the court was of opinion that the defendant was guilty as charged in the indictment, assessed its fine at \$20, and entered judgment therefor. The circuit court refused a writ of error. There is no brief filed by the prosecuting attorney of the county nor by the Attorney General on behalf of the state. It is insisted by counsel for the defendant that the defendant's license to manufacture carries with it the right to sell its manufactured products, and that the real question involved is the construction or interpretation of chapter 40, p. 140, Acts 1899, which act amended section 54 of chapter 32

of the Code by inserting therein the words "shall be coextensive with the state," which made the section read, as amended, "A license to carry on a distillery for the manufacture of whisky or brandy, or a brewery for the manufacture of beer or ale, shall be coextensive with the state, and shall be regulated, and the amount fixed by the following classification," assuming that the license to manufacture necessarily carried with it the license to sell at wholesale the product of the brewery, and the case is argued by counsel for the defendant company upon that theory alone. In my view of the case, that question whether a license to brew is coextensive with the state is not here involved at all. The sole question for decision is whether a brewing company paying a license tax as a manufacturer can sell its manufactured beer at wholesale without naving a wholesale license therefor. Section 62 of the same chapter provides there shall be paid "on every license to sell spirituous liquors, wine, porter, ale, beer and drinks of like nature at wholesale, \$350 in addition to all other taxes." There is no exception made in favor of any class of sellers by the statute, and all who deal in such liquors, whether they sell by wholesale or retail, are required to obtain a license and pay the tax imposed. Section 62 provides that the \$350 wholesale tax is "in addition to all other taxes." The tax is charged and paid for the privilege of selling, and from the section quoted it seems clear that no person shall be permitted to sell without first having obtained a license therefor; but, if a shadow of doubt should remain on this point, section 65 of the same chapter dispels it, and makes clear the intention of the law makers. This section provides that "apple and peach brandy distilled within any of the counties of this state from fruit grown in the state, may be sold by the distiller thereof in quantities not less than five gallons at a time, to be carried away and not drank on the premises where sold, by paying a license tax of one hundred dollars." This shows beyond all question that the Legislature intended distillers and brewers to pay a tax for selling. The statute requiring manufacturer's license is without exception. It applies to all brewers and distillers alike. Section 65 favors distillers of fruit by requiring a less license tax to sell, perhaps because of the limited quantity of material to be used in that way, as well as the limited season for operating. If brewers, who, by paying a manufacturer's license only, are permitted to sell under such license at wholesale, by what rule can they be prevented from selling at retail their manufactured products under the same license? It may be answered that under section 65 only one class of distillers is required to have a license to sell at wholesale the product of their distilleries; all others being free to sell at wholesale under their manufacturer's li-

cense. This is not a reasonable construction of the law. Without section 65 all distillers would have to pay the wholesale license required by section 62. Clearly, the intention was to relieve the smaller distillers of apple and peach brandy to the extent of the difference between the license required under section 62 and that required under section 65, and not to discriminate against them. Black on Intoxicating Liquors, § 23, is cited by counsel for defendant to show what constitutes a wholesale liquor dealer, and also *Taylor v. Vincent*, 12 Lea (Tenn.) 282, 47 Am. Rep. 338, where it is held, "A manufacturer of liquors, selling in unbroken packages at his place of business, is not a wholesale liquor dealer liable to taxation as other merchants." However, on the other hand, I find in *Webb v. State*, 11 Lea (Tenn.) 662, it is held: "Manufacturers of whisky and brandy, out of products of farms and orchards in the state, who sell by wholesale, are liable for the privilege tax imposed upon wholesale dealers." But why continue the examination of authorities when the statute itself is too plain to be misunderstood? The wholesale license is a tax for the privilege of selling, and what the purpose of the Legislature may have been in amending section 54 by providing that the license therein mentioned should "be coextensive with the state" has nothing to do with the question in this case, as it applies only to the manufacture, and not to the selling.

The judgment is affirmed.

(56 W. Va. 308)

ROBINSON et al. v. LOWE.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

APPEAL—REVIEW—INSTRUCTIONS.

1. An erroneous or irrelevant instruction on a material point is presumed to be to the prejudice of the party appealing, against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless. *Ward v. Ward*, 35 S. E. 873, 47 W. Va. 766.

(Syllabus by the Court.)

Error from Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by S. I. Robinson and others against John M. Lowe. Judgment for defendant, and plaintiffs bring error. Reversed.

E. B. Snodgrass, T. P. Jacobs, E. L. Robinson, and E. A. Brannon, for plaintiffs in error. E. O. Keifer, for defendant in error.

MILLER, J. This case was here once before on writ of error awarded to defendant, Lowe. The then judgment in favor of the plaintiffs was reversed, and the case remanded. See *Robinson v. Lowe*, 50 W. Va. 75. It is now here on writ of error to a judgment therein in favor of Lowe for the lands hereinafter referred to. Plaintiffs claim title to a tract of 136 acres, described by metes and bounds in their declaration;

but the lands really in controversy, as shown by the record, are two alleged interlocks, one called the "Island Interlock," and the other the "Gas Well Interlock," the first containing about 10, and the second about 20, acres. Counsel for plaintiffs in error concede that the defendant has shown himself entitled to hold, by adversary possession, the island interlock. This concession eliminates it from further consideration, and narrows the controversy to the gas well interlock, which is held by the Philadelphia Gas Company under lease from plaintiff S. I. Robinson. There was a trial to a jury, a verdict in favor of defendant, a motion to have the same set aside, which was overruled, judgment rendered thereon, and exceptions taken and saved on the record by plaintiffs.

Upon the trial, to maintain the issue on their part, the plaintiffs introduced the following documentary evidence: (1) A patent of the commonwealth of Virginia, bearing date on the 1st day of October, 1859, which grants to the plaintiff S. I. Robinson, by metes and bounds, the tract of 136 acres described in the declaration; and (2) a deed executed by Jared Morris, as attorney in fact for T. M. Ewart, to the plaintiff S. M. Robinson, in and by the name of Sarah M. Robinson, bearing date on the 16th day of October, 1877, for 126 acres. The beginning corner, and most of the other corners and lines, called for in the patent and deed, are the same. It thus appears that the 126 acres are included within the calls of the 136 acres. The record states that the blue prints, and the map from which they are taken, were given in evidence; but no such papers are printed in the record, and none such appear in the former record, to which our attention is called by the brief of counsel for plaintiffs. There is also evidence tending to prove actual, open, and continuous possession of the land by plaintiffs under their said title papers, and of valuable and permanent improvements made thereon by their tenants.

The defendant introduced as evidence the following papers: (1) A patent of the commonwealth of Virginia, bearing date on the 26th day of October, 1819, which grants to Achilles Morgan, by metes and bounds, a tract of land containing 300 acres; (2) a deed by Morgan and wife, bearing date on the 14th day of June, 1820, to James Lowe, for the same land; (3) a deed from James Lowe and wife, bearing date on the 28th day of July, 1848, to Levi M. Lowe, for said land, the first call in the last-mentioned deed being "144," instead of "142," poles, as stated in the preceding deed and also in the patent; (4) another patent from the commonwealth of Virginia, bearing date on the 31st day of July, 1843, which grants to said Levi M. Lowe, by the name of Levy Lowe, 50 acres; (5) a deed from Levi M. Lowe and wife, bearing date on the 5th day of June,

1882, to defendant, John M. Lowe, for a tract of 130 acres, described therein by metes and bounds; and (6) a copy of a survey of 100 acres, made on the 10th day of November, 1848, for William King. The defendant also gave in evidence acts by himself and tenants under his said deed, tending to prove his adversary possession of the land in dispute. The patent to plaintiff for the 136 acres begins "at a beech, corner to Levi M. Lowe; and its first line runs thence with two of his [Lowe's] lines, S., 74 E., 54 poles, to a hickory; thence N., 25 E., 100 poles, to a chestnut oak in William King's line." We find in the 50-acre patent those objects, and substantially the said two calls. Plaintiff S. I. Robinson, who testifies as to the location of those lines and corners, does not claim that his patent or his wife's deed interlaps the 50-acre patent. We therefore conclude that there is no interlock of the 136 and 50 acre patents, so far as the gas well interlock, now in controversy, is concerned. The alleged interlock, if any there be, is occasioned by the deed from Levi M. Lowe to defendant for the 130-acre tract. Upon this assumption plaintiffs' action is based. If any part of the 50-acre tract be included within the gas well interlock, and be also covered by and included in the said deed to defendant, which must be determined by the evidence, then it follows that, whatever claim or title Levi M. Lowe had to such parcel of said 50-acre tract on the 5th day of June, 1882, passed to and became vested in the defendant by virtue of the deed to him, of the date last aforesaid.

There is a great mass of evidence—about 275 pages of printed matter—the most of which relates to the location of the corners and lines mentioned in the alleged title papers, given in evidence by the parties respectively. There is much testimony tending to prove that, if correctly surveyed and laid down, the gas well interlock will not fall within the plaintiffs' true boundaries. It is urged by defendant that plaintiffs have not identified the exterior boundaries of the land claimed by them. The evidence relating to the identification and location of their alleged corners and lines is neither certain nor conclusive. Before the plaintiff can recover in an action of ejectment, he must identify the land claimed, so far as the exterior boundaries thereof are concerned. *Miller v. Holt*, 47 W. Va. 7, 84 S. E. 956; *Coal Co. v. Howell*, 38 W. Va. 490, 15 S. E. 214; *Jeffrey v. Lemon*, decided at the present term.¹

The court, at the instance of defendant, and over the objection of plaintiffs, gave to the jury 16 several instructions, some of which, as plaintiffs contend, are mere abstractions, and others erroneous, inapplicable, and misleading. It is not deemed necessary here to refer specifically to more

¹Rehearing pending.

than one of them, which is in the following words: "The court instructs the jury that in the trial of an action of ejectment it is not necessary for the defendant to show that he has any title to the land in controversy, but can defeat the plaintiff's claim by showing a title to the land in controversy in some other person than the plaintiff." It is the right of any party to an action or suit to have the ruling of the court, hypothetically, by way of instructions to the jury, upon the facts to be found by them from the evidence. "Instructions may be shortly defined as directions in regard to the law of the case. * * * The third and most important function of instructions is to declare what rules of law will apply to any state of facts which may be found in the case, and to assist the jury in correctly applying those rules to the facts." 1 *Blashfield* on Instr. 1, 3; *State v. Dodds*, 54 W. Va. 289, 46 S. E. 228; *Hyde's Digest* (W. Va.) vol. 2, 2828 et seq. The plaintiffs contend that defendant introduced the 50-acre patent to prove an outstanding title to the land in controversy in a stranger, and that, no evidence having been offered by defendant to show that it was then a subsisting, operative, legal title, on which the owner could have recovered had he been asserting it in an action, the instruction was for that reason erroneous, irrelevant, and misleading. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Parkersburg Industrial Co. v. Schultz et al.*, 43 W. Va. 471, 27 S. E. 255; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Greenleaf v. Birth*, 6 Pet. 302, 9 L. Ed. 132; *Newell on Eject.* 652. The instruction was and is erroneous. The defendant asserts that the 50-acre patent was offered not to show outstanding title, but to establish the boundary of plaintiffs' patent; to prove that no interlock existed; and to connect defendant's title with the commonwealth. His contention seems to be the more reasonable and consistent with the other facts in the case. In this maze of uncertainty we are left in doubt and confusion. Nevertheless, we are asked to reverse the action of the circuit court, and set aside the verdict as being contrary to the law and the evidence, and because of the instructions given as aforesaid. The jury may have found as they did because they believed from the evidence that plaintiffs had not sufficiently identified the exterior boundaries of the land claimed by them; that plaintiffs' land did not cover said alleged interlock; that defendant had good and sufficient title to the controverted parcel; or that the title thereto was outstanding in a stranger. It has been repeatedly held that, where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the evidence or facts proved. *Mil-*

ler v. Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452; *Grayson's Case*, 6 Grat. 712; *Thompson's Case*, 21 W. Va. 741; *State v. Yates*, 21 W. Va. 761. It is the province of the jury to weigh the testimony, and the appellate court will not disturb their finding, sustained by the lower court, unless it be plainly contrary to the preponderance of the evidence. *Scott v. Chesapeake & O. R. Co.*, 43 W. Va. 484, 27 S. E. 211. We cannot, therefore, disturb the verdict on the question of preponderance of the evidence. But we are not unmindful of the rule that an instruction should not be given unless relevant, and it is not relevant unless there be evidence tending to prove the facts on which the instruction is based. *Kerr v. Lunsford*, 31 W. Va. 663, 8 S. E. 493, 2 L. R. A. 668; *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65; *Carrico v. W. Va. Cent. & P. R. R. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. In *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, it is held that an erroneous instruction on a material point is presumed to be to the prejudice of the party appealing, against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless. *Stevenson v. Wallace*, 27 Grat. 77; *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859. We are asked to eliminate and disregard the above instruction as harmless error. The defendant evidently believed that the 50-acre patent tended to show outstanding title, and would thereby materially aid him in his defense; otherwise he would not have asked an instruction thereon. It is held in *McVey v. St. Clair Co.*, 49 W. Va. 412, 38 S. E. 648, that, if improper instructions be given, or proper ones refused, on the trial, the judgment will be reversed, unless the evidence be so plainly and decidedly in favor of the finding of the jury that the giving or refusal of such instructions amounts to merely harmless error. *Bank of Huntington v. Napier*, 41 W. Va. 481, 23 S. E. 900. The evidence is conflicting and contradictory upon the material points involved. The instruction being erroneous and irrelevant, we cannot say what effect it had upon the jury. It is presumed to have been prejudicial to the plaintiffs.

For the reasons stated, the judgment is reversed, the verdict of the jury set aside, a new trial granted, and the case remanded.

(56 W. Va. 345)

FIRST NAT. BANK OF JEFFERSON v. HARRIS et al.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

HUSBAND AND WIFE—WHAT SUFFICIENT PROOF OF INDEBTEDNESS—COMMISSIONER'S REPORT—EXCEPTIONS.

1. The claim of a married woman against her husband, unless impeached for fraud, is subject to the same rules of proof as any other debt

against him; and she is not bound to show affirmatively, in absence of any allegation to the contrary, that such debt is free from fraud.

2. An exception to a commissioner's report on the ground that the evidence of an insolvent husband is insufficient to sustain his wife's claim against his estate, in the absence of any allegation impeaching such claim for fraud, is an exception to the competency of the husband as a witness in behalf of his wife, and should be overruled. Section 22, c. 130, Code 1899.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by the First National Bank of Jefferson against George Harris and others. Decree for defendants, and plaintiff appeals. Affirmed.

Joseph Trapnell and T. O. Greene, for appellant. B. D. Gibson, for appellees.

DENT, J. Appeal of the First National Bank of Jefferson, etc., from a decree of the circuit court of Jefferson county in favor of Mary E. Davis. The First National Bank of Jefferson filed its bill in the circuit court of Jefferson county, attacking a deed of trust executed by Albert F. Davis, insolvent, conveying all his property in trust to secure his wife, Mary E. Davis, to the amount of \$3,500, evidenced by notes, as giving an unlawful preference to the various preferred creditors named, and praying that such trust be held for the benefit of all the creditors of the grantor, and that the proceeds thereof be prorated among all the creditors of the grantor. No answers were filed, the bill was taken for confessed, and the court referred the case to a commissioner to ascertain and report the indebtedness of the insolvent, and the property liable to the payment of the same. On the filing of the report, the following exception was endorsed thereon: "The auditing of the claim or debt in favor of Mary E. Davis in class No. 2 of this report, for \$3,500, and \$981 interest, is excepted to, because said claim is not sustained by the evidence; and said claim is excepted to, and claim should not be allowed, as the testimony of a husband in behalf of claim of his wife against the husband, an insolvent. B. D. Gibson, T. O. Green, Attorneys for Creditor." On the hearing of such exception, the following decree was entered: "The court, not now passing upon the said exception, but being of the opinion that an opportunity should be afforded the said creditor, Mary E. Davis, to submit further testimony in support of her claim, if any she have, doth adjudge, order, and decree that this cause be recommitted to Commissioner Oleon Moore, with instructions to inquire further into said matters of the demand of Mary E. Davis, and to certify such evidence as may be produced before him, and make report to the next term of the court." Further depositions were taken, and on final hearing the court overruled the exception, and allowed the claim of Mary E. Davis as

a just debt, entitled to participation under the deed of trust.

The appellants here insist that the court erred in allowing further time to Mary E. Davis to sustain her claim by proof. The bill does not attack the claim of Mrs. Davis as in any wise fraudulent, nor in any manner invalid, nor is there any petition or other pleading in the cause doing so. Hence the commissioner had the right to report the debt as admitted, without other proof than the note and the deed of trust, which, in the absence of all allegations to the contrary, are certainly sufficient to establish the justness thereof. The first time and the only manner in which the claim of Mrs. Davis is attacked is by the exception to the commissioner's report, and, after such attack was made, if necessary, Mrs. Davis was entitled to have an opportunity to meet and repel it, and, if not necessary, the exceptors have no grounds of complaint.

The exception, however, does not attack Mrs. Davis' claim as fraudulent as to creditors, but only asserts that the claim should not be allowed on the testimony of her insolvent husband. If the claim had in any proper proceeding been impeached for fraud, such exception might have weight. A husband, by statute, is made a competent witness in behalf of his wife. Section 22, c. 130, Code 1899. And in the absence of any allegations of fraud, his admissions on oath are sufficient to establish the justice of her claim against his property. A husband may confess a judgment in favor of his wife which will be valid to bind his estate, unless successfully impeached for fraud. *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47. The appellants were both plaintiffs in this suit—one by bill, and the other by petition—and neither in the bill nor petition is Mrs. Davis' claim attempted to be impeached as fraudulent, and hence both bill and petition must be taken to admit the validity of the same. It is a well-established rule that fraud must be alleged, and, in the absence of such allegation, the court will not examine the evidence to ascertain whether it discloses a fraudulent transaction, as is said by Judge Brannon in the case of *Bank v. Atkinson*, 32 W. Va. 209, 9 S. E. 178. "The rule of pleading is that the *allegata et probata* must both exist and correspond, and the *probata* can perform no function unless preceded by *allegata*. Matters not charged in the bill or averred in the answer cannot be considered on the hearing." *Hunter's Executor v. Hunter*, 10 W. Va. 321.

The exception filed is in no sense sufficient to raise the invalidity of Mrs. Davis' claim but only goes to the weight or measure of the evidence necessary to sustain such claim in the absence of any allegations impeaching the same. For this purpose the evidence is amply sufficient, and the exception was properly overruled.

In each of the cases relied upon by appellants, there was direct impeachment of the wife's claim as being fraudulent as to the husband's creditors. *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960; *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871.

Unless the wife's claim is impeached as fraudulent, she is not bound to prove affirmatively freedom from fraud. Until such impeachment is made, she stands on the same footing as any other creditor, and the debtor's admission or testimony is sufficient to establish a debt in her favor.

For these reasons, the decree is affirmed.

(56 W. Va. 314)

SCOTT v. ISAACSEN et al.

CURTIN & CO. v. SAME.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

MORTGAGE—LIEN—PROPERTY HELD IN TRUST—NOTICE.

1. H. negotiated the purchase of 200 acres of land for I., but with the understanding and agreement between them at the time that I. was to pay the purchase money therefor, which he did, and was to have 100 acres of the land, with all of the oak and poplar timber on the whole tract. For his services in making the purchase, H. was to have 100 acres of the land, to be taken from the end thereof which he might select. The title bond for the land was taken in the name of I. One hundred acres of the land was surveyed and platted to H. with the acquiescence of I. Afterwards I. executed to C. & Co. a mortgage on the 200 acres, and still later took from the vendors a deed for the land in his own name; but C. & Co. had no knowledge or notice of the claim to or interest of H. in the land at the time of the execution and delivery of the mortgage to them.

Held, that I. took the legal title to the land, and holds the same as trustee for H., to the extent of the right and interest of H. in the land, but that the mortgage of C. & Co. binds the 100 acres selected by and laid off to H. as aforesaid for the balance of the mortgage debt, after applying thereon the proceeds of the sale of the residue of the mortgaged property.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bills by Marshall Scott against Leon Isaacson and others, and by Curtin & Co. against the same defendants. From the decrees, defendant A. P. Hart appeals. Reversed.

C. H. Scott, for appellant. Harding & Harding and W. B. Maxwell, for appellees.

MILLER, J. This is an appeal from a decree of the circuit court of Randolph county, made in the two causes above styled, heard together. They were here once before. *Curtin et al. v. Isaacson et al.*, 36 W. Va. 391, 15 S. E. 171. But the question now before the court was not then adjudicated. The sole controversy now is between appellant, Alexander P. Hart, and appellees, Curtin & Co., as to the ownership of and right to a parcel of 100 acres of land, part of a 200-acre tract situate on Roaring creek, in said county.

Defendant Leon Isaacson conveyed the 200-acre tract to Curtin & Co. by his deed, which was and is a mortgage, bearing date on the 22d day of April, 1889, and which was duly admitted to record on the following day. It recites a consideration of \$8,935.25 theretofore advanced by the grantees to the grantor, then due and payable. Isaacson did not then have the legal title to the land. On the 1st day of April, 1888, and prior thereto, the tract of land was owned by M. W. Harrison and Thomas A. Edwards, who lived at Weston, in Lewis county. Isaacson desired to buy the land. It adjoined the land on which Hart lived. Hart was well acquainted with the land and the timber thereon. In his answer, Hart says that, on or about the date last aforesaid, Isaacson agreed with him that, if he would go to Weston and buy the land at a price not to exceed \$4 per acre, he (Isaacson) would pay for it, and take all the oak and poplar timber thereon, and 100 acres thereof, and that Hart should have the other 100 acres, with the right to choose which end of the tract he would take; that thereupon Hart went to Weston, agreed with the owners upon terms of purchase, returned to Grafton and received Isaacson's check for \$800, went back with it to Weston, delivered it to Harrison and Edwards as payment for the land, and took from them a title bond or contract in writing showing that Isaacson had become the purchaser of the land. Why the deed was not then executed by the vendors does not appear. The deal was thus consummated on the 12th day of April, 1888. Hart further alleges that in pursuance of the said contract of purchase, and by reason thereof, Isaacson procured one Milton Hart, a surveyor, to survey said tract of land, to make a plat thereof, and to divide the same between himself and the respondent, which was done about April 8, 1889, after Isaacson had taken the poplar and part of the oak timber from the 100 acres which was selected by respondent as his share of the land, and which was so laid off to him by said Milton Hart; that respondent has had actual possession of his part of said tract of land, claiming to own the same under his contract with Isaacson, from that time to the present, and that his ownership thereof is good, notwithstanding the fact that Isaacson has declined to give him a title bond or contract in writing showing his ownership as aforesaid. Respondent then prays that, before any decree be rendered in the cause for the sale of the 200 acres of land, the said 100 acres thereof so laid off to him by Milton Hart be exempted and relieved from the operation of the said deed of April 22, 1889, and that the allotment of said tract of land so made by Milton Hart, and of which he made a plat, be confirmed. On the 12th day of May, 1890, M. W. Harrison, S. E. Harrison, and Mary O. Edwards filed their answer, accompanied by a deed of said last-named respondents to Isaacson for the 200

acres of land. This deed bears date on the 18th day of July, 1894; is executed by M. W. Harrison, Sarah E. Harrison, his wife, and Mary O. Edwards, as widow and devisee of Thomas A. Edwards, deceased; recites the payment of \$800 theretofore paid to said M. W. Harrison and Thomas A. Edwards as a consideration for the land; and describes it by metes and bounds. To the answer of Alexander P. Hart, Curtin & Co. filed a special reply in writing, denying specifically all the material allegations therein. At the January term, 1901, the circuit court further heard the causes on the sole matter in controversy, and decreed that Curtin & Co., without further conveyance thereof, were and should be the owners in fee of the whole of said 200 acres of land, including the 100 acres, part thereof, claimed by appellant, Hart.

From this decree Hart was granted an appeal, and says that the circuit court erred to his prejudice, because it found against him, and refused to compel a conveyance of said 100 acres of land to him, and because the whole of said 200 acres, including the 100 acres thereof claimed by petitioner, was decreed to Curtin & Co. There are other assignments of error, but the decision of the questions above stated will determine the controversy.

Appellant claims the right to specific performance of his alleged contract with Isaacson, and to have a conveyance of the 100 acres of land from Isaacson or his vendees, Curtin & Co. This involves an examination and consideration of the evidence.

The testimony clearly and conclusively proves the truth of the allegations in the answer of appellant, A. P. Hart, as to the purchase of the 200 acres, and also that Isaacson employed Milton Hart, a surveyor, to survey the parcel of 100 acres of land in controversy; that on or about the 3d day of April, 1889, Milton Hart surveyed and laid off 100 acres of the land as claimed by A. P. Hart, and made and delivered to him a plat thereof, which is made a part of the record; and that afterwards the surveyor communicated to Isaacson what he had done, and received from Isaacson his pay therefor. The sale of the land by Harrison and Edwards to Isaacson, through Hart, was consummated on the 12th day of April, 1888. On the 22d day of April, 1889, before he had obtained the legal title thereto, Isaacson, by his deed, and another written contract of that date, conveyed the said 200 acres to Curtin & Co., but this deed and written agreement were treated together by Curtin & Co. as a mortgage, and so held by this court supra. Before that date, A. P. Hart, having fully performed his agreement with Isaacson as to the purchase thereof, was the equitable owner of 100 of the 200 acres of land, and was then entitled to the legal title to the same from Isaacson. "Where two or more persons purchase or acquire lands un-

der a specific agreement between themselves, and pursuant to such agreement the legal title to the lands is taken in the name of one of them, the holder of said title is a trustee for the others to the extent of the interest of such others in said lands." *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448. See, also, cases cited in *Hyde's W. Va. Dig.* vol. 3, col. 4594, "Resulting and Implied Trusts;" 1 *Perry on Trusts*, § 128 et seq.; *Underhill on Trusts & Trustees*, 160. But there is no allegation by Hart in his answer that Curtin & Co. had any notice or knowledge of his interest in or claim to the land at the time the conveyance of the 22d day of April, 1889, was executed by Isaacson and accepted by Curtin & Co. The testimony on this point does not sufficiently prove either actual or constructive notice to them. Hart's evidence as to his possession of the land—it being the only evidence introduced on that question—is as follows: "Q. What has been the character of your possession of said 100 acres of land from the time of your said purchase from Harrison and Edwards up to the present time? A. My possession is, that it joins the land I reside on, and I have a little cleared on the 100 acres, and have the cleared part under fence. Q. When did you make said improvements on said 100 acres of land? A. In May, I think it was, last spring." It appears from the record, and admission by counsel in court, that the land which Hart says he resided upon was then owned by his wife, who also lived with him thereon. "The actual possession proper of the husband of a part or all of his wife's lands does not, in and of itself, give him constructive actual possession of his own contiguous tract." *Coal Co. v. Howell*, 36 W. Va. 513, 15 S. E. 222. The above testimony was given by Hart on the 27th day of December, 1889. According to it, the improvement on the land was made by him after the execution of the deed by Isaacson to Curtin & Co. No notice to them being shown, Curtin & Co. must be treated as purchasers of the land from Isaacson for a valuable consideration, without notice of Hart's claim to or interest in the land, and therefore are not, as to their demand, affected by his claim. The deed to Curtin & Co. conveys the land to them as security for their debt due from Isaacson. It is a mortgage, and tantamount to a deed of trust made for the same purpose. In *Evans v. Greenhow*, 15 *Grat.* 157, the court says: "A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security, which deed, if it be legally recorded, and was not executed with a fraudulent intent known to the trustee or the beneficiaries therein, will be valid against all prior secret liens and equities and all subsequent alienations and incumbrances." See, also, *Fidelity Co. v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180; *Duncan v. Custard*, 24 W. Va.

730; *Wickham v. Martin*, 13 Grat. 427; *Douglass Mdse. Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188. When Isaacsen afterwards acquired the legal title to the land from Harrison and Edwards, he thereby became the holder of said title as trustee for Hart to the extent of the interest of Hart in the land. But Hart's interest therein was and is subject to Curtin & Co.'s mortgage, to the extent of the balance due to them from Isaacsen on the mortgage debt, after the proceeds of the sale of Isaacsen's interest in the land, and other property of which he was the owner, and which was conveyed to them by the mortgage, has been applied to the debt. Hart is entitled to a specific enforcement of his contract with Isaacsen for the purchase of said land against both Isaacsen and Curtin & Co. Having fully complied with the said contract on his part, he was, before and at the date of the decree appealed from, entitled to a deed for the 100 acres of land laid off to him by Milton Hart, surveyor, a plat and description of which is filed in the papers of the cause; but such deed, and the land thereby conveyed, had the deed been then executed, would have been subject to the mortgage of Curtin & Co. to the extent hereinbefore stated. Hart was and is entitled to have Isaacsen's 100 acres of the land and the other mortgaged property sold, and the proceeds of the sale applied to the mortgage debt, in order to relieve his 100 acres of the land.

The court therefore erred in decreeing that Curtin & Co., without further conveyance thereof, were and should be the owners in fee of said 200 acres of land, including the 100 acres, part thereof, claimed by Hart. The decree appealed from, being erroneous and prejudicial to Hart, must be reversed and set aside, and the cause remanded to the circuit court, wherein a decree must be entered in the cause requiring said Leon Isaacsen and Curtin & Co. to convey said 100 acres of land, as described in the plat thereof, made by said Milton Hart, and filed as aforesaid, to appellant, A. P. Hart, by an apt and proper deed, with covenants of special warranty, but subject to the balance which may be due on the mortgage debt from Isaacsen to Curtin & Co. after applying on the debt the proceeds of the sale of the mortgaged property, not including Hart's 100 acres thereof; and upon failure of Isaacsen and Curtin & Co., or either of them, to execute such deed within a reasonable time to be given to them for the purpose, a special commissioner, to be appointed, will do so for them. The circuit court is also directed to make and enter a decree in the cause, if any person in interest so desire, for the foreclosure of said mortgage on, and a sale of, the remaining 100 acres of land, giving a day to Isaacsen, the mortgagor, for the redemption thereof, but reserving in such decree the right to Curtin & Co. to

proceed further against the Hart 100 acres if it should thereafter become necessary to do so.

(12 Ga. 334)

YOUNG v. STATE.

(Supreme Court of Georgia. Dec. 9, 1894.)

HOMICIDE—CIRCUMSTANTIAL EVIDENCE.

1. The evidence relied upon for conviction was entirely circumstantial, and was not sufficient to exclude every reasonable hypothesis save that of the guilt of the accused. The verdict was therefore contrary to law.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Albert Young was convicted of murder, and brings error. Reversed.

John R. Cooper and Hines & Vinson, for plaintiff in error. John C. Hart, Atty. Gen., and Joseph E. Pottle, Sol. Gen., for the State.

SIMMONS, C. J. Albert Young was convicted of the offense of murder. The evidence relied upon to sustain the conviction was entirely circumstantial. It was shown that Young and a woman named Lily Anderson had, some three years before the homicide, sustained criminally intimate relations with each other, when the woman became tired of him, and "took up with" one Gus King, with whom she sustained similar relations. Young appeared dissatisfied with this conduct on the part of the woman, and on several occasions followed her about with a gun. On two occasions he was heard to make quasi threats against King. One of these was that, if he went to kill King, he was going to kill him, and not play with him. The other was that, if King had gone off, he "had better have stayed off." These threats were made a few days before the homicide. King was killed in a public road, by shot evidently fired from a shotgun. Tracks were found on a private road which branched off from the road in which King was killed. According to one of the witnesses, these tracks resembled Young's tracks. There was no evidence to show when the tracks were made. They were discovered the morning after the killing. The private road was regularly used by a number of people in the neighborhood, among them the accused. There was a clump of bushes near the side of the public road, behind which a man could have hidden, and within gunshot of the place where King's body was found. The tracks alleged to have been Young's were not, however, shown to have led to these bushes. A piece of paper was found near the body of the deceased in the road, but the evidence does not disclose whether or not it appeared to have been discharged from a gun or to have been used as a gun wad. It also appeared that one barrel of Young's gun had

been recently discharged, and that one of the witnesses pulled a wad from the other barrel. These are all the material facts appearing in the record to sustain the conviction. The motive claimed to have been proved was Young's jealousy and anger that the deceased had "taken up with" the woman in the case, who had three years before the homicide been intimate with the accused. The accused, the deceased, and the woman appear to have lived in the same neighborhood—as far as appears, upon the same plantation. The woman had left Young three years before, and in the meantime there had been abundant opportunity for Young to have killed King, if this was the motive which actuated the crime. The tracks were not shown to have been recently made. There had been no rain just before the homicide, and the tracks may have been made before the death of King. Whether they were Young's tracks at all was merely the opinion of one of the witnesses. The tracks had not been measured or compared with the shoes worn by Young at the time. The opinion of a witness as to the tracks of any particular individual adds little to a case unless there is something more. So many men wear the same sort of shoes and walk in the same manner that it is hardly possible to identify tracks positively. In the present case the witness swore to the tracks because of peculiarities in Young's shoe and in his way of walking, but others may have had the same peculiarities. Conceding, however, that these were Young's tracks, the evidence did not show that the tracks led to the public road and to the point where the body of the deceased was found. The Solicitor General argued in his brief that the tracks led to the clump of bushes near the dead body, there stopped, and then returned. This does not appear in the record. The only witness who testified as to the tracks testified that he saw Young's tracks where he had passed along the private road, going toward the public road, and had returned. It also appeared that this private road was generally used by Young in going to or from his house. The Solicitor General also argued that the paper found near the dead man was the wad of the gun with which deceased had been killed, and was similar to the wad drawn from the undischarged barrel of Young's gun. The record does not bear out this contention. The coroner, who was introduced as a witness, testified: "There was a paper handed me by some one near the body in the road, and I pulled a wad out of the other barrel of the gun, and have it here." There was no other evidence as to the wadding. There was no evidence that the wad taken from Young's gun was of paper, or that, if so, it resembled in any way the paper found in the road. We cannot tell either that the wad taken from the gun was of paper, or that the paper found in the road appeared to have

been used as a gun wad. Neither the paper nor the wad appears to have been put in evidence. The truth is the evidence does not indicate whether the paper found in the road had ever been in a gun at all, but merely shows that a piece of paper was handed to the coroner by some one near the body of the deceased. There was no evidence, either, as to the size or character of the shot in the gun of the accused or of the shot with which deceased had been killed.

For the reasons above indicated, we think the conviction of the accused ought not to stand. The evidence was clearly insufficient to exclude every other reasonable hypothesis save that of the guilt of the accused.

Judgment reversed. All the Justices concur.

(121 Ga. 337)

BUCKINE v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

LARCENY—EVIDENCE.

1. Upon the trial of one accused of the larceny of a \$100 bill, evidence that shortly after the commission of the alleged crime the wife of the accused was in possession of a bill of the same denomination and description as the one alleged to have been stolen, and that she sent the bill to a bank, to be changed by another person, was admissible as a circumstance, the probative value of which was for the jury.

2. The evidence was largely circumstantial, and was conflicting, but that for the state was sufficient to warrant the conviction of the accused. The trial judge having expressed his approval of the verdict by his refusal to grant a new trial, this court will not interfere.

(Syllabus by the Court.)

Error from City Court of Waycross; J. C. Reynolds, Judge.

Zeke Buckine was convicted of larceny, and brings error. Affirmed.

Leon A. Wilson, for plaintiff in error. J. Walter Bennett, for the State.

CANDLER, J. The accused was convicted upon an accusation charging him with simple larceny. He excepts to the overruling of his motion for a new trial, which was upon the general grounds that the verdict was contrary to law and the evidence, and upon the further ground that the court erred in the admission of certain evidence, which will be mentioned hereafter. The evidence for the state was to the effect that the accused came to the home of the prosecutor at an early hour in the morning, and solicited a loan of money, offering a watch as security for the loan; that, after some discussion, the prosecutor agreed to lend the accused \$10 on the watch; that thereupon the prosecutor took from a satchel a roll of bills, took off the bill on the outside of the roll, and, without looking at it, handed it to the accused in exchange for the watch. Subsequently he discovered that the bill which he had given the

¶ 2. See Criminal Law, vol. 15, Cent. Dig. §§ 3076, 3076, 3080.

accused was for \$100, instead of \$10, as he had supposed. Upon being arrested, the accused insisted that the bill he received from the prosecutor was for \$10. There was evidence that a few days after the occurrence above related the wife of the accused was in possession of a \$100 bill of the same description as the one which the prosecutor claimed to have given the accused, and that she sent it to a bank to be changed. There was no direct evidence that it was the same bill, or that the accused had at any time given his wife a \$100 bill; but, on the other hand, there was no evidence to negative either theory. In his statement the accused admitted having received a bill from the prosecutor, but declared that he "took it to be a ten-dollar bill." He further stated that after leaving the house of the prosecutor he went to the railroad station, preparatory to going out on his "run" in the discharge of his duties as a locomotive fireman; that he tried, without success, to have the bill changed as a \$10 bill at the ticket office; that he accosted a stranger at the station, whom he had never seen before, and whom he took to be a traveler about to go out on the train, and that this stranger gave him in exchange for the bill a \$5 bill and five silver dollars; and that he sent a part of this money home to his wife by a messenger, and proceeded to go out on his run. In many essential particulars his statement was corroborated by the sworn evidence. It was also in evidence that the wife of the accused was a school-teacher, making a good salary, and that she had been in possession of a \$100 bill for a considerable time prior to the time of the commission of the alleged crime.

Upon its facts the case is exceedingly close; but it is for the jury, and not the Supreme Court, to settle close questions of fact. The evidence is undisputed, other than by the statement of the accused, that the accused received from the prosecutor a bill of the denomination of \$100, and not \$10. The issue upon which the case turned is whether the accused subsequently discovered that fact, and converted the balance of \$90 to his own use, or whether, as he contends in his statement, he was the innocent victim of a fraud perpetrated upon him by the stranger at the railroad station—a fraud the commission of which was made possible by the prosecutor's own negligence. There was circumstantial evidence to support either theory, direct evidence to support neither. The jury resolved the conflict adversely to the accused, as it was their right to do, and, the trial judge having expressed his approval of the verdict by his refusal to grant a new trial, this court will not interfere.

The evidence to which objection was made on the trial in the lower court and the admission of which is assigned as error in the motion for a new trial was that which showed the possession by the wife of the accused of a \$100 bill shortly after the trans-

action under investigation, and her having the bill changed at the bank. Owing to the very close relationship of husband and wife, we think this evidence was admissible solely as a circumstance to be considered by the jury along with all the other facts and circumstances in the case as throwing light on the transaction under investigation. We do not hesitate to say that such evidence would not justify a charge upon the subject of recent possession of stolen goods, but as a circumstance to be weighed by the jury for what it was worth.

We do not overlook the contention of counsel for the accused that the state failed to carry the burden of proving that the money was taken *animo furandi*, and that the evidence shows that the appropriation, if any, was made subsequently to the reception of the money by the accused. In view of the fact that the state showed that when the accused was arrested he asserted that he looked at the money when it was handed to him, and that it was a \$10 bill, the jury were authorized to find that the money was taken by him with knowledge that it was a larger amount than he was entitled to receive. This contention is therefore without merit.

Judgment affirmed. All the Justices concur.

(121 Ga. 340)

CHELSEY v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

INDICTMENT—ATTEMPT—COMPLETED ACT—INTENT—HOMICIDE—PLEA IN ABATEMENT—CHALLENGE TO ARRAY—EVIDENCE.

1. Where there is not a completed act, but only an attempt, and the crime consists of the intent with which the attempted act was done, it is necessary that the indictment should charge and the evidence prove the existence of such criminal intent.

2. But where there has been a completed act—as, for example, a killing—the law supposes that the person intends the natural consequences of his act, and in such cases "the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved. The intent is nothing more than the law draws from the act, and requires no proof beyond that which the act itself supplies."

3. If therefore A. puts poison in flour with intent that it shall be cooked into bread and eaten by B., but the same is taken by C., and death results from the use thereof, A. will be guilty of murdering C., even though he had no malice against him.

4. The indictment was not subject to the demurrer presented; nor was there error in charging and refusing to charge on the subject of intent.

5. The pleas in abatement were properly overruled, it appearing that the indictment was actually returned into open court, though no entry was made on the minutes at the time.

6. The court properly disallowed the challenge to the array, it appearing that the two panels of jurors had been properly drawn, and that the jurors who were excused constituted a part of those drawn in excess of those needed to make the full panels.

7. There was no allegation or proof that jurors regularly drawn, and which the defendant had a right to insist should be put upon him in the panel, had been excused; nor that a deficiency improperly occasioned had then been supplied by talesmen.

8. The evidence warranted the verdict, and there was no error of law committed, and the court properly refused to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Young Chelsey was convicted of homicide, and brings error. Affirmed.

The indictment against Young Chelsey charged that he unlawfully, willfully, feloniously, and with malice aforethought did make an assault upon Arthur McKamie by putting "Rough on Rats," an arsenic poison, in sufficient quantities to produce death, into a sack of flour, with the intention and for the purpose of having the same cooked into bread, presented to and eaten by said Arthur; that the same was so cooked and presented and eaten by said Arthur, and from its effects he died. The defendant demurred on the ground that the indictment did not allege facts constituting the crime of murder, but only the crime of assault, and failed to allege any intent to kill. The demurrer was overruled. There was a plea in abatement on the ground that the minutes failed to show that the indictment had been returned into open court. On the hearing of this plea it appeared from the testimony of the officer that the indictment had in fact been returned by the qualified bailiff of the grand jury, and received from him by the clerk in open court, during the May term, 1904, though it had not been entered on the minutes at the time of the hearing, May 10, 1904. The court refused to sustain the plea. There was a challenge to the array because the minutes failed to show that the two panels of traverse jurors had been drawn as jurors for the present term, and because the names of seven jurors regularly drawn for the present week were not on the list of jurors furnished the defendant; and that, if these seven had been excused, they were not legally excused. From the evidence on this plea it appeared that thirty-six jurors were drawn and summoned; that their names were on the minutes, but the page containing the same had not been signed by the judge at the time of trial; that the two panels of twenty-four put upon the defendant contained only the names of jurors who had been regularly served. It appeared also that some of the seven referred to in the motion had been excused from service. On the trial on the merits it appeared that the defendant had, in what he claimed was a spirit of play, fired into a window of a house occupied by Lou McKamie, a woman with whom he was living, and who was an aunt of deceased; that the shooting was not at any one in the building; that the woman was provoked, and some-

thing was said about defendant being arrested. The contention of the state was that this talk aggravated him, and defendant at once purchased a package of "Rough on Rats"; that afterwards he had access to a pantry, in which was contained a sack of flour; that it was eaten by Arthur McKamie, one of the inmates of the house; that he was immediately made extremely ill; that when the defendant learned of this fact he attempted to conceal the flour; that McKamie died the same day; that his stomach, with the uneaten bread and parts of the flour in the sack, were each analyzed, and found to contain arsenic, and in quantities sufficient to have occasioned death. There was also testimony that "Rough on Rats" did contain arsenic, and was a deadly poison, though the witness had not analyzed packages of "Rough on Rats" recently, and, of course, had not analyzed the contents of the package purchased by the defendant, it being impossible to find any of the contents other than what was contained in the sack of flour and the bread. The defendant was found guilty. A motion for a new trial was made because the court charged, in effect, that, if the defendant did the acts complained of with intent to poison Lou McKamie, he would be guilty, even though Arthur McKamie ate the bread intended for her, and whether he had any malice against Arthur or not; because the court refused to charge that, "if the poison was put into the flour with the intent that it should be eaten by Lou McKamie, and not the deceased, then the defendant would not be guilty as charged in the indictment, and you should acquit him." The defendant excepts to the judgment overruling his motion for a new trial.

Hatton Lovejoy, for plaintiff in error.
John C. Hart, Atty. Gen., and H. A. Hall, Sol. Gen., for the State.

LAMAR, J. (after stating the foregoing facts). There are many decisions construing indictments for murder as defined by modern statutes, in which it is held essential to charge an intent to kill. But this grows out of the fact that under these statutes murder in the first degree is limited to cases where the killing is with deliberate and premeditated malice. But these rulings do not apply to indictments under Pen. Code 1895, § 60, and at common law, where the killing is murder if the malice aforethought is implied, as well as to cases where the malice is express. The allegation that the act was done unlawfully, feloniously, and with malice aforethought is sufficient to characterize the killing as murder. Compare *Cox v. People*, 80 N. Y. 502; *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; *Schaffer v. State*, 22 Neb. 560, 35 N. W. 384, 3 Am. St. Rep. 274. Besides, Pen. Code 1895, § 929, was intended to

obviate the necessity for that strictness of pleading formerly required. As construed in *Newman v. State*, 63 Ga. 534, this indictment was good against the demurrer, for it was there held that "the rule as to the sufficiency of an indictment is this: If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad. But if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good." In his charge the court used the illustration of one recklessly shooting into a crowd, or throwing a heavy timber on a sidewalk where people are passing, as given in *Cook v. State*, 93 Ga. 201, 18 S. E. 823, and charging, as there, that in cases like these it is not "required that there should exist any ill will or express malice. The law implies malice from the act, and declares the killing to be murder." We find no error in this instruction. It was applicable to the theory of the case arising from the evidence offered by the state. The defendant attacks the charge, in view of his theory, on the ground that there was no intent to kill Arthur, but, if anything, an intent to kill Lou McKamle. He contends that the court erred in failing to instruct the jury that, if the evidence showed that the defendant intended to kill her, and not the deceased, they should acquit. But the act includes the intent. A person is in law supposed to intend the natural consequences of his act, and, if he maliciously and unlawfully puts poison into a sack of flour, with the expectation that it is to be cooked into bread and eaten, he is conclusively presumed to have intended the death of any one who ate the bread and died from the effects thereof. In placing the poison where it could be eaten, and with the intent that it should be eaten by the woman, the defendant committed a felony. The law, as well as reason, prevents him from taking advantage of his own wrong, or excusing himself when the unlawful act strikes down an unintended victim. The original malice is transferred from the one against whom it was entertained to him who actually suffered the consequences of the felonious act. Compare *Johnson v. State*, 92 Ga. 39, 17 S. E. 974 (5), where it was said, in a case much like the present, that putting poison into coffee "betrayed a reckless disregard of his life, equivalent to an actual intention deliberately to kill him. This meets in terms the definition of express malice as given in the statute." See, also, *Commonwealth v. Hersey*, 2 Allen, 173, 180, where the court draws the distinction between attempts with a specific intent, in which the intent must be alleged and proved, and those completed acts which are rendered penal. In the last class of cases "the evil intention will be presumed, and need not be

alleged, or, if alleged, it is a mere formal averment, which need not be proved. In such case the intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself supplies." *Gallery v. State*, 92 Ga. 463, 17 S. E. 863; *Stovall v. State*, 106 Ga. 447, 32 S. E. 586.

The other grounds of the motion need not be specifically considered. The plea in abatement was properly overruled. The evidence showed that the indictment as a fact had been duly returned. The failure to make an entry on the minutes was an irregularity, which was cured by the testimony of the bailiff and the clerk. The same was true as to the entry of the list of jurors on the minutes, though they had not been signed. *Cribb v. State*, 118 Ga. 316, 45 S. E. 396. Nor was there good challenge to the array. The panels put upon the defendant had been regularly drawn in the method prescribed by law. There were more jurors drawn than were required to fill the panel. The fact that some of the number in excess were excused afforded no reason for challenging the array of those left. The evidence was amply sufficient to warrant the verdict. Even if the chemist had not recently made an analysis of a package containing "Rough on Rats," such analysis as he had made, coupled with the analysis of the flour, bread, and contents of the stomach, was sufficient to support the allegations in the indictment.

Judgment affirmed. All the Justices concur.

(121 Ga. 337)

SIMS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The motion for a new trial was upon the general grounds only. The evidence for the state made a clear case of murder. The accused introduced no evidence. His statement tended to show that the killing was in self-defense. The jury have resolved the conflict in favor of the state. The trial judge has approved the verdict and refused a new trial, and no reason appears why his discretion in so doing should be interfered with.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Spear Sims was convicted of murder, and brings error. Affirmed.

W. H. Darris and Watts Powell, for plaintiff in error. John C. Hart, Atty. Gen., and F. A. Hooper, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring.

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 701.

(121 Ga. 334)

BLAKEMAN v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

NEW TRIAL—BRIEF OF EVIDENCE—FILING.

1. This case is controlled by the decision of this court announced in *Baker v. Johnson*, 27 S. E. 706, 99 Ga. 374, and followed in the later cases of *Mize v. Americus Mfg. Co.*, 32 S. E. 22, 106 Ga. 140, *Holloman v. Small*, 35 S. E. 665, 111 Ga. 812, *Brooks v. Proctor*, 36 S. E. 99, 111 Ga. 835, and *Hyatt v. Cowan*, 41 S. E. 985, 115 Ga. 608.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

James Blakeman was convicted of crime, and brings error. Affirmed.

Henry Walker, for plaintiff in error.
Moses Wright, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 375)

RUSK et al. v. HILL, Ordinary.

(Supreme Court of Georgia. Dec. 9, 1904.)

APPEAL—REMAND—PROCEDURE BELOW—TAXATION OF COSTS—AFFIDAVIT OF ILLEGALITY.

1. Where the judgment of a trial court has been affirmed by the Supreme Court, with direction to amend such judgment in a designated way, and that the costs incident to the writ of error be taxed against the prevailing party in the court below, an order formally making the judgment of the Supreme Court the judgment of the trial court is not an indispensable prerequisite to the amendment by the latter court of its judgment in accordance with the direction in the judgment of affirmance. *Knox v. State*, 39 S. E. 830, 113 Ga. 929, *Brown v. Wilson*, 59 Ga. 604, 606.

2. The amended judgment of the trial court was not the place in which to tax the costs of the writ of error in accordance with the direction of the Supreme Court.

3. There was no error in dismissing the affidavit of illegality.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by W. D. Hill, for the use of, etc., against T. J. Rusk and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. P. Brooke and H. B. Moss, for plaintiffs in error. J. Z. Foster, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 379)

RUSK v. HILL, Ordinary.

(Supreme Court of Georgia. Dec. 9, 1904.)

EXECUTION—LEVY—PROPERTY SUBJECT.

1. The reversion in lands which have been assigned as dower is subject to levy and sale at the instance of creditors of the husband's estate.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by W. D. Hill, ordinary, for use, etc., against Margaret Rusk. Judgment for plaintiff. Defendant brings error. Affirmed.

J. P. Brooke and H. B. Moss, for plaintiff in error. J. Z. Foster, for defendant in error.

OOBB, J. The only question involved in this case is whether the reversionary interest of the estate of a decedent in land which has been assigned to his widow as dower can be seized on execution issued in favor of a creditor of the estate. There is in this state no general statute prescribing definitely what property of a debtor is subject to levy and sale; our statute providing simply that executions may be levied on "all the estate, real and personal, of the defendant, subject to levy and sale." Civ. Code 1895, § 5413. Authority in this state to levy upon "lands and tenements" is derived from the statute 5 Geo. II, which became incorporated into our law by our adopting statute of 1784. *Pitts v. McWhorter*, 3 Ga. 10, 11. Hence common-law executions in this state usually order the levying officer to seize enough of the "goods and chattels, lands and tenements," of the debtor to make the sum due. A vested remainder, subject to be divested upon the happening of a given contingency, can be seized on execution against the remainderman before the death of the life tenant. *Lufburrow v. Koch*, 75 Ga. 448; *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196. In *Wilkinson v. Chew*, 54 Ga. 602, 604, it was said that: "Upon principle as well as authority subjection to levy and sale should rest on two questions only: Is there a vested interest, and is it so definite as to be susceptible of description in terms of legal certainty?" Accordingly, it was held in that case that the interest of an heir in the reversion of land devised to a tenant for life, as well as a vested interest in remainder, was subject to levy and sale. And in *Pitts v. Hendrix*, 6 Ga. 454, it was said that "every legal interest in real and personal property" can be seized on execution. It is therefore settled in this state that neither possession nor the right to immediate possession is necessary to render the interest of a debtor in land subject to levy and sale. "Dower is the right of a wife to an estate for life in one-third of the lands" of her deceased husband. Civ. Code 1895, § 4687. The estate in dower is therefore simply a life estate, and subject to be dealt with as any other life estate. The interest of the life tenant or doweress is subject to levy and sale at the instance of her creditors. *Pitts v. Hendrix*, 6 Ga. 452. There is no statute in this state expressly providing that the reversion in dower lands is subject to levy and sale, though laws have been passed recognizing that it was as an asset in the hands of a legal representative for the payment of debts. See Civ. Code 1895, §§ 3513, 3514. Nor has the question ever been directly decided by this court. The nearest approach to it was in *Parlier v. Johnson*, 81 Ga.

254, 7 S. E. 317, where it was held: "Though the right of a widow to her dower in land seized as the property of her deceased husband be not reserved in the levy, it may be reserved in the sale and in the sheriff's deed, and the conveyance will be effective as to the reversion." If the whole land may be seized, and a deed made which will be "effective as to the reversion," the same result can be accomplished by seizing simply the reversion in the first instance. Clearly, on principle and authority, this can be done. In *Massachusetts* it has been expressly decided that it can. *Peabody v. Minot*, 24 Pick. 329. The reversion in lands out of which dower has been assigned does not differ in nature from any other reversion, and the same reasons which would authorize a sale of the reversion in lands devised to another for life would also authorize the seizure and sale of the reversion in lands set apart as dower. It is true that in *Jolly v. Lofton*, 61 Ga. 154, and cases which followed it, it was held that the reversion in lands set apart as a homestead was not subject to levy and sale during the existence of the homestead estate. Those decisions were based upon the language of the homestead law, providing that no execution or judgment should ever be enforced against the homestead property; and this language was held to be broad enough to include the reversionary interest. Clearly, therefore, these decisions are not controlling here. There was no error in directing a verdict for the plaintiff in execution.

Judgment affirmed. All the Justices concurring.

(121 Ga. 475)

BRANTLEY v. TAYLOR.

(Supreme Court of Georgia. Dec. 12, 1904.)

APPEAL—REVIEW—WAIVER OF ERRORS—NEW TRIAL.

1. Assignments of error not referred to in the brief of the plaintiff in error will be considered as abandoned.

2. The Supreme Court will not disturb the first grant of a new trial upon certiorari from a city court, when the verdict was not demanded by the evidence. *Walker v. Hughes*, 48 S. E. 387, 120 Ga. 1079.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action between C. W. Brantley and W. I. Taylor. From the judgment, Brantley brings error. Affirmed.

F. G. Corker and Akerman & Akerman, for plaintiff in error. Griner & Baldwin and Peyton L. Wade, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 4254.

(121 Ga. 412)

STANDARD OIL CO. v. SWANSON.

(Supreme Court of Georgia. Dec. 10, 1904.)

HAWKERS AND PEDDLERS—LICENSES—WHEN REQUIRED—OIL IN BULK.

1. Paragraph 8 of section 2 of the general tax act of 1902 (Acts 1902, p. 21), imposing a special tax upon traveling vendors "of patent or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise," does not embrace vendors of merchandise not ejusdem generis with the articles expressly enumerated.

2. Oil handled in bulk and sold in quantity is not ejusdem generis with the articles expressly enumerated in the above-mentioned statute, and that statute does not embrace traveling vendors of such oil.

(Syllabus by the Court.)

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by the Standard Oil Company against S. E. Swanson. Judgment for defendant, and plaintiff brings error. Reversed.

King, Spalding & Little, for plaintiff in error. Sam. P. Maddox, Sol. Gen., for defendant in error.

SIMMONS, C. J. Suit was brought by the Standard Oil Company against S. E. Swanson for the recovery of about \$50 alleged to have been illegally collected by him as tax collector of Gordon county. From the pleadings and the evidence it appeared that the plaintiff was a corporation duly organized under the laws of the state of Ohio and doing business in Georgia; that it was engaged in the manufacture and sale of oils and oil products; and that in pursuance of this business it had an agent, a storage warehouse, and a place of doing business in Whitfield county. Oil received in tank cars was pumped into the plaintiff's storage tanks in Whitfield county, and taken from these tanks into a tank wagon. This wagon was driven through the county of Gordon, as well as Whitfield, and the oil delivered to merchants. In some instances orders are previously sent in; in others not. Upon the arrival of the wagon at a store, such quantities of oil were sold, delivered, and paid for as the merchant might desire. The defendant, as tax collector of Gordon county, issued against plaintiff an execution for taxes under paragraph 8 of section 2 of the general tax act of 1902 (Acts 1902, p. 21). Under protest, and in order to prevent the sale of certain of its property levied upon under this execution by the sheriff of the county of Whitfield, the plaintiff paid the amount of the execution. For the recovery of the amount so paid the present suit was brought. On the trial it was admitted that the plaintiff had paid its ad valorem tax on its plant and property in the county of Whitfield, and that no special tax or peddler's tax or other license had been demanded of it in that county. The case was submitted to the judge without the intervention of a jury, and he found for the defendant, holding that the plaintiff was subject to the tax imposed,

and that the execution was legal. To this judgment plaintiff excepted.

Counsel expressly refrained in the present case from raising any question as to whether the collection of this tax would be an unlawful interference with interstate commerce, or as to whether the execution should have been issued against plaintiff or against its agent in charge of its wagon. The sole question is whether such a business as is shown by the record to have been carried on by plaintiff in the county of Gordon was taxable under the above-cited provisions of the act of 1902. The tax was imposed under the following provision of that act: "That in addition to the ad valorem tax on real estate and personal property as required by the Constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years: * * * Upon every traveling vender of patent or proprietary medicines, special nostrums, jewelry, paper, soap or other merchandise, fifty dollars in each county where they may offer such articles for sale." Whether plaintiff's agent was, under Pol. Code 1895, § 1640 et seq., subject to tax as a peddler or itinerant trader, is not involved in this case. The tax collected from plaintiff was imposed under the act of 1902, and the question now presented is whether the tax was authorized by that act. "Statutes which impose restrictions upon trade or common occupations, and which levy an excise or tax upon them, must be construed strictly." "Statutes levying duties or taxes upon subjects or citizens are to be construed most strongly against the government, and in favor of their subjects or citizens, and their provisions are not to be extended, by implication, beyond the clear import of the language used." "Revenue laws are neither remedial statutes nor laws founded upon any permanent public policy, and are not, therefore, to be liberally construed; and hence, whenever there is a just doubt, that doubt should absolve the taxpayer from his burden." Mayor, etc., Savannah v. Hartridge, 8 Ga. 23. "We will hold that the Legislature intended nothing beyond what their language in its fair and usual meaning will indicate; and, if the terms of their enactment have not embraced the object contended for, the power is with them, by additional act or acts to extend them." Id. Whether the business carried on by plaintiff can properly be classed as that of a "traveling vender," as used in the act of 1902, we need not now decide; for, conceding that plaintiff is a traveling vender, we think that it is not within the classes of such vendors taxed by the act. We think that the words "other merchandise" in the act must be construed to mean other merchandise ejusdem generis with the articles expressly named. "Where a statute or other document enumerates several classes of persons or things, and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word

'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated." 21 Am. & Eng. Enc. Law (2d Ed.) 1012, and cit. This rule is well established in this state. See Sanders v. State, 86 Ga. 717, 12 S. E. 1058, in which the rule is thus quoted, from Endlich, Int. Statutes: "The general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended." This rule is not inflexible, but it is clearly applicable to the present case, where not only is there nothing "to show that a wider sense was intended," but the statute is one which must be strictly construed, and the terms of which cannot be extended by implication. The statute then provides for a tax upon traveling vendors of "patent or proprietary medicines, special nostrums, jewelry, paper, soap," and other like merchandise. The plaintiff handled oil in bulk, and sold it to merchants in quantity. Such oil was surely not ejusdem generis with any of the articles specially enumerated in the statute. The statute expressly mentions only such small articles as are usually or frequently carried by peddlers, hawkers, and "street fakirs." Possibly small packages of standard merchandise would be of the same general class with the articles expressly enumerated, but we are clear that oil, or other standard merchandise, handled and sold in bulk, would not be. The statute therefore does not impose any tax upon one carrying on a business such as the record shows was conducted by the plaintiff in error, and the execution based upon this statute was not authorized by law. The money collected from plaintiff in error under and by virtue of this execution was illegally exacted. The money having been paid under duress, the plaintiff had a right to recover the amount so paid, and the court erred in finding for the defendant.

Judgment reversed. All the Justices concur.

(121 Ga. 487)

OGBURN v. DUBLIN WAGON & MACHINE CO.

(Supreme Court of Georgia. Dec. 10, 1904.)

NONSUIT—EVIDENCE—INJURY TO EMPLOYÉ.

1. The plaintiff proved his case exactly as laid in the petition, and it was error to sustain a motion to nonsuit.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Action by L. B. Ogburn against the Dublin Wagon & Machine Company. Judgment for defendant, and plaintiff brings error. Reversed.

K. J. Hawkins, for plaintiff in error. Geo. W. Williams, for defendant in error.

LAMAR, J. The petitioner proved his case exactly as laid, and it was therefore error to sustain the motion to nonsuit. The question as to whether the injury was occasioned by a fellow servant or by the act of a vice principal, or whether the vice principal at the time was so acting as to constitute himself a fellow servant of the plaintiff, was not argued, nor can we know that the court below passed upon this question. All of the facts proved were stated in the petition. If they were such as to constitute a defense, advantage should have been taken thereof in the first instance by demurrer, or afterwards by motion to dismiss, and not by motion to nonsuit. The evidence disclosed no new fact. It did not make a case where the plaintiff first proved and then disproved his right to recover. *Evans v. Josephine Mills*, 119 Ga. 448 (1, 2), 46 S. E. 674.

Judgment reversed. All the Justices concur.

(121 Ga. 465)

CENTRAL OF GEORGIA RY. CO. v. McWHORTER.

(Supreme Court of Georgia. Dec. 12, 1904.)

RAILROADS—KILLING STOCK—EVIDENCE—PRESUMPTIONS.

1. According to the testimony of the company's engineer, the horse for the killing of which the plaintiff sought to recover damages suddenly ran upon the track, about 20 yards ahead of his engine, and then down the center of the track to the point where it was killed; and he used every effort to avoid injury to the horse, and could not sooner have discovered its presence on or near the track because of a curve in the roadbed, a high embankment, and some bushes. The testimony offered by the plaintiff tended to show that, notwithstanding the curve, the embankment, and the bushes, the horse might have been seen at least 144 yards from the point where the animal was killed; that the horse had walked some 200 yards along the track in the direction of the approaching train, and had then turned and fled from it a distance of 20 yards, never leaving the track at all, so that the animal could not, as testified by the engineer, have suddenly run in front of the engine from a point adjacent to the roadbed. In view of this conflict in the evidence, and of the fact that the defendant did not undertake to show that the injury to the animal could not have been prevented, even though it had been seen on the track 144 yards distant from the engine and all precautionary measures had been promptly taken, the verdict in favor of the plaintiff was warranted, the presumption of law being that the company was guilty of negligence.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Action by W. C. McWhorter against the Central of Georgia Railway Company. Judgment for plaintiff.

Defendant brings error. Affirmed.

J. Branham and F. W. Copeland, for plaintiff in error. Bale & Shaw, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 471)

LONGMORE v. STEGALL.

(Supreme Court of Georgia. Dec. 10, 1904.)

APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

1. The evidence for the claimant was to the effect that the land levied on had been purchased and paid for by her with her own funds. The evidence for the plaintiff in *fi. fa.* tended to show that the defendant had a bond for titles to the land; that plaintiff's money was advanced on the faith thereof, and used partly in paying the purchase money and partly in making improvements thereon; that other payments were made out of the defendant's salary; that he was insolvent; and that having the deed made to his wife was a voluntary conveyance by an insolvent. The evidence being conflicting, and sufficient to sustain a verdict finding the land subject, and the verdict having been approved by the trial judge, this court will not interfere with his refusal to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by J. P. Stegall against E. U. Longmore. Judgment for plaintiff, and Ellen Longmore, on levy of an attachment, filed a claim. From judgment against plaintiff, she brings error. Affirmed.

Stegall, obtained judgment against A. Longmore on an attachment. It was levied on a lot of land in Emerson, Ga. Mrs. Ellen Longmore, the wife of the defendant, filed a claim. It appeared that the debt of Stegall arose in 1888, at a time when A. Longmore had a bond for titles to the land in controversy; and, according to the testimony for the plaintiff, the money had been advanced by him in order to enable the defendant to make improvements on the lot. It also appeared that when the defendant came to Emerson, shortly before the loan, he stated that he had recently failed in business, and there was also evidence sufficient to warrant the finding that he was insolvent. The testimony for the claimant tended to show that she was a nonresident; that when her husband came to Emerson it was understood that he was to contract for her for a lot; that he negotiated the purchase of the land in controversy; that the bond for titles, as originally drawn, was in the name of Mrs. Longmore, but, because she was absent and could not sign the purchase-money note, he himself signed the note, and took the bond in his name. The evidence was directly conflicting as to who paid for the land. The evidence for the claimant was to the effect that she had done so with her own money,

and that therefore, and in execution of the original understanding, the deed was made to her when the purchase price was finally paid. On the contrary, the evidence for the plaintiff tended to establish that part of his advance and part of Longmore's salary went to pay the purchase price. There was some evidence as to statements by Longmore indicating an intent to hinder creditors.

T. C. Milner and Jno. H. Wikle, for plaintiff in error. Thos. W. Milner & Sons, for defendant in error.

LAMAR, J. (after stating the foregoing facts). From the statement of facts it will be seen that the case, in its last analysis, involved the question as to whether having the deed made to the wife was a gift by an insolvent, leaving the land subject to his debts. The evidence in her favor was very strong and circumstantial, and would have sustained a verdict in her favor. That for the plaintiff in *fi. fa.*, however, was in direct conflict with that for the claimant, and sufficient to sustain a verdict finding the land subject. There is no error of law assigned. The verdict has been approved by the trial judge, and this court will not interfere with his judgment in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(121 Ga. 416)

BALDWIN v. WEBB.

(Supreme Court of Georgia. Dec. 10, 1904.)

ACTION FOR BOARD—EVIDENCE.

1. In a suit by the keeper of a boarding house for board and lodging of defendant and others, where the defendant claims that the entertainment was, by agreement, to be furnished free of charge, a verdict for the plaintiff is not authorized unless the evidence shows that the defendant contracted to pay at an agreed price, or that the entertainment furnished was reasonably worth the amount found therefor, or that such amount was in accordance with the usual and customary rates charged by plaintiff.

2. Where there is no evidence from which the jury can determine the amount for which they should find, a verdict for any amount is unauthorized.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by J. A. Webb against T. A. Baldwin. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Payne, for plaintiff in error. W. E. Mann, for defendant in error.

SIMMONS, C. J. Suit upon an account for \$74.65 was brought by Webb against Baldwin. On appeal from a justice's court, the case was tried in the superior court. From the evidence it appeared that Webb rented and kept a boarding house or hotel at Catoosa Springs. Baldwin purchased the property, and went there with his wife and several servants and employes for the purpose

of improving the condition of the property before he took charge of it. In the meantime Webb continued to run the place, and furnished board and lodging to Baldwin and the others of his party. Webb paid Baldwin no rent for the property. During this same period Webb received and entertained other boarders, collected from them the price of their entertainment, and retained all that he thus made out of his business. About six weeks after Baldwin purchased the property, Webb moved away, and Baldwin took possession. Some ten days thereafter Baldwin and Webb had a settlement by which the former paid the latter for certain articles left on the place, Webb giving his receipt for such payment. This receipt was dated June 19, 1903. On July 17, 1903, plaintiff wrote defendant a letter in which he inclosed an account for \$16.85. In his letter, and at the foot of the account, he stated that he made no charge for the board and lodging of defendant and Mrs. Baldwin. The letter also contained an unequivocal statement that the account was correct. On the account plaintiff also wrote the statement that he "guessed" the board of one Capt. Rockyback was to be charged to defendant. On the trial, and in bringing the suit, plaintiff claimed that defendant owed him on account \$74.65. No indebtedness was incurred between the time of the rendition of the first account and the time of bringing suit upon the larger account. The account sued on contained all of the items embraced in the account rendered in July, but the prices were in several instances raised. The account sued on also contained a number of items not embraced at all in the earlier account, including a claim for the price of the board and lodging of Col. and Mrs. Baldwin. So much of the evidence is undisputed. The plaintiff testified that the account sued upon was correct and unpaid, that Col. Baldwin had promised orally to pay board for himself, his wife, and the members of his party, and that the settlement had in June was not to cover all accounts, but only those enumerated. The receipt then given by him recited that it was "in full of all accounts," but he testified that this statement had been inserted in it after he had signed it, and without his knowledge or consent. As to why he had in July rendered an account for an amount so much smaller than that which he subsequently claimed to be due him, plaintiff attempted no explanation. The defendant testified that he and plaintiff had entered into an oral agreement whereby plaintiff was to be allowed to keep and run the boarding house free of rent until defendant took charge of the place, in consideration for which plaintiff undertook to furnish defendant and his party with board and lodging without charge. Defendant also testified that Capt. Rockyback and one or two others whose board was included in the plaintiff's

account were not members of the party included in this agreement, and that defendant was in no way responsible for their debts, and did not promise to pay for their entertainment. Defendant also testified that the receipt of July 17th was signed by plaintiff just as it appeared on the trial, and was in full of all accounts and claims existing at the time of its execution. Defendant admitted two or three of the smaller items of the account, and one of them appeared, without dispute, to have arisen after the date of the June receipt. In payment of this item defendant sent plaintiff a check for \$2, but plaintiff testified that he had never received the check. The jury returned a verdict in favor of the plaintiff for \$66.40, principal, besides interest and costs. The defendant moved for a new trial. The motion was overruled, and he excepted.

Assuming, as we must for the purposes of this case, that the evidence of the plaintiff was true, we still think that the verdict returned by the jury was without sufficient evidence to support it. There was evidence to show that the defendant had agreed to pay for the board and lodging furnished himself and his party, but none that any rate was agreed upon. There was no express agreement to pay at a specified rate, nor was there any agreed standard by which any definite rate could be ascertained. It cannot be said that the verdict was authorized on the idea that one who becomes a guest at an inn renders himself liable for his entertainment at the usual and customary rate of charges made by the innkeeper, for in the present case, even treating plaintiff as the keeper of an inn, there was no evidence as to what were the usual and customary rates charged by the plaintiff for the entertainment of guests. Nor was there any evidence as to what the entertainment furnished defendant and his party was reasonably worth. Thus there was nothing from which the jury could determine the amount for which they should find for the plaintiff. In the absence of all evidence as to the amount for which defendant was liable on the items for board and lodging, the jury was not authorized to find at all for the plaintiff on those items of the account. There were other items as to which there was evidence of the propriety of the amount charged, but the verdict was so large as necessarily to have been based in great part upon the items for board and lodging for which, as we have just shown, there could be no lawful finding for the plaintiff. We do not mean to intimate that the jury ought to have found for the plaintiff at all upon the disputed items of the account, for, in view of the evidence presented in the record, we cannot understand how any impartial jury could have determined the case against the defendant. The plaintiff is claiming, under an express contract which he testified was made in May, an item which

in July he had "guessed" was chargeable to defendant. He has increased the amount of items which he had formerly stated to be correct. He is suing for numerous items which were not included in the statement of account for the correctness of which he had so unequivocally vouched. His claim has grown nearly fivefold, and yet he offers no explanation whatever. His testimony does not seek to excuse the increase in his claims, and the record leaves a strong impression that the truth in this regard is probably inconsistent with the justice of plaintiff's claim. However that may be, we are clear that the evidence did not authorize a verdict for the amount found by the jury, and that the court below erred in not granting a new trial.

Judgment reversed. All the Justices concur.

(121 Ga. 384)

WEST v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

HOMICIDE—INSTRUCTIONS.

1. Under no theory of the case would a charge upon the subject of manslaughter, either voluntary or involuntary, have been applicable. The verdict was amply warranted by the evidence, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Lige West was convicted of murder, and brings error. Affirmed.

R. N. Holtzclaw, for plaintiff in error. John C. Hart, Atty. Gen., and Wm. Brunson, Sol. Gen., for the State.

CANDLER, J. The accused was convicted of the murder of his wife, and, his motion for a new trial being overruled, he excepted. The motion complains only that the verdict was contrary to law and the evidence, and that the court erred in failing to give in charge to the jury the law relating to voluntary and to involuntary manslaughter. The evidence for the state amply warranted the verdict of guilty of murder. The accused offered no evidence, but relied on his statement, which was to the effect that he killed his wife accidentally, in an effort to resist an attack upon him with a deadly weapon made by a man who was accompanying her at the time. It has been repeatedly ruled that, in the absence of a written request, the trial court is in no event required to charge upon a theory of defense presented only by the statement of the accused. See *Andrews v. State*, 118 Ga. 4, 43 S. E. 852; *Darby v. State*, 79 Ga. 64, 3 S. E. 663. Aside from this, however, even the statement in the present case did not authorize a charge on the subject of manslaughter, either voluntary or involuntary. The motion for a new trial

was entirely without merit, and was properly overruled.

Judgment affirmed. All the Justices concur.

(121 Ga. 362)

WATTS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. There being no merit in the contention of the plaintiff in error that the evidence did not warrant a finding that he actually did, as charged in the indictment, point and aim a pistol at another, and there being no complaint that any error of law was committed at the trial, no reason appears why the judgment overruling his motion for a new trial should be set aside.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

J. O. Watts was convicted of crime, and brings error. Affirmed.

D. B. Nicholson and Martin Cannon, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 329)

McFARLIN v. STATE.

(Supreme Court of Georgia. Nov. 10, 1904.)

GRAND JUROR—DISQUALIFICATION—PLEA IN ABATEMENT.

1. The act of 1903 (Acts 1903, p. 83) expressly declares that a grand juror who has served at one term is ineligible to serve as juror at the succeeding term; and such disqualification may be taken advantage of by challenge made, or plea in abatement filed, in due time.

2. In this case the plea complied with the requirements suggested in *Lascelles v. State*, 16 S. E. 945, 90 Ga. 372, 35 Am. St. Rep. 216, and was not subject to demurrer.

(Syllabus by the Court.)

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Handy McFarlin was convicted of crime, and brings error. Reversed.

A. H. Freeman, for plaintiff in error. H. A. Hall, Sol. Gen., for the State.

LAMAR, J. McFarlin was indicted at the September term, 1904, of Coweta superior court. He filed a plea in abatement on the ground that under the act approved August 15, 1903 (Acts 1903, p. 83), three of the grand jurors by whom the indictment was returned were ineligible, because they had previously served as grand jurors at the March term, 1904, of Coweta superior court; that no warrant had been issued for his arrest; that no bond had been given by him to appear at court; that he had no notice or knowledge that the grand jury at the September term would attempt to indict or would indict him; that he had had no prior opportunity to challenge the ineligible grand jurors; and that

his plea was filed at the first opportunity he had for making this objection. There is no written demurrer or traverse in the record. It is, however, recited that, this "plea having been filed and argued, the same is hereby overruled."

We cannot, of course, consider statements of what occurred at the hearing, made in the briefs of both counsel, but which are not included in the judge's certificate. No traverse having been filed, and the record failing to show that the case was submitted, as in *Wells v. State*, 118 Ga. 556, 45 S. E. 443 (7), to the judge or to the jury, and it not appearing that the case was heard by him or the jury on evidence, we are forced to the conclusion that the plea was stricken on motion, as being insufficient.

It is always necessary that challenges to jurors should be in due time, or else there will be a conclusive presumption that the want of qualification has been waived by all concerned. *Jordan v. State*, 119 Ga. 443, 46 S. E. 679. But here the plea avers that the defendant had no knowledge or reason to believe that any bill of indictment would be presented to the grand jury. It sets out facts excusing his nonaction, and meets the requirements suggested in *Lascelles v. State*, 90 Ga. 372, 16 S. E. 945, 35 Am. St. Rep. 216. The plea, therefore, was not filed too late. The three grand jurors were incompetent to serve at the September term, 1904, if in truth they had served at the March term, 1904. The plea was therefore good in substance, and, upon proof of the facts charged, the indictment should have been quashed or abated. The language of the statute and the public policy to be subserved apply as well to grand as to petit jurors. It is intended as a relief, and to equalize jury duty. But it is also intended to prevent the same persons from constantly serving, whether they wish to or not. One grand jury may return no bill. Grand juries are charged with many important public duties. The same facts in both classes of subjects may come before the succeeding body, and the public is entitled to a complete change of membership from term to term. Such is the language of the law, and, where the objection is seasonably made, advantage can be taken of the fact that the body has not been duly constituted.

Judgment reversed. All the Justices concur.

(121 Ga. 466)

BOMAR v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. Dec. 12, 1904.)

CONTINUANCE—ILLNESS OF PARTY.

1. Where, on the hearing of an application for a continuance on account of the illness of a party, the evidence introduced was of such a character as to authorize a finding that there had been "several" previous continuances granted the applicant for the same cause, the judge did not abuse his discretion in overruling the

¶ 1. See *Continuance*, vol. 10, Cent. Dig. § 147.

motion to continue; and this is true though there was no dispute as to the party's illness and consequent inability to attend court. *Stanford v. New England Mortgage Co.*, 34 S. E. 600, 110 Ga. 274, and citations.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Geo. F. Gober, Judge.

Action by the Equitable Mortgage Company against C. E. Bomar. Judgment for plaintiff. Defendant brings error. Affirmed.

W. A. James, for plaintiff in error. Payne & Tye, J. A. Noyes, and Roberts & Hutcheson, for defendant in error.

COBB, J. Judgment affirmed. All the Justices concurring.

(121 Ga. 363)

MEADOWS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

INTOXICATING LIQUORS—GIVING AWAY—EVIDENCE.

1. Where a merchant gives away whisky to his customers, it is a question of fact for the jury whether he does so for the purpose of inducing trade in violation of Pol. Code 1895, § 1548. Such a violation is made penal by Pen. Code 1895, § 451.

2. Under the evidence in the county court the jury could fairly have found that the whisky was given away by the accused to his customers to induce trade at his place of business, and the judge of the superior court did not err in refusing, upon certiorari, to set the verdict aside.

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Walker Meadows was convicted of a sale of intoxicating liquors, and brings error. Affirmed.

R. H. Lewis, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 390)

SUMMERFORD v. STATE.

(Supreme Court of Georgia. Dec. 10, 1904.)

CRIMINAL LAW—INSTRUCTIONS—ASSIGNMENTS OF ERROR.

1. There was no error in charging that the law is no respecter of persons, and that whether one of the parties is white and the other colored should have no weight with the jury.

2. The charge intimated no opinion as to the credit which should give to the witnesses, nor did it have a tendency to prejudice the minds of the jury against the defendant.

3. There was no error in the other rulings complained of, and the verdict was warranted by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Jim Summerford was convicted of crime, and brings error. Affirmed.

Busbee & Busbee, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LAMAR, J. It was not error to charge that the law is no respecter of persons, and that whether one of the parties interested is white and the other colored should have no weight with the jury. The caution was not improper. It had no tendency to prejudice their minds against the defendant, and intimated no opinion as to the credit they should give the different witnesses.

The fifth and sixth grounds of the motion do not contain complete assignments of error. One does not indicate the evidence of the officer which was objected to, and the other is qualified by a note of the judge, which shows that he fully stated the principle on which the defendant relied. Indeed, the only complaint is that the instructions complained of were given at the conclusion of the charge, but there is no indication as to how or why this was erroneous, or operated to the prejudice of the defendant.

According to the statement of the defendant, the shooting was without malice, and in self-defense, the result of an altercation which began in words, and ended in each party shooting at the other. The evidence for the state made out a more serious offense against the defendant. There was no error in refusing to grant a new trial where the verdict was shooting at another with a recommendation for misdemeanor punishment.

Judgment affirmed. All the Justices concur.

(121 Ga. 449)

NORMAN v. GOODE et al.

(Supreme Court of Georgia. Dec. 12, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. A party is bound, at his peril, to submit on the trial all competent evidence in his favor he has at hand. If he had knowledge of the fact, and the same could have been proved at the trial by evidence other than that newly discovered, a new trial will not be granted, unless the movant can satisfactorily explain why he did not attempt to use the evidence then at hand. A stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly discovered evidence than to an ordinary motion on that ground.

Simmons, C. J., and Lamar, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by C. C. Goode, executor, and others, against C. B. Norman. Judgment for plaintiffs. Defendant brings error. Affirmed.

E. Winn Born, for plaintiff in error. Green, Tilson & McKinney, for defendants in error.

FISH, P. J. Amanda A. Sanders, formerly Clark, married Charles B. Norman, in Gwinnett county, this state, in 1883, and died there, intestate, 1897, without a lineal descendant, and owning a certain house and lot in the town of Norcross. After her death

her sisters, M. A. Goode and Ora O. Clark, and her niece, Harriet E. C. Norton, claiming to be her heirs at law, brought an action against Norman to recover the house and lot. Plaintiffs contended that Norman married Anna Hancock in Harris county, this state, in July, 1866, from whom he had never been divorced; that she was living at the time of his marriage to Mrs. Sanders, and therefore his marriage to Mrs. Sanders was void, and he was not her heir at law. Norman's contention was that he married Henrietta Prescott in Jacksonville, Fla., in February, 1865, was never divorced from her, that she was living when he married Anna Hancock, but died in 1869, before his marriage to Mrs. Sanders, and therefore his marriage with Anna Hancock was void, his marriage to Mrs. Sanders was valid, and he was her sole heir at law. On the trial the Hancock marriage was proved by a certified copy of the license and certificate from the ordinary's office of Harris county. Norman submitted evidence to the effect that he and Henrietta Prescott lived together as husband and wife in Jacksonville, Fla., in the early part of 1865, and that the repute in her family and in the community where they lived was that they were husband and wife. Norman testified, in general terms, that he was married to her in Jacksonville, Fla., in February, 1865, but did not give any of the circumstances of the marriage, whether there was a license or ceremony, and, if so, who officiated, or whether there were any witnesses present. There was a verdict for the plaintiffs. Norman moved for a new trial, which was refused, and he excepted. This court (113 Ga. 121, 38 S. E. 317) affirmed the judgment of the trial court refusing a new trial, and held that "the presumption of law, founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person;" and that, as the bare statement of Norman in his testimony that he was married to Henrietta Prescott was merely a conclusion of his from the facts surrounding his relations with her, which were not detailed by him, but which were referred to in the testimony of other witnesses who testified in his behalf, and as the testimony of these witnesses merely raised a presumption, from cohabitation and repute, of a marriage between Norman and Henrietta Prescott, when such presumptive marriage came in competition with his marriage in fact to Anna Hancock, shown to have taken place in strict conformity to law, the marriage in fact prevailed; that Anna Hancock was the lawful wife of Norman; that he was incapacitated to marry Mrs. Sanders, and was therefore not her heir at law, and that plaintiffs were entitled to recover the property in dispute. Subsequently Norman made a second, or extraordinary, motion for a new trial, on the ground of newly discovered evidence. The alleged newly discovered evi-

dence, which was set out in exhibits attached to the motion, consisted of a certified copy from the War Department at Washington, D. C., of a marriage license, dated at Jacksonville, Fla., February 23, 1865, and issued by Capt. J. W. Johnson, 3d U. S. C. T., and provost marshal of the district of Florida, reciting that martial law existed throughout such district, and authorizing any minister of the gospel to join N. B. Norman and Henrietta Prescott in marriage, and to make return to the office of such marshal; also a certified photographic copy from the War Department of a certificate, entered on the license, by John W. Swain, pastor of the Methodist Episcopal Church, at Jacksonville, Fla., that he had solemnized the rite of matrimony between N. B. Norman and Henrietta Prescott on February 23, 1865. There were also exhibits of certified copies from the War Department of orders showing that martial law was in operation in Florida in February, 1865, and that Capt. Johnson was then provost marshal of the district of Florida; also a certified copy from the War Department of an order by the Assistant Adjutant General, dated April 7, 1865, that "all military records, such as files of public letters, letter books, other books and other record books, muster rolls, &c. * * * required for future reference in the settlement of claims against the government and for other official purposes," be forwarded by express to the Adjutant General's office by the officers of discontinued commands, if such records were not necessary for use at the department headquarters. There were also exhibits of ordination of J. S. Swain as a deacon and elder in the Methodist Episcopal Church, dated respectively 1836 and 1838, authorizing him to perform the ceremony of marriage, etc. Other exhibits were: The affidavit of J. W. Swain, who deposed that he was the son of J. S. Swain; that he found the certificates of ordination above referred to among his father's papers; that his father was pastor of the Methodist Episcopal Church in Jacksonville, Fla., in February, 1865, but was not an army chaplain, and that he died in 1875; that deponent knew his father's handwriting, and that from the certified photographic copy of the marriage certificate he knew that his father wrote and signed the original. A certified copy of Ordinance No. 3 of the Constitutional Convention of Florida, adopted November 4, 1865, declaring all marriages valid which had been solemnized in that state since January 10, 1865, by an ordained minister of the gospel, etc. A certified copy of article 15, § 6, of the Constitution of Florida, adopted February, 1868, validating "all proceedings, decisions or actions accomplished by civil or military officers in Florida acting under authority of the United States subsequent to January 10, 1865, and prior to the final restoration of the state to the government of the United States," viz., July 31, 1868. Certified copies of acts of the Legisla-

not attempt to use the evidence at hand. 14 Enc. Pl. & Pr. 802. The principle of this rule has been recognized and followed in many cases. *Davis v. Zumwalt*, 1 White & W. Civ. Cas. Ct. App. § 596; *Herman v. Mason*, 37 Wis. 273; *Hinson v. Catoe*, 10 S. C. 311; *Bledsoe v. Little*, 4 How. (Miss.) 13; *Conrad v. Conrad*, 9 Phila. 510; *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741; *Chapman v. Moore*, 107 Ind. 223, 8 N. E. 80; *Davis Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Hanley v. Life Ass'n*, etc., 69 Mo. 380; *Gullett v. Housh*, 7 Blatchf. (Ind.) 52; *Nixon v. Christie*, 84 Ga. 496, 10 S. E. 1087. In *Jinks' Case*, 117 Ga. 714, 44 S. E. 814, it was said: "The discovery of evidence which is simply cumulative of that of the existence of which a party knew when the case was tried, and which he then might have introduced, cannot be ground for a new trial." Applying the rule announced to the facts disclosed by the record in the present case, did the court err in overruling the extraordinary motion for a new trial? The alleged new and material fact, evidence of which is claimed to have been discovered by the movant after the rendition of the verdict against him, and after the overruling of his former motion for a new trial, is that a marriage in fact—one solemnized in accordance with a license, and by a ceremony performed by a minister of the gospel—was entered into between the movant, Norman, and Henrietta Prescott, in Jacksonville, Fla., on February 23, 1865; and the alleged newly discovered evidence relating to this alleged new and material fact is the license and certificate found on file in the War Department at Washington, D. C. All the other evidence attached as exhibits to the motion relates to this marriage license and the certificate thereon, and, disconnected therefrom, would not be considered as cause for a new trial. Was the marriage in fact a new fact which Norman did not discover until after the verdict against him? In the nature of things, it was not. He was a party to the marriage, and, of all persons, must have known that it had taken place. But, aside from that, it appears from the record, in the affidavit made by the attorneys who represented Norman on the trial, that he knew and remembered the marriage in fact at and before the trial, and that these attorneys then knew of it. The language of this affidavit, in reference to what these attorneys did before the trial, is: "That they asked C. B. Norman who married him, and he answered that he got a marriage license in Jacksonville, Fla.—not stating that a provost marshal issued same—and was married by a minister, whose name he had forgotten and could not recollect. That they further inquired of Norman as to who was present at his marriage with Henrietta Prescott, and he was unable to give the names of any witnesses who were present." If Norman had testified on the trial to what he

then knew (that is, that he procured a license to marry Henrietta Prescott, and that he was married to her by a minister, but that he could not remember from whom he procured the license, nor the name of the minister), then there would have been evidence of a marriage in fact between him and Henrietta Prescott, and all presumptions would have been in favor of the validity of such a marriage—that both parties consented, that they were both competent, that the minister officiating was authorized to perform the ceremony, and that the marriage license was properly issued. In other words, his testimony would have been evidence of a valid marriage in fact. 19 Am. & Eng. Enc. Law, 1202 et seq.; Dale v. State, 88 Ga. 552, 15 S. E. 287, and cit. And who can say but that the jury would have believed his testimony and rendered a verdict in his favor? If he or his counsel, having evidence of a marriage in fact, were content to submit on the trial circumstances sufficient to prove only a presumptive marriage, over which a subsequent marriage in fact prevailed, then he must take the consequences. Our opinion is that the alleged newly discovered evidence was not such as to require the grant of a new trial, even if tested by the rule applicable to ordinary motions for new trials. Extraordinary motions for new trials, based on the ground of newly discovered evidence, are viewed by the courts with even less favor than original motions on such ground, and a stricter rule has been applied to the former. In Cox v. Hillyer, 65 Ga. 57, it was held: "The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character. Whilst the newly discovered evidence now brought to the attention of this court discloses some facts not in evidence before, yet, in its general character and bearing, it is merely cumulative to the case heretofore presented, and would scarcely have produced a different result on the ordinary motion for new trial, much less can it give to this proceeding the peculiar characteristic of being 'an extraordinary motion.'" It was said in East Tenn. Va. & Ga. R. Co. v. Whitlock, 75 Ga. 77, that the motion for new trial in extraordinary cases provided for in our Code was intended in a great degree to take the place of a bill in equity for a new trial; and in Robinson v. Veal, 79 Ga. 633, 7 S. E. 159, it was held: "For equity to set aside a verdict at law on account of newly discovered evidence, the evidence discovered must be decisive of the controversy, and there must be no want of diligence to discover it before

the trial at law." In Wimpy v. Gaskill, 79 Ga. 620, 7 S. E. 156, it was held: "That, at the time of trial, certain letters relevant to the issue were misplaced, and after diligent search could not be discovered, would lay the foundation for proving their contents. On discovery of the letters after verdict, etc., their contents not having been put in evidence, a bill for new trial is not maintainable because the letters were misplaced, more especially if their contents would merely serve to corroborate one side in a conflict of parol evidence, and not of themselves be decisive of the controversy." In the opinion in that case it was said that if the lost instrument had been a contract between the parties, such as a deed or note, or perhaps a receipt, and which would absolutely control the question at issue, and if there were no question of negligence, the bill would be one which equity ought to retain, and, if nothing else appeared, decree in favor of a new trial. In Hays v. Westbrook, 96 Ga. 219, 22 S. E. 893, it was held that the trial court did not abuse its discretion in granting a new trial on extraordinary grounds. There the lost paper which was found after the trial was a deed to the property in question, and the movant had no notice or knowledge that the instrument existed until its accidental discovery after verdict. The ruling was therefore in accord with what was said in Wimpy v. Gaskill, supra. A certified copy of a marriage license, with the marriage certificate entered thereon, is not conclusive evidence of the marriage. It may be contradicted or shown to be a forgery. It is not in contemplation of law "the best evidence." It is of no higher grade than the testimony of witnesses. 1 Bish. Marriage, Div. & Sep. § 991. Granting, therefore, that the certified copies of the license and certificate attached to the motion in this case could be considered as record evidence, it would not be absolutely decisive of the question in controversy, and therefore would not require the grant of the extraordinary motion for a new trial.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., and LAMAR, J., who dissent.

(121 Ga. 381)

EQUITABLE MFG. CO. v. BIGGERS.

(Supreme Court of Georgia. Dec. 9, 1904.)

SALE—ACTION FOR PRICE—DEFENSE.

1. Where a written contract of bargain and sale stipulates that "this sale is made under inducements and representations herein expressed, and no others," it is not a valid defense to an action for the price of the goods that the purchaser was induced to enter into the agreement by reason of false representations made by an agent of the seller, but not contained in the contract, when there is nothing to show that the purchaser was misled or deceived as to its contents, or in any manner prevented from ascertaining the same.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by the Equitable Manufacturing Company against W. E. Biggers. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Odell and R. J. & J. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

FISH, P. J. The Equitable Manufacturing Company sued Biggers for \$185, the price of a lot of jewelry which he purchased from the plaintiff, under the terms of a written contract between them, a copy of which was attached to the petition. The contract contained the following stipulations: "This sale is made under inducements and representations herein expressed and no others. The purchaser hereby waives all right to claim failure of consideration or goods are not like sample or not according to order unless he has exhausted the terms of warranty and exchange." "Warranty and Exchange Obligation: Any jewelry in this assortment failing to wear satisfactorily will be duplicated free of charge if returned to us within five years. Jewelry can be exchanged for new jewelry in plated, filled or solid gold any time within twelve months from date of invoice." "The Equitable Mfg. Co. hereby agrees to send a good bond of \$185 to South Chattanooga Savings Bank to protect the purchaser in all the conditions of trade, including the guarantee of profits of \$58 a year, each year for three years per slip furnished by the Equitable Mfg. Co."

One of the amended pleas filed by the defendant contained the following allegations: "Defendant says that the writing now attached to the petition was procured by fraudulent representation of the agent of the plaintiff in representing that said goods were merchantable and were all right, when in fact said representation made by said agent, and there set out in said writing, was false. Said agent guaranteed that defendant should have a profit of \$58 per year for room in his store." "Plaintiff moved to strike all those portions of defendant's plea wherein he alleged that the contract sued on was procured by fraud, on the ground that the facts set up in these pleas did not state such fraud as the court could thereon give relief." This motion was overruled by the court, to which ruling the plaintiff excepted *pendente lite*. There was a verdict for defendant, and, plaintiff's motion for a new trial being denied, it excepted, assigning error upon the exceptions *pendente lite*, and also upon the refusal to grant a new trial.

As will have been observed, the motion to strike was confined to "those portions of defendant's plea wherein he alleged that the contract sued on was procured by fraud." The amended plea from which the allegations of the defendant quoted above are taken is

the only plea wherein the defendant averred that the contract was procured by fraud, and, in passing upon the assignment of error on the overruling of the motion to strike, we are necessarily confined to the question of the merits of that particular plea, notwithstanding the arguments of counsel here were not so restricted. We think it clear, in view of the explicit stipulations of the contract of sale, and the entire absence of any averment in the plea that the defendant was misled or deceived as to the contents of the contract, or in any manner prevented from ascertaining the same, he was estopped from setting up as a defense that he was induced to execute the contract by reasons of the fraudulent representations of the plaintiff's agent as to the quality of the goods purchased and guaranty of profits for room in the store. "This sale is made under inducements and representations herein expressed, and no others," is the plain and unambiguous language of the contract. The right to claim failure of consideration was expressly waived unless the defendant should exhaust the terms of warranty and exchange as specified in the contract, and there was not even an intimation in the plea that defendant had complied, or made any effort to comply, with such terms. The plea merely sought to set up that certain representations (presumably oral) made by plaintiff's agent to defendant, contemporaneously with the execution of the contract, and which induced defendant to enter into the same, were false and fraudulent, and this, too, in the face of the explicit agreement on the part of the defendant that the contract was made under the inducements and representations expressed therein, and no others. The plea was, for the reasons given, if for no others, without merit, and the court erred in refusing to strike it.

The view we have taken renders it unnecessary to pass on the assignments of error made in the motion for a new trial.

Judgment reversed. All the Justices concur.

(121 Ga. 376.)

TURNER'S CHAPEL AFRICAN M. E. CHURCH v. P. A. LORD LUMBER CO.

(Supreme Court of Georgia. Dec. 9, 1904.)

JUDGMENT—MOTION TO SET ASIDE.

1. The motion to set aside the judgment was sufficient as against a general demurrer. (Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by one Woods against the P. A. Lord Lumber Company. Garnishment issued against the Turner's Chapel African Methodist Episcopal Church. From a judgment against the garnishee, it brings error. Affirmed.

H. B. Moss, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

SIMMONS, C. J. In October, 1903, Woods sued out an attachment before a justice of the peace in Fulton county, Ga., against the P. A. Lord Lumber Company, on the ground that it was indebted to him and was a non-resident. A certified copy of the proceedings was sent to Cobb county, and a magistrate in that county on October 27, 1903, issued a garnishment against Turner's Chapel A. M. E. Church. Proper service was had of the summons of garnishment, which was returnable to the superior court of Cobb county. On November 16, 1903, the garnishee answered, admitting assets in its hands. In February, 1904, the defendant dissolved the garnishment as provided in Civ. Code 1895, § 4568. Notice of this dissolution was then given the proper officers of the garnishee by the magistrate before whom the attachment had been sued out. Subsequently counsel for the garnishee tendered to counsel for the defendant the amount which the garnishee had admitted owing the defendant. This tender was declined, the defendant claiming that the indebtedness was for a larger amount. Thereafter, at the March term, 1904, of Cobb superior court, counsel for the garnishee took an ex parte order that the garnishee pay into court the amount of its admitted indebtedness, and that the clerk of the court pay to counsel for the garnishee the sum of \$25 as a fee for his services—this fee to be paid out of the fund paid into court—and that the garnishee be then discharged. At the same term of the court the defendant made a motion asking that this order be set aside. In the motion the above facts were recited. When this motion came on to be heard, counsel for the garnishee demurred to it upon the ground "that said motion fails to set out any reason why the judgment should be set aside." This demurrer was overruled, and, "respondent's counsel stating that no further cause would be shown, or answer filed," the court granted an order setting aside the former judgment or order. To this the garnishee excepted.

As we have seen, the demurrer filed to the motion was very general in its terms, whilst the motion itself stated all of the facts from the commencement of the attachment proceedings to the granting of the ex parte order sought to be set aside. The motion shows that the garnishment had been dissolved by giving bond under section 4568 of the Civil Code of 1895, and that after this was done the garnishee, with full knowledge that the garnishment had been dissolved, took the order sought to be set aside. When the garnishment was dissolved by giving bond, the garnishee was relieved, and the effects in its hands should have been paid to its creditor, the defendant. After the dissolution of the garnishment, the garnishee must respond to the defendant, and cannot relieve itself by paying the money into court. It was claimed, however, that the motion

did not show that the defendant was an "incorporation not incorporated by the laws of this state," so as to have any right to dissolve the garnishment under section 4568. The motion does not contain any express averment to this effect. It does, however, set out that the garnishment was dissolved under this section of the Code. The presumption is that the officer who took and approved the bond was satisfied by proper showing that defendant was "an incorporation not incorporated by the laws of this state." Otherwise he would have refused to accept and approve the bond. Besides this, the motion shows that the attachment was issued against the defendant as a non-resident. This and its name are sufficient to show prima facie that it is a nonresident corporation, for its name, "P. A. Lord Lumber Company," is such as to import a corporation. "When the name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect which prevails until the contrary is shown." *Holcomb v. Cable Co.*, 119 Ga. 466, 46 S. E. 671. The "P. A. Lord Lumber Company" being a party to this case, and its name importing that it is a corporation, there is a presumption that it is a corporation. Added to this are the facts that the attachment was issued against it as a non-resident, and that a bond given by it under section 4568 of the Civil Code of 1895, was accepted by the proper officer; the presumption being that such officer would not have accepted the bond unless he had been satisfied by proper proof that the defendant was an "incorporation not incorporated by the laws of this state." We think there was enough in the motion to show, as against a general demurrer, that the defendant was an incorporation not incorporated under the laws of this state. If the garnishee wished to rely upon the point that the motion did not set out with sufficient certainty and distinctness that it was a nonresident corporation, this question should have been raised by special demurrer.

After the dissolution of the garnishment, the garnishee could not then be properly discharged by paying into court its admitted indebtedness, and the order to that effect was properly set aside.

Judgment affirmed. All the Justices concur.

(121 Ga. 331)

THOMAS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

HOMICIDE—VERDICT—CONSTRUCTION.

1. According to the express decision in *Wright v. State*, 2 S. E. 693, 78 Ga. 192, and the oft-followed principle announced in *Bulloch v. State*, 10 Ga. 47 (4), 54 Am. Dec. 369, a verdict that the defendant is guilty of involuntary manslaughter will be referred to the highest grade of that offense, and be treated as equivalent to

a finding that he was guilty of involuntary manslaughter in the commission of an unlawful act.

2. The decision to the contrary in *Thomas v. State*, 38 Ga. 117, is, on review, overruled. (Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Joe Thomas was convicted of involuntary manslaughter, and brings error. Affirmed.

Thomas was indicted for murder, for that with force and arms, and acting with malice aforethought, he did unlawfully kill Will Benton by striking him and beating him with a stick. At the August term, 1904, of Spalding superior court, a trial was had, resulting in the following verdict: "We, the jury, find the defendant guilty of involuntary manslaughter." The verdict was received and recorded, and the jury trying the case were discharged and dispersed. At the same term of the court the defendant moved in arrest because the verdict was too uncertain and indefinite, was unlawful, not justified by the pleadings, did not find whether the killing was in the commission of a lawful or an unlawful act, and that no legal judgment could be rendered, since the court could not tell what grade of involuntary manslaughter was meant. The court overruled the motion, and the defendant excepted.

Marcus W. Beck and J. R. Williams, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., for the State.

LAMAR, J. The careful and thorough review of the authorities, and the convincing opinion of Justice Cobb in *Watson v. State*, 116 Ga. 607, 43 S. E. 82, make it unnecessary to re-examine the question as to the possible verdicts which may be rendered in a trial on an indictment for murder. It was there shown that under such a charge the defendant might be found guilty of murder, voluntary manslaughter, involuntary manslaughter in the commission of an unlawful act, involuntary manslaughter in the commission of a lawful act without due care, assault with intent to murder, shooting at another, stabbing, or assault. In other words, whatever may be the rule elsewhere, under the Penal Code of this state each of these minor offenses may by inclusion be as well charged as though the indictment contained separate counts for each of these distinct offenses. Treating the indictment, therefore, as in effect containing several counts, the rule is that a general verdict of guilty will be referred to that count charging the greatest offense. "Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity." Pen. Code 1895, § 1033. As far as possible, they must be construed according to uniform rules. At the beginning it would no doubt have been quite as

logical to say that a verdict of guilty in such cases should be referred to the lowest instead of to the highest offense charged. But whether because there was a conclusive presumption that the jury would have indicated that fact if they intended to find the defendant guilty of the lesser offense, or whether because, after the verdict of guilty, the presumption of innocence had been removed, and in vindication of the law the defendant would be considered as guilty of the highest offense named, the principle was established that verdicts of guilty were to be referred to that count charging the greatest offense. By analogy, under an indictment for murder, including therein a charge of manslaughter, a verdict for manslaughter is to be treated as a finding that the defendant was guilty of voluntary manslaughter, that being the highest grade included within that term. *Welch v. State*, 50 Ga. 128, 15 Am. Rep. 690. By exactly the same principle, if the defendant is found guilty of involuntary manslaughter the verdict must be treated as a finding that he has committed the highest grade of that offense, or involuntary manslaughter in the commission of an unlawful act. Such was the express ruling of two judges in *Wright v. State*, 78 Ga. 192, 2 S. E. 693. That decision was based upon the early and carefully considered case of *Bulloch v. State*, 10 Ga. 60, 54 Am. Dec. 369, the principle of which has repeatedly been followed, even where one count charges a felony and the other a misdemeanor. *Dean v. State*, 43 Ga. 218; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650; *Long v. State*, 12 Ga. 317; *Adams v. State*, 52 Ga. 565. The decision complained of was in accordance with these cases, and there would be no room for questioning the ruling but for a dictum in *Welch v. State*, supra, and the opinion in *Thomas v. State*, 38 Ga. 117. This want of harmony was recognized in *Isom v. State*, 83 Ga. 378, 9 S. E. 1051. But the decision in *Thomas' Case* was opposed to the principle of the prior ruling in *Bulloch's Case*, and the later decision in *Smith v. State*, 109 Ga. 479, 35 S. E. 59, nor has it at any time been followed by a full bench. *English v. State*, 105 Ga. 516, 31 S. E. 448. In view of these conflicts, the Solicitor General asked and obtained permission to review the *Thomas Case* if the court should be of opinion that it was controlling authority. As has been shown, it was in conflict with the principle laid down in the earlier and authoritative ruling in *Bulloch's Case*. But that there may be no room for future discussion, the court is unanimously of the opinion that the *Thomas Case* should be overruled, and that the principle as expressly announced in *Wright v. State* should be followed. There was no error in refusing to arrest the judgment.

Judgment affirmed. All the Justices concur.

(121 Ga. 333)

DICKERSON v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

HOMICIDE—VERDICT—CONSTRUCTION.

1. On the trial of one indicted for murder, the legal effect of a verdict of "guilty of involuntary manslaughter" was to find the accused guilty of the highest grade of the last-named offense, viz., involuntary manslaughter in the commission of an unlawful act. *Thomas v. State* (this day decided) 49 S. E. 273.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

B. F. Dickerson was convicted of manslaughter, and brings error. Affirmed.

Twiggs & Oliver, James T. Evans, and E. H. Abrahams, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 469)

ROWAN v. COMBS.

(Supreme Court of Georgia. Dec. 12, 1904.)

HOMESTEAD—RIGHTS OF BENEFICIARY—RENTS AND PROFITS.

1. This case is controlled in principle by the ruling in *Moore v. Peacock*, 21 S. E. 144, 94 Ga. 523.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by J. M. Rowan, guardian, against W. J. Combs. Judgment for defendant. Plaintiff brings error. Affirmed.

John S. Gleaton, for plaintiff in error. J. F. Wall, for defendant in error.

COBB, J. The guardian of an imbecile brought an action to recover the possession of land and for mesne profits. The title pleaded was the interest of the ward as the sole beneficiary of a homestead estate which had been carved out of her husband's estate. Pending the action the ward died. Her death being suggested of record, it was ordered that the suit proceed in the name of the guardian, he being clothed by law with all the powers of an administrator of his ward's estate. See *Jefferson v. Bowers*, 33 Ga. 452. The defendant filed a plea in abatement, alleging that, on account of the termination of the homestead estate by the death of the sole beneficiary, her legal representative had no further interest either in the land or in mesne profits which had accrued during her lifetime. This plea was sustained, and the action was abated. To this judgment the plaintiff excepted.

It is conceded that, the homestead estate having terminated upon the death of the sole beneficiary, the legal representative of the beneficiary had no right to recover possession of the land; but it is contended that the mesne profits which had accrued during

the existence of the homestead estate, and withheld from the beneficiary, were a part of her estate, and could be lawfully recovered by her legal representative. At common law the general rule was that where the lessor of the plaintiff was a life tenant, and died pending the action, the suit might be revived by the legal representative of the lessor for the sole purpose of recovering mesne profits, damages, and costs. See *Tyler on Ejectment*, p. 578. The contention is that the case is controlled by this principle of the common law. In *Moore v. Peacock*, 94 Ga. 523, 21 S. E. 144, it was held that those who were beneficiaries of a homestead during their minority, and had arrived at full age, could not thereafter recover from one who had wrongfully excluded them from the possession and enjoyment of the estate during their minority, and who had received the rents and profits to his own use. It was said that, their right as beneficiaries having become extinguished by lapse of time, they had no claim as beneficiaries, and consequently no title, legal or equitable, on which they could recover; the ruling going to the extent that all rents and profits arising out of the homestead land, except those consumed while the homestead estate was in existence, belonged to the owner of the realty out of which the homestead was carved. This case is directly controlling in principle, and seems to make the peculiar character of the homestead estate a sufficient reason for not applying the rule of the common law above referred to. If the arrival at majority of minor beneficiaries, and consequent termination of the homestead estate, precluded them from recovering from a wrongdoer rents and profits which were unlawfully withheld from them during their minority, it would seem, upon like principles, that the death of an adult beneficiary whose interest terminated with her life would have a similar effect; and the fact that the suit was brought during her life would not seem to be a distinction in principle between the two cases.

Judgment affirmed. All the Justices concurring.

(121 Ga. 345)

LAMB v. MAYOR, ETC., OF CITY OF BRUNSWICK.

(Supreme Court of Georgia. Dec. 9, 1904.)

MUNICIPAL CORPORATIONS—TRIAL OF POLICEMAN—EVIDENCE.

1. Where articles of impeachment are preferred against a policeman, one of the specifications charging him with "cursing and using profane and vulgar language" in and about the guardhouse, it is error to allow a witness to testify, over proper objection of the defendant, that witness had heard defendant use language which witness "considered profane and vulgar and cursing," without stating literally or in substance what was the language used. Whether such language was in fact vulgar, profane, or cursing, was a matter to be determined by the court.

2. Where in such a trial the defendant is charged with violating a rule which prescribes that members of the police force shall not "use profane language * * * while on duty or in uniform," and the evidence fails to show that when such language was used the defendant was on duty or in uniform, a conviction on this charge is contrary to law.

3. Where the defendant is also charged with committing a breach of the peace by drawing a pistol, and the evidence clearly shows that the circumstances justified him in so doing, a conviction upon this charge is unauthorized and illegal.

4. None of the other charges preferred against the defendant were supported by any evidence whatever which tended to establish their truth.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

T. L. Lamb, on trial before the mayor and council of the city of Brunswick, was discharged as policeman of such city, and brings error. Reversed.

Frank H. Harris and Woodford Mabry, for plaintiff in error. C. P. Goodyear, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(121 Ga. 386)

HARTNETT v. STILLWELL.

(Supreme Court of Georgia. Dec. 9, 1904.)

PARTNERSHIP — PURCHASE OF REALTY TITLE — ADMINISTRATOR'S SALE — PURCHASE BY SURVIVING PARTNER.

1. The legal title to real estate acquired by purchase with partnership funds, whether the title be taken to the individuals composing the partnership or to the partnership, is in the partners as tenants in common, but the equitable title to the real estate thus acquired is in the partnership.

2. The purchaser at an administrator's sale of a deceased partner's interest in land, the title to which was in the partnership name, acquired only the interest of the deceased partner in the land on a settlement of the partnership affairs. The proceeds of the sale belonged to the estate of the deceased partner, and were not partnership assets.

3. Where the title to the land was taken in the individual names of the partners, an innocent purchaser at the sale of a deceased partner's interest by his administrator would take such interest unincumbered by the secret equity of the partnership, and the proceeds of the sale could be recovered from the administrator by the surviving partner, if necessary to pay partnership debts.

4. But, if the surviving partner becomes the purchaser at such sale, he will be estopped from claiming the proceeds of the sale as partnership property, and must look to the land itself as assets of the partnership subject to the payment of its debts.

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Action by W. H. Hartnett against John F. Stillwell. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. T. Daniel, for plaintiff in error. T. E. Patterson and Lloyd Cleveland, for defendant in error.

EVANS, J. W. H. Hartnett sued John F. Stillwell, as administrator of J. D. George, to recover \$500 alleged to be due by reason of the following facts: Petitioner and J. D. George composed the firm of George & Hartnett. Among the assets of the firm were two lots of land in the city of Griffin, one known as the "White Place" and the other being a vacant lot on Solomon street. George died, and Stillwell became his administrator, and as such sold a one-half interest in the White place and the vacant lot as belonging to his intestate, and collected the proceeds, amounting to \$455.90. The firm was insolvent at the time of George's death, and the firm assets in the hands of petitioner as surviving partner are insufficient to pay the partnership debts. The proceeds of the property sold by Stillwell, as administrator of the deceased partner, should be paid over to petitioner, to be applied to the payment of debts of the firm.

The defendant, in his plea, denied the substantial averments of the petition, and the case was referred to an auditor. When the case came on to be heard before the auditor, the defendant filed a demurrer to the petition, and moved to dismiss the same because no cause of action was set out. The demurrer was sustained by the auditor and he so reported. Afterwards evidence was submitted before the auditor, and the uncontradicted evidence established the following facts: George and Hartnett were partners doing a general merchandise business, and in the course of their business purchased a house and lot from W. R. and M. J. White, paying therefor with partnership assets, and procuring the deed to be made to John D. George and W. H. Hartnett. They also purchased a vacant lot on Solomon street from A. M. Elledge, and paid therefor with partnership funds, the deed to the last-mentioned lot being made to George & Hartnett. John D. George died, and Stillwell became his administrator. At the time of the death of George the firm was insolvent. All of the firm assets were exhausted in the payment of partnership debts. Stillwell, as the administrator of George, sold a one-half interest in the vacant lot to Dr. Drewry for \$178.70, and a one-half interest in the White place to W. H. Hartnett for \$276. These amounts were insufficient to pay the debts of the firm of George & Hartnett.

Upon these facts the auditor found that the plaintiff had no lien, in law or equity, on the money or proceeds in the hands of the administrator arising from the sale of the real estate, and that he was not entitled to recover. The plaintiff filed various exceptions to the rulings of the auditor, which were overruled by the court, and the report

¶ 1. See Partnership, vol. 23, Cent. Dig. §§ 101-105.

of the auditor was made the judgment of the court. He excepts to the judgment of the court dismissing his exceptions to the auditor's report. It is not necessary to notice the various exceptions to the auditor's report, and for this reason they are omitted. The question raised by the demurrer and the conclusion of fact by the auditor are identical. The evidence sustained the petition, so that the controlling question in the case is the right of the plaintiff to recover on the case he made.

The plaintiff's theory is that a surviving partner has a lien on the fund in the hands of an administrator of a deceased partner arising from a sale by the administrator of the interest of the deceased partner in partnership property. Under the undisputed facts, as found by the auditor, the plaintiff neither had a lien on the proceeds of the sale of the deceased partner's interest in the lands sold by his administrator, nor was the plaintiff entitled to recover such proceeds on any legal or equitable ground. Real estate received in payment of a partnership debt, whether the title be taken to the individuals composing the partnership or to the partnership, is to be considered at law as the property of the partners as tenants in common, subject, however, to be sold, and the proceeds thereof brought into the partnership fund for the payment of partnership debts and the settlement of balances as between the partners. *Burnside v. Merrick*, 4 Metc. (Mass.) 537; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Moran v. Palmer*, 13 Mich. 367; *Buchan v. Sumner*, 2 Barb. Ch. 163, 47 Am. Dec. 305; *Collumb v. Read*, 24 N. Y. 505; *Putnam v. Dobbins*, 38 Ill. 394. The legal title to the real estate acquired by purchase with partnership assets is in the partners as tenants in common, but the equitable title in the real estate thus acquired is in the partnership. *Bank of S. W. Ga. v. McGarragh*, 120 Ga. 944, 48 S. E. 893. This equitable title is treated as personalty, and on the death of one of the partners the survivor may sell and dispose of the entire equitable interest in the land, and the purchaser may compel a conveyance from the heirs of the deceased partner. Civ. Code 1895, § 2649. The administrator of the deceased partner has an inferior right to the surviving partner to the possession and control of partnership real estate. A surviving partner has the right to the control and possession of the property of the firm, and the administrator or heirs of the deceased partner can claim only such of the partnership property as remains after the partnership debts are all paid. *Valentine v. Wyssor* (Ind.) 23 N. E. 1076, 7 L. R. A. 788, and cases cited. When the administrator of the deceased partner administered on the interest of his intestate, and sold that interest, the purchaser acquired only the title which the administrator's intestate had. The doctrine of caveat emptor applies to administrator's

sales, and purchasers at such sales acquire the intestate's title cum onere. This title was the interest of his intestate in the land on a settlement of the partnership affairs. *Dickenson v. Moore*, 117 Ga. 887, 45 S. E. 240. The proceeds of the sale represent the partner's individual interest in the land, and that interest, as we have seen, was the legal title, subject to the sale of the land, if necessary, to discharge partnership obligations. It follows, therefore, that as to the vacant tract of land conveyed to the partnership, as such, the surviving partner may, in a proper proceeding instituted against the purchaser at the administrator's sale, subject that tract to the payment of partnership debts. The deed to this vacant lot was taken in the name of the partnership, and when the administrator of the deceased partner undertook to sell his intestate's interest therein the purchaser was chargeable with notice of the partnership character of the land. His title would be for no greater interest in the land than was owned by the administrator's intestate. Upon proof that the land so purchased was necessary to pay partnership liabilities, the surviving partner could subject it to the payment of firm debts. All the purchaser acquired at this sale was the interest of the deceased partner, and that interest was what remained to John D. George after a settlement of the liabilities of George & Hartnett. The proceeds of the sale belong to the estate of the deceased partner, and are no part of the assets of the partnership.

The title to the White lot was taken to the members of the partnership in their individual names as tenants in common. The deed did not disclose that it was partnership property, or that it was purchased with partnership funds. An innocent purchaser at the administrator's sale would have acquired a good title as against the surviving partner, because the doctrine of caveat emptor does not extend to secret equities. Thus it was held in *Johnson v. Equitable Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933, that "a bona fide purchaser at a sheriff's sale, who has paid the purchase money without notice of an equity, will be protected against the same." If the purchaser of the White lot had been an innocent purchaser, without notice of the partnership claim on the land, the purchase money would be substituted for the land, and the administrator of the deceased partner would be liable to account to the surviving partner for the same. But the record discloses that the surviving partner was himself the purchaser. He was charged with knowledge of the nature of the title and the interest the partnership had in the land, and by suffering it to be sold as the property of his deceased partner's estate and becoming the purchaser at that sale he is estopped from now claiming the proceeds as partnership property.

There being no conflict in the evidence,

the conclusion of the auditor that the plaintiff was not entitled to recover was right, and the court did not err in dismissing the exceptions to his report and making the report the judgment of the court.

Judgment affirmed. All the Justices concur.

(121 Ga. 402)

CENTRAL OF GEORGIA RY. CO. v. HENSON.

(Supreme Court of Georgia. Dec. 12, 1904.)

DEATH BY WRONGFUL ACT—PETITION—AMENDMENT—EVIDENCE.

1. A petition for damages, brought by a father, under Civ. Code 1895, § 3828, for the homicide of his minor daughter, which alleges that the petitioner "has been and is unable to earn a support for his family without the assistance of his said daughter," may be amended by striking therefrom the words "his family," and inserting in lieu thereof the word "himself."

2. The allegations of the petition as to the prospective earning capacity of the deceased were not subject to the special demurrer filed thereto.

3. In a suit for damages by a father for the homicide of his minor child, brought under Civ. Code 1895, § 3828, it is not necessary, in order for the plaintiff to recover, that he show by the evidence that he depended alone upon the deceased child for his entire support. It is sufficient if he establish partial dependence upon the child's labor, accompanied by substantial contribution therefrom to his maintenance.

4. The evidence was conflicting, but that for the plaintiff warranted a finding that the homicide on account of which the suit was brought was brought about by the negligence of the defendant's employes, and that the deceased was free from fault.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by J. W. Henson against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. Branham, McHenry & Maddox, and F. W. Copeland, for plaintiff in error. Dean & Dean, for defendant in error.

CANDLER, J. This was a suit for damages against a railroad company, brought by a father for the homicide of his minor daughter. The original petition alleged that the petitioner's wife died in the year 1901, and that since her death "petitioner and his family, consisting of [the deceased] and four small children, have lived together, each working for the support and maintenance of the family as they were able to do; they having no means of support except such as they derived from their labor. Petitioner, being in feeble health and disabled by an injury, has been and is unable to earn a support for his family without the assistance of his said daughter." By an amendment, which was allowed over the objection of the defendant, the words "his family," in the sentence last quoted, were stricken, and the word "himself" substituted therefor. The defendant

demurred generally and specially, but its demurrer was overruled. It also filed an answer, and the case was tried before a jury, which returned a verdict for the plaintiff for \$2,500. The defendant brings the case to this court on exceptions to the overruling of its motion for a new trial and of its demurrer, and to the allowance of the amendment to the petition heretofore mentioned.

1, 2. The cause of action stated by the plaintiff in his original petition was the wrongful homicide of his daughter. It is true that the fact that the deceased assisted the petitioner in his efforts to support his family would not authorize a recovery by reason of the section of the Code under which this suit was brought, and to that extent the petition as originally filed was defective and subject to special demurrer. The disposition made of the earnings of the deceased, however, was not the cause of action. It was matter which should have been properly pleaded in the first instance, but the failure to so plead it did not render the petition fatally defective and not subject to amendment. In the case of *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318, is to be found an exhaustive review of the law relating to amendment of pleadings in this state. The previous decisions of this court on the subject were either harmonized, or, so far as they were in conflict with the principles announced, overruled, and the rulings there made may be taken as the settled law of this state in regard to amendments. Tested by that decision, we do not hesitate to say that the judgment allowing the amendment to the petition in the present case was correct. The demurrer filed by the defendant raises, in part, the same question as the objection made to the allowance of the amendment, and to that extent the demurrer need not be separately considered. The only remaining ground of demurrer was that certain allegations of the petition as to the earning capacity of the deceased were remote, speculative, and contingent; but a careful reading of the allegations in question shows that they are not fairly open to that objection.

3. It is urged that the verdict was contrary to law and the evidence, for the special reason that the evidence showed that the plaintiff was not dependent upon his minor daughter for a support for himself. It is well settled by the decisions of this court that section 3828 of the Civil Code of 1895, under which the present action was brought, being in derogation of the common law, must be strictly construed; that, in order to authorize a recovery thereunder, the deceased must at the time of the homicide have been contributing in a substantial degree to the support of the plaintiff; and that the plaintiff must have been dependent upon the deceased for such support and maintenance. *Smith v. Hatcher*, 102 Ga. 160, 29 S. E. 162; *Georgia R. Co. v. Spinks*, 111 Ga. 571, 36 S. E. 855. It is equally well settled, however, that it is

not necessary, under this section, that the plaintiff show that he or she depended alone upon the deceased for his or her entire support; but that partial dependence upon the child's labor, accompanied by substantial contribution therefrom to the maintenance of the plaintiff, is sufficient; and further that where a family of working people includes parents and a minor child, and the child renders valuable services, of which the mother, or, if no mother, the father, gets the benefit, the parent is dependent upon the child if the child thus contributes substantially to his or her support. *Daniels v. S., F. & W. Ry. Co.*, 86 Ga. 236, 12 S. E. 365; *R. & D. R. Co. v. Johnston*, 89 Ga. 560, 15 S. E. 908; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *A. & C. R. Co. v. Gravitt*, 93 Ga. 396, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; *Georgia R. Co. v. Spinks*, supra. In the present case it was shown that the plaintiff was capable of earning, and at times did earn, some money, which went to his support and maintenance. It was also shown, however, that from various causes he was disabled, and had not the capacity to provide his entire support; and there was some evidence to show that at the time of the homicide of his minor daughter he was in part, at least, dependent on her earnings for his support, and that those earnings contributed to a material extent to his support.

4. The evidence as to the negligence of the employés of the railroad company and the contributory negligence of the deceased was very conflicting. That for the defendant made out a perfect defense, and, if believed by the jury, would necessarily have resulted in a verdict in its favor. On the contrary, the evidence for the plaintiff warranted a finding that the defendant's train was cut in two at the crossing where the homicide occurred for the express purpose of allowing the crowd of mill operatives, of which the deceased was one, to cross the track; that after the train was cut in two the deceased and others were invited to cross the track; that all this was done by employés of the railroad company; that the attempt of the deceased to go across the track was not an act of negligence; and that, while the crowd of people were pouring across the track between the separated portions of the train, those portions were negligently brought together again, catching the plaintiff's daughter between two cars and crushing out her life. It was for the jury to say which of these conflicting theories was correct, under the evidence. The conflict was resolved by them in favor of the plaintiff. The trial judge, by his refusal to grant a new trial, in effect expressed his approval of their finding, and the verdict will not be disturbed by us.

The amended motion for a new trial contained several grounds in which complaint was made of rulings of the trial judge as to the admission of evidence, but, as these grounds were not insisted upon before this

court, they will be considered as having been abandoned.

Judgment affirmed. All the Justices concur.

(121 Gr. 178)

EDWARDS v. KELLOGG.

(Supreme Court of Georgia. Dec. 9, 1904.)

PLEADING—DEMURRER—HARMLESS ERROR.

1. The erroneous refusal to sustain a demurrer to so much of a petition as prays for attorney's fees on the ground that the defendant had been stubbornly litigious and had acted in bad faith will not work a reversal of the judgment where the jury does not find a verdict for attorney's fees, but when evidence is admitted in support of such a prayer, and this evidence is, in its tendency, prejudicial to the defendant on the main issues involved, a new trial must result.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Action by T. W. Kellogg against L. G. Edwards. Judgment for plaintiff. Defendant brings error. Reversed.

Griffin & Attaway and A. S. J. Hall, for plaintiff in error. N. A. Morris, J. Z. Foster, and Dupree & Dobbs, for defendant in error.

CANDLER, J. The petition filed by the plaintiff makes, in effect, the following case: The plaintiff and W. O. Thomas were partners in a mercantile business in the town of Blue Ridge, and on a day named the defendant purchased from the plaintiff his interest in the partnership at an agreed price of \$1,650. By the terms of the agreement the defendant undertook to assume and pay off the plaintiff's part of the indebtedness of the firm, and was entitled to all of the plaintiff's interest in the partnership assets. The defendant also contracted to pay \$150 of the purchase price in cash upon the consummation of the trade, and to give three notes for \$500 each for the balance, due 12 months after date, and bearing interest at 8 per cent. per annum from date. A few days after this agreement was made, the defendant paid the plaintiff \$175, but has refused to pay the balance, or any part of it, although due, and has failed and refused to give his notes as promised. It was also alleged that the defendant had been stubbornly litigious and had acted in bad faith, in that, prior to the filing of suit by the plaintiff, he entered into a written agreement to submit to arbitration the matters in controversy, and after evidence was heard by the arbitrators he withdrew from his agreement and notified the arbitrators that he would not abide by their award, thus causing the plaintiff the expense of employing counsel and entering suit. The petition prayed for judgment for \$1,475, besides interest, and for \$250 attorney's fees. The defendant demurred to so much of the petition as claimed attorney's fees. The demurrer was over-

ruled. He also filed an answer in which he admitted having entered into an agreement to purchase the interest of the plaintiff in the partnership mentioned, but averred that this agreement was induced by the express guaranty of the plaintiff that the debts of the firm did not exceed \$8,000, and that this guaranty was not true, the partnership debts, as a matter of fact, amounting at that time to \$17,797.96, one-half of which had been paid by the defendant as the successor of the plaintiff in the partnership. The answer prayed that the defendant have judgment against the plaintiff for \$4,898.88, or one-half of the excess of the amount really owed by the firm at the time of the contract over the amount represented by the plaintiff to be the maximum indebtedness of the partnership. On the trial the jury returned a verdict for the plaintiff for \$1,475, without interest or attorney's fees. The defendant's motion for a new trial was overruled, to which order, as well as the order overruling his demurrer, he excepts.

There can be no doubt that the demurrer to so much of the petition as sought to recover attorney's fees should have been sustained. The allegations of the petition do not set up such bad faith as the law recognizes as a warrant for the recovery of attorney's fees. "Bad faith," as contemplated by the statute, refers to the original transaction, rather than to the motive with which the defense is made. *Traders' Ins. Co. v. Mann*, 118 Ga. 381 (7), 45 S. E. 426. It matters not how stubborn or litigious a defendant may be, he is not liable for attorney's fees so long as he has proceeded in good faith and has a substantial right in the premises. *Lowry Banking Co. v. Atlanta Piano Co.*, 95 Ga. 149, 22 S. E. 42. The fact that the defendant entered into an agreement to submit to arbitration, and, after evidence had been heard, but before an award had been made, withdrew from his agreement, furnished no ground for a judgment against him for attorney's fees, for it was his right to withdraw at any time before an award. *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 697. We do not, however, reverse the judgment of the court below on the ground of error in overruling the demurrer, because it is apparent, from the fact that no verdict was returned for attorney's fees, that this error was harmless. But the admission of evidence in support of the allegations of the petition which were attacked by the demurrer was, in our opinion, error requiring the grant of a new trial. The natural tendency of this evidence was to prejudice the minds of the jury against the defendant by creating the impression that, in withdrawing from a submission to arbitration into which he had entered, he was acting in bad faith; and to this extent it was not only irrelevant, but harmful. The plaintiff's petition was, in effect, an action on account for the agreed purchase price of a one-half interest in the

partnership, while the plea of the defendant was one of failure of consideration. The evidence demanded a finding that the defendant purchased the plaintiff's interest in the partnership, and agreed to pay therefor \$1,650, only \$175 of which was ever paid; that the plaintiff stated to the defendant that the debts then due by the firm would approximate \$8,000; that, as a matter of fact, they exceeded this amount; that the debts due to the firm were also in excess of the amount represented by the plaintiff; and that the defendant, upon learning that the statements made to him by the plaintiff were not true, did not attempt to rescind the contract, but adhered to it, reaping whatever benefits accrued to him from a membership in the firm, as well as bearing his proportion of the partnership burdens. Under the evidence, the jury might have found for the plaintiff the full amount sued for, with the exception of attorney's fees. They might have found that the consideration flowing to the defendant had partly failed, and have returned a verdict for the plaintiff on a quantum valebat, or they might have found that the \$175 already paid the plaintiff by the defendant had completely discharged the obligation, in view of the failure of the alleged warranty. Thus, in view of the conflict of the evidence on this vital and controlling point, it is clear that the admission of irrelevant evidence having a tendency harmful to the defendant must work the grant of a new trial.

The motion for a new trial also complains of alleged error in the charge of the court, but those charges, in our opinion, fairly set forth the law applicable to the case. We reverse the judgment solely on the ground of error in the admission of evidence as above set out.

Judgment reversed. All the Justices concur.

(121 Ga. 360)

CARTER v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT—EVIDENCE.

1. In only one of the charges complained of was there any error, and that was cured by language used in immediate connection therewith. The evidence, the admission of which is assigned as error, does not appear to have been objected to on the trial in the court below, and therefore, even if erroneously admitted, will not work the grant of a new trial. The assignments of error on the failure of the judge to charge certain principles alleged to have been applicable are without merit, for the reason that no written requests were made that such charges be given. The evidence warranted the verdict, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2639.

J. C. Carter was convicted of assault, and brings error. Affirmed.

G. A. Whitaker and W. M. Hammond, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

CANDLER, J. The accused was found guilty upon an indictment charging him with assault with intent to rape. He moved for a new trial, which was refused, and he excepted. The motion, aside from the general grounds that the verdict was contrary to law and the evidence, complains of various extracts from the charge of the court, of the admission of stated evidence, and of the failure to give in charge certain principles alleged to have been applicable to the case.

Most of the charges complained of are assigned as error because the court failed to charge in immediate connection therewith that, before a conviction could be had, the jury must be satisfied of the guilt of the accused beyond a reasonable doubt, and that the evidence must preclude every other reasonable hypothesis than that of the guilt of the accused. An examination of the charge of the court shows that the law of reasonable doubt was sufficiently explained to the jury. To hold that this principle must be reiterated after the instructions given upon each and every principle of law given in charge would lead to a manifest absurdity. Aside from this, it is too well settled to need citation of authority that it will not be held error that the court, in giving in charge a correct and applicable principle of law, failed to charge in connection therewith some other equally applicable and correct principle. Only one of the charges complained of presents any difficulty, and that was in the following language: "You must be satisfied, gentlemen, under the law, that the defendant in the commission of this act—and you will look to all of the evidence, all of the circumstances surrounding the case, everything connected with it that has been admitted before you, and determine from that evidence whether or not the defendant took hold of this girl—made this assault upon her by laying his hands upon her with the intent to have carnal knowledge of her forcibly and against her will. It is necessary that you be satisfied of this fact before you would be authorized to convict the defendant of the offense of assault with intent to rape." It is claimed that the language used in the first part of this charge, "You must be satisfied, gentlemen, under the law, that the defendant in the commission of this act," assumed that the accused was guilty of the act charged in the indictment, and left to the jury only the question of his intent. It must be confessed that the language quoted is not well expressed; but a careful reading of the entire charge will show that the language immediately following, which is parenthetical in its form, made it clear that the jury could not consider the

question of intent until they had first determined that the accused laid his hands upon the girl as charged; and this, we think, cured whatever was objectionable in the part of the charge to which exception is taken.

The ground of the motion which complains of the admission of evidence does not show that any objection was made to its admission when it was offered in the trial court, and hence it cannot now be considered. The failure to charge the principles alleged to have been applicable will not be held error in the absence of written requests, and it appears that no such requests were made. The jury believed the witnesses offered by the state. The trial judge approved the verdict, and we will not, in a case where the evidence, if believed, is sufficient to make out the case charged, set aside a judgment refusing a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 384)

HARVEY v. BUCHANNAN.

(Supreme Court of Georgia. Dec. 9, 1904.)

VIOCEUS ANIMALS—LIABILITY OF OWNER.

1. The owner of a vicious or dangerous animal, who allows the same to go at liberty, is liable to one who sustains injury, as a result of the vicious or dangerous tendency of the animal, only in the event that the owner knows its vicious or dangerous character. If he does not know this fact, he will not be liable for an injury which is not the usual and natural consequence to be anticipated from allowing an ordinary animal of that kind to go at large.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by J. A. Buchanan against W. E. Harvey. Verdict for plaintiff. Defendant's certiorari was overruled, and he brings error. Reversed.

McHenry & Maddox, for plaintiff in error. Junius F. Hillyer, for defendant in error.

COBB, J. This suit originated in a justice's court. The plaintiff was the owner of a kid, of the alleged value of \$1. The defendant was the owner of a mule, and the record discloses that "her name was Maud." The cause of controversy was the death of the kid at the hands, or, to speak more accurately, at the mouth and fore feet, of the mule. The trial resulted in a verdict in favor of the plaintiff for \$1 damages and \$26.05 costs. The defendant complains because the court overruled his certiorari.

It appears from the evidence that the mule was at large, and entered the pasture of the owner of the kid, the pasture not being protected by a lawful fence. While the record discloses the district in which the suit was brought, and therefore the district

¶ 1. See *Animals*, vol. 2, Cent. Dig. §§ 222, 228, 238, 239, 236.

in which the defendant resided, it does not disclose the district in which the pasture of the plaintiff was located. The stock law is in force only in some of the districts in Floyd county, in which the cause of action arose. We, therefore, cannot determine from the record whether the case should be controlled by rules which would be applicable in a stock-law district, or by those which would apply in a district in which fences are maintained. In those districts where the stock law has been adopted, it is the duty of the owners of stock to keep them in inclosures protected by lawful fences, and a mule at large in such a district would be a trespassing animal. In those districts where the stock law has not been adopted, it is the duty of owners of land to protect their premises and crops by lawful fences against animals which are allowed to go at large. In the one case the owner of the animal would have been at fault in negligently allowing it to go at large; in the other case he would not have been to blame for merely allowing his mule to roam. We have called attention to the matter of fences, for the reason that stress has been laid in the argument upon the fact that the pasture in which the kid was killed was not protected by a lawful fence. But, under the view we have taken of the case, we do not think it is material whether the cause of action arose in a stock-law district or not. The Code declares: "A person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury." Civ. Code 1895, § 3821. This is but a restatement of the common law, and at common law, in order to support such actions, it was necessary to show, not only that the animal was vicious or dangerous, but also that the owner knew this fact. The scienter was the gist of the action. *Conway v. Grant*, 88 Ga. 40, 13 S. E. 803, 14 L. R. A. 196, 30 Am. St. Rep. 145; *Reed v. Southern Express Co.*, 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62. A careful examination of the record fails to disclose any evidence that the owner of the mule knew that the animal was vicious and dangerous. Hence there was no liability upon him for damages, whether he was at fault in allowing the mule to go at large, or whether he had a right to release it from his premises. The killing of stock is not the natural or usual consequence of allowing the ordinary mule to go at large. The destruction of or injury to crops or herbage would be. Hence, in the one case, proof of the scienter as to the mule's habits and tendencies is necessary as a part of the plaintiff's case, and in the other it is not. The judge erred in not sustaining the certiorari.

Judgment reversed. All the Justices concurring.

(121 Ga. 443)

MACON RY. & LIGHT CO. v. BARNES.
(Supreme Court of Georgia. Dec. 12, 1904.)

**TRIAL — INSTRUCTIONS—STREET RAILROADS—
INJURY TO TRAVELER—DILIGENCE—
MISTRIAL—EVIDENCE.**

1. Where the court properly instructed the jury as to the respective rights of the parties on a question in the case, the refusal to give in charge a request containing a general proposition of law, though pertinent to the question, was not cause for a new trial.

2. "What particular means or measures of diligence would be appropriate for use under the circumstances should be left to the jury." Accordingly it was not incumbent on the court to give, as requested, a charge that one who drives on and along a street railway track laid in a public highway "should be careful to look and listen with ordinary care to avoid a collision."

3. An exception to a correct charge because of failure to give, in the same connection, some other pertinent legal proposition, is not a good assignment of error.

4. It was not erroneous to instruct the jury that, in passing upon the credibility of the witnesses, "their bias or impartiality, as the same may legitimately appear from the evidence," might be considered.

5. A motion for a mistrial was not the appropriate remedy when, upon a poll of the jury, the party against whom the verdict was rendered contended that it appeared from the answers of one of the jurors that it was not his verdict.

6. There was evidence to authorize the verdict, and the court did not err in refusing a new trial. (Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by James Barnes against the Macon Railway & Light Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Dessau, Harris & Harris, for plaintiff in error. Jos. H. Hall and Steed & Ryals, for defendant in error.

FISH, P. J. 1. The defendant operated a street railroad in the city of Macon and some of the adjacent suburbs. Plaintiff was driving in his buggy longitudinally on defendant's track, in a public highway beyond the city limits, when one of defendant's cars came in collision with the buggy, resulting in the alleged injuries and damages for which he sued. On the trial defendant's counsel requested the court to charge the jury that "the street railway company, at the place where the alleged injury to the plaintiff is alleged to have occurred, had the superior right of way." The court refused to give this request, but did instruct the jury that "the public have a right to use a public highway upon which a street railway is operated, and the company has a right to use the highway upon which its track is laid, and to operate its cars thereon; but it is incumbent upon the public, in * * * driving longitudinally on the track, to exercise ordinary care and diligence * * * not to interfere with the use of the track by the railway company," and to exercise a like degree of care to avoid collisions. In view of these

instructions, we do not think the refusal to give the request was erroneous. A street railway company has no superior right to the use of the public highway in which its cars are operated, over the rights of other users of the highway, except that, from the necessity of the case, the latter, at places other than crossings, must give the company's cars the right to pass when occasion requires. In other respects the rights of street railway companies in using public highways with their cars are precisely like the rights of others who use the highways with other vehicles. As the highway is laid out for passage, each passer has a right of passage, subject only to the condition that he does not unnecessarily interfere with such use by others as they are entitled to. *Buttelli v. Railway Company*, 59 N. J. Law, 302, 36 Atl. 700; *Nellis, Street Railroad Accident*, Law, § 15; *Booth, Street Railway Law*, § 303; 27 Am. & Eng. Enc. L. 57 et seq. The instructions given to the jury clearly recognized, to the full extent, the superior right of way the defendant company had in the use of its tracks when the collision occurred; and the jury were much more likely to get from the court's instructions a correct understanding of the principle involved than they would have been from the general, abstract proposition embodied in the request. The broad assertion in the request that the railway company had the superior right of way might, if given without qualification, have impressed the jury with the idea that the railway company was in some measure exempt from the care required of it by law to avoid the collision with the plaintiff's buggy.

2. It was not erroneous to refuse to charge the jury that one who drives on and along a street railway track laid in a public highway "should be careful to look and listen with ordinary care to avoid a collision." Whatever may be the rulings on the subject in other jurisdictions, it is well settled in this state that it is not incumbent upon the court to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his senses of hearing and seeing before stepping on the track. "The precise thing which any man should do before stepping upon a railroad track is that which any prudent man would do under similar circumstances. If prudent men would look and listen, so must every one else, or take the consequences, so far as the consequences might have been avoided by that means. The court cannot instruct the jury what a prudent man would do, for, in legal contemplation, the jury know it better than the court." *Richmond & Danville R. Co. v. Howard*, 79 Ga. 44, 53, 3 S. E. 428; *Richmond & Danville R. Co. v. Johnston*, 89 Ga. 580, 15 S. E. 908; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49. "What particular means or measures of diligence would be appropriate under the cir-

cumstances should be left to the jury." *Ins. Co. of North America v. Leader*, 121 Ga. —, 48 S. E. 972. If the court should charge in a case of this character that it was the duty of a party to do a specific thing, would it not be equivalent to saying that the omission to do that thing would be negligence? It is true that in the opinion rendered in *Savannah Railway Company v. Beasley*, 94 Ga. 142, 146, 21 S. E. 285, 286, it was said that "people who intend to cross its [the street railroad's] track should be careful to look and listen in order to avoid a collision." The question in that case was whether an electric street railway company is under the duty to stop its cars before reaching the crossings of public highways for the purpose of looking and listening by the motorman, or to enable them to look and listen, when there is no apparent reason for so doing, and the question was decided in the negative. What people who are about to cross the railroad track should do was not a question in the case, and therefore what was said as to their duty in that respect appears to be obiter; but, even if it were not, it would not be controlling, in the light of the former express rulings on the subject.

3. The court instructed the jury: "If you believe from the evidence in this case that the plaintiff and defendant were both negligent, then the court charges you that, if the plaintiff was more negligent than the defendant, the plaintiff could not recover in this case, and you should so find. If, on the other hand, you believe from a consideration of the evidence in the case that both parties were negligent, then I charge you that if the evidence shows the defendant company, its officers, agents, servants, and employes, were more negligent than the plaintiff, I charge you that the plaintiff can recover, but the damages recovered by the plaintiff should be decreased by the jury in proportion to the amount of default attributed to the plaintiff from a consideration of the evidence in the case." The errors assigned upon this charge were: "(1) Because, under this charge, if the jury found that both the company and the plaintiff were negligent, they could still find for the plaintiff. As a matter of law, the plaintiff cannot recover for injuries inflicted by the negligence of the agent of a railroad company in the operation of its trains or cars if both the agent and the person injured are equally negligent at the time the injury is sustained. (2) This charge was error because it omitted any statement as to the effect of finding that the injury was occasioned by casualty where neither party was at fault. The court nowhere in his charge instructed the jury upon either of these defenses, which the defendant was entitled to have considered by the jury, and which the court in its charge excluded, and to which the court, in its charge, should have called the attention of the jury. The court nowhere in its charge called the attention of the jury

to either of the matters herein complained of and set up as error." The instructions given were correct. Under them certainly the jury were no more authorized to find for the plaintiff than for the defendant, in the event it appeared that both parties were equally negligent. The assignments of error were merely exceptions to a correct charge because the court failed to give in the same connection some other pertinent legal propositions. Such assignments of error are not well taken. *Holston v. Southern Ry. Co.*, 116 Ga. 656, 43 S. E. 29 (3). The statements that the court nowhere in its charge called the attention of the jury to the legal propositions which it failed to give in connection with the charge complained of were not assignments of error upon the charge, but were used merely as arguments why the instruction given should be held to be erroneous.

4. The court instructed the jury that in determining where the preponderance of the evidence in the case was, and in passing upon the credibility of the witnesses, "their bias or impartiality, as the same may legitimately appear from the evidence," might be considered. The exception to the charge was based upon the use of the word "bias" in this connection; the contention being that, without explanation, it was calculated to mislead the minds of the jury. We are unable to see any force in this exception. "Bias" is synonymous with "partiality," and any sensible juror would so understand; but, even if there should have been any doubt as to this, a proper request should have been made for an explanation.

5. When the verdict was read, the jury, at the request of defendant's counsel, was polled. Upon the call of the name of H. Moll, one of the jurors, the following colloquy occurred between the court and the juror: "Was that your verdict? A. Yes, sir. Was it freely and voluntarily made? A. Involuntarily. Is it now your verdict? A. Yes, sir. Was it freely and voluntarily made? A. I don't know. Do you mean that it was not made freely and voluntarily? A. I agreed to it. Was it made voluntarily or involuntarily? A. Voluntarily. By the Defendant's Counsel: Was it freely made? No, sir. By the Court: What do you understand by the distinction between a verdict freely made and a voluntary verdict? A. I did not want to give that much. Is it not your verdict? A. I agreed to it. Why did you agree to it? A. A compromise verdict. Did you freely and voluntarily agree to compromise? A. Yes, sir. Thereupon defendant, by its counsel, moved the court to direct a mistrial in said case, and not to receive the verdict of the jury, and upon the ground that it appeared that the juror H. Moll did not agree to said verdict, and the same was not his verdict, and was not freely and voluntarily made by the said H. Moll, but was involuntarily made and not freely made, and that the said juror Moll did not agree to the same as

his verdict but as a compromise verdict." The court "overruled said motion and allowed said verdict to be received and * * * recorded." Exception was taken to this ruling of the court, both in exceptions pendente lite and in the motion for a new trial. "Counsel moved the court to direct a mistrial in said case and not to receive said verdict." This, as it seems clear to our minds, was merely a motion for a mistrial. The words "and not to receive said verdict," while unnecessary in the motion for a mistrial, were, we think, evidently a part of such motion. Under the circumstances, a motion for a mistrial was not the appropriate remedy, and the court did not err in not granting it. The proper motion would have been that the verdict be not received, and the jury directed to retire to their room for further deliberation on the case. While we cannot make an authoritative ruling on the question, we will say that, in the light of former rulings of this court (*Black v. Thornton*, 31 Ga. 641; *Hill v. State*, 64 Ga. 453), we are inclined to the opinion that, even if the proper motion had been made, it would not have been erroneous to receive the verdict.

6. There was evidence to authorize the verdict, and the court did not err in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 323)

JENKINS v. FORBES.

(Supreme Court of Georgia. Dec. 9, 1904.)

ACTION ON LOST NOTE—PAYMENT—PLEADING.

1. In an action upon an established copy of a lost promissory note, payment made prior to the judgment establishing the copy may be pleaded. (Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by E. E. Forbes against V. D. Jenkins. Judgment for plaintiff, and defendant brings error. Reversed.

Moses Wright, for plaintiff in error. M. B. Eubanks, for defendant in error.

FISH, P. J. The only question presented by this record is whether, in an action upon a copy of a promissory note, regularly established in lieu of the lost original as provided by statute, the defendant can plead payment of the original note made prior to the judgment establishing the copy. In our opinion, such defense can be made. A copy established in lieu of the lost note has all the force and effect of the original. Civ. Code 1895, §§ 4751, 4754. But the established copy is no more binding than the original. In *Venable v. Born*, 40 Ga. 74, which was a proceeding to establish a lost promissory note, it was held that the fact that the consideration of the lost note was a slave did not impair the right of the owner of the note to establish a copy of the

same by a proper statutory proceeding. "The establishment of a lost note under the statute is no bar to any defense that might be set up to the original note." Prescott v. Johnson, 8 Fla. 391. In this connection, see Suwannee County Commissioners v. Columbia County, 18 Fla 78; Rockwell v. Servant, 54 Ill. 251. What was said in Vaughn v. Drewry, 79 Ga. 761, 4 S. E. 879, in so far as it conflicts with the ruling we now make, was obiter. That was a suit upon an established copy of a promissory note, to which a plea of non est factum was filed at the second term. This court, affirming the judgment of the court below, held that the plea was properly stricken because not filed at the first term. Such ruling finally disposed of the plea, and it was wholly unnecessary for the court to pass on the question as to whether the defense set up, if it had been made in time, could be made in a suit on an established copy of the note.

Judgment reversed. All the Justices concur.

(121 Ga. 386)

SOUTHERN RY. CO. v. HORINE.

(Supreme Court of Georgia. Dec. 9, 1904.)

RAILROADS—FIRES SET BY LOCOMOTIVES—PETITION—AMENDMENT—LIMITATIONS—EVIDENCE.

1. A petition alleging that fire, which the defendant railway company carelessly permitted to escape from its locomotive, ignited litter which the company had permitted to accumulate on its right of way, and, spreading therefrom, burned plaintiff's property, was amendable by alleging that the company "carelessly" permitted the litter to accumulate. Such amendment did not set up a new cause of action (City of Columbus v. Anglin, 48 S. E. 318, 120 Ga. 785), nor add a second count to the petition.

2. The words "carelessly" and "negligently" are synonymous.

3. The general rule is that an amendment to a petition relates back to the time of the filing of the original petition, which is the only date to be considered, relatively to the pleadings, on the question as to whether the action is barred by the statute of limitations.

4. "Possession of land under a claim of ownership being prima facie evidence of title in the occupant, the latter, upon proof of such possession, and without showing complete title, may maintain against a wrongdoer an action for a trespass upon the property, committed while such possession existed." McDonough v. Carter, 25 S. E. 938, 98 Ga. 703.

5. In the present case there was evidence from which the jury could have found that the plaintiff below was in the actual possession of the land upon which the property burned was situated, claiming it as his own; and the contention of the plaintiff as to the liability of the defendant for the damages caused by the fire was not without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by V. C. Horine against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

¶ 3. See Limitation of Actions, vol. 33, Cent. Dig. § 543.

Hugh M. Dorsey, for plaintiff in error. James Beall and Price Edwards, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 421)

HOBBS v. BOWIE & TERHUNE.

(Supreme Court of Georgia. Dec. 10, 1904.)

INJURY TO EMPLOYÉ—DEFECTIVE APPLIANCE—DIRECTING VERDICT.

1. This being a suit for damages by an employé against his employers, which was governed by the common-law doctrine of master and servant, and it affirmatively appearing that the servant had equal means with the master of ascertaining the defective condition of the appliance alleged to have been the cause of his injuries, no recovery can be had against the master.

2. As the defendants offered no evidence, the proper procedure was to grant a nonsuit, rather than direct a verdict for the defendants (Hines v. McLellan, 45 S. E. 279, 117 Ga. 845); but, inasmuch as the plaintiff, in his petition for certiorari, did not make this point, but contended merely that the verdict was contrary to law and the evidence, and that the issues should have been submitted to the jury for determination, the judgment of the superior court overruling the certiorari will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by H. O. Hobbs against Bowie & Terhune. Judgment for defendants, and plaintiff brings error. Affirmed.

H. F. Sharp and Moses Wright, for plaintiff in error. W. W. Brookes, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 470)

WEST et al. v. WRIGHT.

(Supreme Court of Georgia. Dec. 12, 1904.)

VENDOR AND PURCHASER—BONA FIDE PURCHASER—VOLUNTARY CONVEYANCE—APPEAL—REVIEW.

1. Where one makes a voluntary conveyance of land, and subsequently, for a valuable consideration, conveys the same land to another, who knows that the grantor has previously made the voluntary conveyance, and the grantee in the later deed sells and conveys the land to another person, who has no notice, such last grantee will be protected against the voluntary deed. Civ. Code 1895, § 3938.

2. Whether the deed in this case from a mother to her children was voluntary or for value cannot be determined by this court, as no copy or sufficient description of the deed is embraced in the record. Inasmuch as the trial judge treated the deed as voluntary, and the plaintiffs in error have failed to show that he erred in so doing, this court must also treat the deed as a voluntary one.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Janie West and others against

J. W. Wright. Judgment for defendant, and plaintiffs bring error. Affirmed.

Geo. A. Merritt and Jos. P. Brown, for plaintiffs in error. James B. Park, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 467)

SMITH v. ZACHRY.

(Supreme Court of Georgia. Dec. 12, 1904.)

BANKRUPTCY—JUDGMENT LIEN.

1. This case is controlled by the decision in *McKenney v. Cheney*, 45 S. E. 433, 118 Ga. 387.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by J. T. Zachry against J. H. Smith. Judgment for plaintiff. Defendant brings error. Affirmed.

E. T. Moon, for plaintiff in error. H. A. Hall, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 466)

CAMP et al. v. BRITT.

(Supreme Court of Georgia. Dec. 12, 1904.)

CONTINUANCE—REFUSAL—ILLNESS OF DEFENDANT.

1. Both as to the refusal of the court to grant another continuance on account of the illness of one of the parties defendant, and as to the direction of a verdict in favor of the plaintiff, this case is controlled by the decision of this court in *Stanford v. Security Co.*, 34 S. E. 600, 110 Ga. 274. Not only does it appear that the case had several times been continued because of the illness of this party, but that at the preceding term the court had announced that the case would not be again continued on that account, and that interrogatories for him should be sued out, if his testimony was desired.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by W. E. Britt against B. T. and H. A. Camp. Judgment for plaintiff, and defendants bring error. Affirmed.

W. L. Stallings, for plaintiffs in error. J. C. Newnan and W. C. Wright, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 443)

WESTBROOK v. BALDWIN COUNTY.

(Supreme Court of Georgia. Dec. 10, 1904.)

HIGHWAYS—ESTABLISHMENT—ACTION FOR DAMAGES.

1. There being evidence from which the jury could have found that the change in the public road was made under the authority of the officers of the county who were empowered by

law to do the work complained of, that the plaintiff's land abutting on the road was damaged by such change, and that plaintiff made proper demand on the county for the damages claimed, the granting of a nonsuit was erroneous. *Roughton v. City of Atlanta*, 89 S. E. 316, 118 Ga. 948, and cases cited.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by R. N. Westbrook against Baldwin county. Judgment for defendant, and plaintiff brings error. Reversed.

Allen & Pottle, for plaintiff in error. Sanford & Sanford and Hines & Vinson, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concur.

(121 Ga. 476)

MILLER v. THIGPEN.

(Supreme Court of Georgia. Dec. 12, 1904.)

NEW TRIAL—DISMISSAL OF MOTION.

1. Under the facts appearing in the record, the court erred in dismissing the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Action by H. N. Thigpen against J. D. Miller. Judgment for plaintiff, and defendant brings error. Reversed.

This case was tried at the June term, 1904, of the city court of Dublin. The defendant filed a motion for a new trial during the term, and the rule nisi was made returnable on June 27th "at the courthouse in Dublin." An order provided that the brief of evidence should be presented for approval "on or before that date, or in default the motion will be dismissed." On June 27th an order was passed which recited that the brief of evidence had not been prepared owing to sickness in the family of the stenographer, and that the hearing was for that reason postponed until July 9th, the movant to have all the rights as to filing the brief of evidence which were allowed in the first order. On July 9th the judge was absent from the county, and no action was taken on the motion. On July 11th an order was passed fixing the time for the hearing on July 16th, and purported to give to the movant all the rights accorded him in the original order. On July 16th an order was passed postponing the hearing until August 22d, which order also purported to give to the movant all of the rights conferred by the original order with reference to filing a brief of the evidence. On August 22d the judge was again absent from the county, and no action was taken on the motion. On August 31st, in vacation, the judge passed an order reciting that as there was no agreement consenting to an order preserving the right of movant until that date to present for approval a

brief of the evidence, and counsel for the respondent having made a motion to dismiss the motion for a new trial on that ground, the motion was accordingly dismissed. To this order the movant excepted.

Howard & Baker, for plaintiff in error. T. V. Sanders, for defendant in error.

COBB, J. The record discloses that the rule nisi and original order were granted in term, and that the order of August 31st was granted in vacation. It does not appear whether the other orders were in term or vacation. If these intervening orders were all in term, the effect of the failure to present for approval a brief of the evidence on August 22d would not result in a dismissal of the motion for a new trial, but would simply carry it over to the next term undisposed of, to be then dealt with in conformity to law. If, on the other hand, these orders were in vacation, the failure of the judge to take any action on the motion by written order on July 9th would carry the motion undisposed of into the next term, and would deprive the judge of jurisdiction to deal in any way with the motion prior to that time. In either event the court was without jurisdiction to pass any order in reference to the motion on August 31st in vacation. The order purporting to dismiss the motion was therefore an erroneous order, and the judgment must be reversed. The motion stands on the docket undisposed of, to be dealt with by the judge when called in its order during term. See Atlanta, K. & N. Ry. Co. v. Strickland, 114 Ga. 998, 41 S. E. 501; Napier v. Helker, 115 Ga. 163, 41 S. E. 689.

Judgment reversed. All the Justices concurring.

(121 Ga. 415)

SOUTHERN RY. CO. v. COOK.

(Supreme Court of Georgia. Dec. 10, 1904.)

RAILROADS—KILLING STOCK—EVIDENCE.

1. The evidence is undisputed that the point at or near which the plaintiff's mule was killed, though sometimes used as a crossing by pedestrians and persons riding on horseback, was in no sense a public crossing; and consequently, under the ordinances of the city of Dalton, the speed at which the train was run was not negligent per se.

2. The plaintiff relied entirely upon the presumption of negligence against the railroad company raised by the law. This presumption was completely rebutted by the testimony of the witnesses for the defendant, who were not contradicted, and the verdict for the plaintiff was therefore contrary to the evidence, and should have been set aside on motion for new trial.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Anthony Cook against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

¶ 1. See Railroads, vol. 41, Cent. Dig. § 1484.

Shumate & Maddox, for plaintiff in error. Geo. G. Glenn and Wm. E. Mann, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concur.

(121 Ga. 436)

VAUGHN v. MILNER, Sheriff.

(Supreme Court of Georgia. Dec. 10, 1904.)

WRIT OF ERROR—JURISDICTION.

1. The only ruling complained of being the overruling of the plaintiff's demurrer to a sheriff's answer to a money rule, and there having been no final judgment on the rule, this court has no jurisdiction to entertain the writ of error. United Glass Co. v. McConnell, 36 S. E. 58, 110 Ga. 616.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Application of J. W. Vaughn for a money rule on J. H. Milner, sheriff. From an order overruling a demurrer to the answer, plaintiff brings error. Dismissed.

Henry Walker, for plaintiff in error. J. F. Redding, for defendant in error.

CANDLER, J. Writ of error dismissed. All the Justices concur.

(121 Ga. 438)

TOWN OF DOUGLASVILLE v. SKINNER.

(Supreme Court of Georgia. Dec. 10, 1904.)

APPEAL—REVIEW—ERROR WAIVED.

1. Questions not alluded to in the brief for the plaintiff in error will be treated as abandoned. McKinnon v. Hope, 45 S. E. 413, 118 Ga. 462; Williams v. State, 48 S. E. 906, 121 Ga. —.

2. The evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Geo. F. Gober, Judge.

Action between H. T. Skinner and the town of Douglasville. From the judgment the town brings error. Affirmed.

W. A. James, for plaintiff in error. J. S. James, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 365)

MCCARTY v. CITY OF ATLANTA.

(Supreme Court of Georgia. Dec. 9, 1904.)

INTOXICATING LIQUORS—SALOONS—FAILURE TO CLOSE.

1. The defendant admitted that he owned the bar, and there was nothing to suggest that it was conducted during the daytime in violation of law. This and the exception in the petition for certiorari as to the revocation of the license were sufficient to show prima facie that the place belonged to the class to which the ordinance applied.

2. The ordinance, in declaring that bars shall not be kept open after 10 o'clock p. m., uses substantially the same language as Pen. Code 1895

§ 390, prohibiting the keeping open of tippling houses on the Sabbath. The construction given the statute should also be given similar language in the ordinance.

3. There was no error in overruling the certiorari from a judgment of conviction in the recorder's court.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

J. H. McCarty was convicted of a violation of an ordinance of the city of Atlanta, and brings error. Affirmed.

McCarty was found guilty in the recorder's court of the city of Atlanta of violating section 1546 of the city code, which provides that "no place for which a license is granted shall be kept open later than ten o'clock p. m., nor opened earlier than five o'clock a. m." The evidence for the city showed that a policeman passed the Star Saloon, at 38 Decatur street, at 12:40 a. m., and that, looking through the doors, he saw the defendant and two bartenders sitting around a table, drinking beer. The evidence for the defendant tended to show that he owned this bar, and another on Hunter street, which was in charge of a bartender; that, in response to a telephone message from the bartender of Decatur street, the defendant went to the Decatur street bar, accompanied by the one who kept the one on Hunter street; that when they reached the Decatur bar the door was locked; that it was opened, admitting the defendant and his other employé; that, after discussing the business which called him there, the defendant ordered beer, which was given and not paid for by the others present; that the door was opened and the entry made after the bar had been closed at night after 10 o'clock; that no sales were made, and no other business other than that above indicated was transacted. The defendant was found guilty. His petition for certiorari was overruled, and he excepted.

Arnold & Arnold, for plaintiff in error. James L. Mayson and Wm. P. Hill, for defendant in error.

LAMAR, J. 1. The defendant admitted that he owned the bar. His defense was that it was not kept open after prohibited hours for the purpose of selling liquor, but that the door had been then opened in order that he and his employé might enter and discuss business with the bartender in charge. This was enough to show that the place was not a "blind tiger" conducted even in the daytime in violation of law. Prima facie the place belonged to the class to which the ordinance applied, without further proof that the defendant had a liquor license. Besides, the petition for certiorari showed that he did have a license. The defendant assigned as error that the recorder, in imposing a fine, declared that the defendant's license as a retail liquor dealer was forfeited, and to this judgment and decision petitioner excepted.

2. If once excuses were admitted for keeping open such places upon prohibited days or after prohibited hours, the law would be practically nullified. It would rarely be possible for the state or city to meet the excuse, or to show that the place had been opened for an unlawful purpose. The fact furnishing the excuse and the illegal act after the innocent entry would so often be blended that they could not be separated. The opening absolutely prohibited by law would be legalized by the motive with which the prohibited act was done. As here, it could be said that the beer or whisky was given, and not sold, or that the business intended to be conducted or actually conducted was not the sale of drinks. If such an excuse could be given in one case, it could be in others, and the issue on each trial would be diverted from the question as to whether the place had been opened at an unlawful hour into a consideration of the question as to whether it had been opened for an innocent purpose. It is manifest that any such construction would, in effect, repeal the law, and be utterly subversive of the very policy on which it was enacted. Hence all of the decisions of this state are based upon the idea that opening during the prohibited period is the gist of the offense, and that, if the place be opened but for a moment, the statute is violated. The court will not enter on an investigation as to the motive or purpose which actuated the owner in opening and entering. *Monsey v. State*, 78 Ga. 110. Indeed, it would be hard to find any statute which has been so rigidly and strictly construed as Pen. Code 1895, § 390, against keeping open a tippling house on the Sabbath. The ordinance here uses the same term—"keep open." The same policy underlies it that underlies the statute. The language is substantially the same, and so must be the construction. In fact, it is fair to presume that the same words were used in order to secure the same construction. The ordinance does not appear to be unreasonable, but, rather, is in pursuance of a public policy within the limits of the police power. This, of course is especially true where the license is accepted in the light of the ordinance. There is a manifest difference in the rules of construction to be applied to an ordinance like this, and to an ordinance relating to a class of business like that referred to in *Wright v. Mayor of Forsyth*, 116 Ga. 790, 43 S. E. 46.

We find no error in the refusal to sustain the certiorari. It appears that the recorder stated that, in his opinion, the effect of the judgment would be to revoke defendant's license, but that was not a part of the sentence. The effect on the license is not involved in this proceeding, nor is there in the record anything to show the existence of an ordinance in the city of Atlanta on that subject.

Judgment affirmed. All the Justices concurring.

(121 Ga. 456)

WOODLIFF v. BLOODWORTH.

(Supreme Court of Georgia. Dec. 12, 1904.)

APPEAL—BOND—QUALIFICATION OF SURETY—CLAIM CASE—DAMAGE BOND—CERTIORARI.

1. Where a party has given any statutory bond with security for the payment of the eventual condemnation money, or to produce the property sued for or levied on, and a judgment adverse to the principal in such a bond has been rendered, the security therein cannot be surety on a new bond required in a proceeding seeking a reversal.

2. In such a case the surety has not only obligated himself to the opposite party, but the judgment against his principal binds the surety. The appeal or certiorari is as much for his interest as for that of his principal, and he could no more be surety for himself than the principal could be surety on such second bond.

3. So, if a damage bond is given in a claim case, and a judgment is rendered finding the property subject, and awarding damages on the ground that the claim was interposed for delay only, the surety on the claim bond could not be security on a bond given in a certiorari or appeal from such judgment.

4. But where such damage bond is given, and the verdict finds the property subject, but there is no finding that the claim was interposed for delay, the effect thereof for the time is to relieve the surety from liability under the bond, and, not then being in any way bound to the plaintiff, he may be security on a certiorari bond given by the claimant.

5. If the certiorari is sustained, there is a discharge from liability under the certiorari bond. The obligation on the damage bond is thereby revived. But in such case the surety can never be liable, as in case of appeals, on both bonds.

(Syllabus by the Court.)

Error from Superior Court, Forsyth County; Geo. F. Gober, Judge.

Action by W. A. Bloodworth against one Blackstone. Judgment for plaintiff, and T. J. Woodliff interposed a claim. Judgment finding property subject, and claimant brought certiorari. From an order dismissing the writ, he brings error. Reversed.

An attachment in favor of Bloodworth against Blackstone was levied upon certain personal property as the property of Blackstone. Woodliff interposed a claim, giving Puett as security on the damage bond. The jury on appeal found the property subject, but awarded no damages against the claimant or his surety on the damage bond. The claimant applied for a writ of certiorari, and gave Puett as the sole security on the bond in the certiorari proceeding. Bloodworth moved to dismiss the certiorari on the ground that the security upon the certiorari bond was the same security that Woodliff had previously given upon the damage bond in the claim case. The court sustained the motion, and Woodliff excepted.

Brooke & Henderson and James K. Hines, for plaintiff in error. H. L. Patterson, for defendant in error.

LAMAR, J. (after stating the foregoing facts). Where a party has given a statutory bond with security for the payment of the

eventual condemnation money, or to produce property sued for or levied on, or to pay damages in case he fails to recover, and a judgment adverse to the principal has been rendered, the security on such bond cannot be surety on a new bond required in proceedings seeking to secure a reversal. In some cases the effect of this judgment is to entitle the opposite party to a concurrent judgment against the surety, and in others it to a certain extent binds the sureties when suit is thereafter brought on the bond. The appeal or certiorari, or other similar proceeding to reverse the judgment, is for his benefit as well as that of the original principal. The surety is bound by the existing judgment. In many cases it is against him and has created a lien against all of his property. The obligation to pay the eventual condemnation money or to produce the property is still of force, and will be made effective by a judgment against his principal in the appeal or certiorari. If, therefore, the security thus completely bound or liable to be completely bound puts his name to the new bond, the opposite party gets no new security for the ultimate payment of the debt or production of the property. To secure the appeal, or the right to except to the judgment rendered, the law requires that some additional security shall be given to the successful party. This provision must be complied with regardless of the solvency of those thus already bound. The millionaire must give a bond in order to secure an appeal from a case involving less than \$100. A millionaire surety bound by such original judgment must in effect likewise give additional security when that judgment is sought to be reversed by proceedings instituted in the name of the principal. *Eufaula Co. v. Plant*, 86 Ga. 624; *Stewart v. Hall*, 106 Ga. 176, 32 S. E. 14. See, also, *Napier v. Woodall*, 118 Ga. 830, 45 S. E. 684, where the surety had signed not only the claim bond, but also the forthcoming bond. It was held that such surety could not be surety on an appeal bond. The defendant in error relies on these decisions. But the principle on which they were put does not sustain his contention. In each of them the surety was already bound to produce the property, or to satisfy any money judgment which might be obtained by the plaintiff. This liability continued throughout the entire litigation, and was not suspended by appeals or bills of exception or writ of certiorari. So, too, the damage bond given in attachments and garnishments is a continuing liability to the opposite party. As an appeal is an investigation de novo, in which the jury might award damages, the security on this damage bond could not have made himself liable on the appeal bond, and thus be bound in two capacities at the same time to the plaintiff. But the claim bond is peculiar. It creates a special and limited obligation, differing widely from that arising from forthcoming

garnishment, attachment, appeal, or certiorari bonds. It is not an undertaking to pay the opposite party in case of failure to recover, nor is it an undertaking to produce property or to pay in whole or part the eventual condemnation money, but merely to be liable for damages, not to exceed a certain amount, in the event it is found that the claim is interposed for delay only. Here the verdict of the jury had discharged the surety from this liability. It was not legally possible that the judgment on the certiorari could award these damages. If the certiorari was sustained, of course there would be an end of responsibility on the certiorari bond. If it was overruled, the surety, having been already exonerated, would not be liable for damages for delay in the claim case, but only liable on the certiorari bond. In no event could he be liable both on the certiorari bond and the damage bond, though in case the certiorari was sustained, and the case remanded for a new trial, responsibility on the damage bond might be revived, and liability thereunder enforced, if on the second hearing a verdict should be found that the claim had been interposed for delay only. But when the certiorari bond here was signed, the surety was not then liable on the damage bond, and was therefore in a position to sign the bond given in the certiorari proceeding.

Judgment reversed. All the Justices concur.

(121 Ga. 358)

PHILLIPS v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—INSTRUCTIONS—DRUNKENNESS—WITNESSES UNDER RULE—NEW TRIAL—HOMICIDE—EVIDENCE.

1. Failure of the trial judge to charge the jury upon the subject of the impeachment of witnesses, in the absence of a proper request, is not cause for a new trial. *Boynton v. State*, 41 S. E. 995, 115 Ga. 587; *Anderson v. State*, 43 S. E. 835, 117 Ga. 255.

2. Under the evidence as disclosed by the record, the charge of the judge on the subject of drunkenness of the accused was as favorable as he had any right to expect.

3. When the witnesses have been put under the rule, and one of them disobeys the order of the court, and remains in the courtroom while the other witnesses testify, he is not thereby disqualified as a witness. *Civ. Code* 1895, § 5280; *McWhorter v. State*, 44 S. E. 873, 118 Ga. 55 (6). The fact that he has heard the evidence may go to his credit or subject him to proceedings for contempt, but does not disqualify him.

4. This court will not consider a ground of a motion for a new trial complaining of the admission of evidence when the ground of objection to such evidence is not stated.

5. There was no error in failing to charge upon the subject of involuntary manslaughter.

6. The evidence fully authorized the verdict, and there was no abuse of discretion in refusing a new trial.

(Syllabus by the Court.)

* 1. See Criminal Law, vol. 14, Cent. Dig. §§ 1996, 1999

Error from Superior Court, Coweta County; R. W. Freeman, Judge.

Greely Phillips was convicted of murder, and brings error. Affirmed.

A. H. Freeman, for plaintiff in error. John C. Hart, Atty. Gen., H. A. Hall, Sol. Gen., and W. L. Stallings, for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 419)

WESTERN & A. R. CO. v. CLARK.

(Supreme Court of Georgia. Dec. 10, 1904.)

RAILROADS—KILLING STOCK—EVIDENCE.

1. The presumption of negligence arising against the railroad company from proof of the killing of the animal by defendant's train was completely met and overcome by evidence for the defendant that there was a curve in the track where the animal was killed, obscuring the view up the track, that the engineer and fireman were looking ahead, and could not have seen the animal earlier than it was seen, and that, after discovering its presence on or near the track, the engineer did everything that could be done to prevent the killing. In view of the positive character of the testimony for the defendant as to these matters, testimony of a witness for the plaintiff that "I think the steer could have been seen several hundred yards before the train reached him, if the engineer had been looking in that direction," did not afford sufficient foundation for a verdict in the plaintiff's favor.

(Syllabus by the Court.)

Error from Superior Court, Oatoosa County; A. W. Fite, Judge.

Action by J. W. Clark, administrator, against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Payne & Tye, W. H. Odell, and R. J. & J. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

COBB, J. Judgment reversed. All the Justices concurring.

(121 Ga. 436)

SOUTHERN RY. CO. v. ROLLINS.

(Supreme Court of Georgia. Dec. 10, 1904.)

APPEAL—REVIEW—MISCONDUCT OF COUNSEL—ACTION AGAINST RAILROAD.

1. While the language used by counsel for the plaintiff in the justice's court was highly improper, it does not appear that any motion for mistrial was made at the time, and no ruling of the justice is complained of in the petition for certiorari which would authorize a reversal of the judgment on account of such argument.

2. While the railroad company introduced evidence tending to rebut the presumption of negligence against it, this evidence was contradicted by that of witnesses for the plaintiff. The evidence warranted the verdict for the plaintiff, and it was not error to overrule the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by W. G. Rollins against the Southern Railway Company. Judgment for plaintiff before a justice was affirmed in the superior court, and defendant brings error. Affirmed.

Little & Battle and McLaughlin & Jones, for plaintiff in error. N. F. Culpepper, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 428)

REVIS v. ROPER.

(Supreme Court of Georgia. Dec. 10, 1904.)

APPEAL—REVIEW—NEW TRIAL.

1. There was no complaint that any error of law was committed by the court upon the trial, the evidence warranted the verdict, and the refusal of a new trial was not erroneous.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action by J. C. Roper against Cicero Revis. Judgment for plaintiff, and defendant brings error. Affirmed.

E. B. Bradfield, Jr., for plaintiff in error. Harwell & Lovejoy, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 466)

ATLANTA & B. AIR LINE RY. v. WEAVER.

(Supreme Court of Georgia. Dec. 12, 1904.)

INJURY TO EMPLOYÉ—NONSUIT—EVIDENCE—VERDICT—REVIEW.

1. The motion for a new trial complains that the court erred in refusing to grant a nonsuit, and that the verdict was contrary to law and the evidence. There was clear and positive evidence warranting a finding that the defendant was negligent as charged in the petition; and there was some evidence authorizing a finding that the deceased was injured in the discharge of his duties, and that at the time of the injury which resulted in his death he was free from fault. The plaintiff therefore carried every burden placed upon her by law, and it was not error to refuse a nonsuit. The jury trying the case, whose province it was to settle disputed issues of fact as to diligence and negligence, found for the plaintiff in an amount much smaller than the evidence as to the age and earning capacity of the deceased warranted. The trial judge approved the verdict, and no reason is made to appear why it should be set aside.

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by A. O. Weaver against the Atlanta & Birmingham Air Line Railway. Judgment for plaintiff. Defendant brings error. Affirmed.

Brown & Randolph and John K. Davis, for plaintiff in error. Janes & Hunt and Bunn & Trawick, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 459)

STEELE v. GEORGIA IRON & COAL CO.

(Supreme Court of Georgia. Dec. 12, 1904.)

INJURY TO EMPLOYÉ—PLEADING—AMENDMENT—DEMURRER.

1. The original petition was subject to the demurrer. But the amendment, alleging that the deceased was ignorant of the condition of the electric light, and of the other acts of negligence complained of, cured the defect. As amended, the petition set out a cause of action.

2. Even if a demurrer does not admit an impossibility when alleged in a petition, there is nothing to show that the deceased necessarily knew of the defect in the light. Nor does it appear how long he had been employed at the place and in the particular service referred to in the petition.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by Wyatt Steele against the Georgia Iron & Coal Company. Judgment for defendant, and plaintiff brings error. Reversed.

This was a suit by a dependent father for the homicide of his son, who contributed to his support. It alleged that the son Noah Steele was an employé of the Georgia Iron & Coal Company, engaged in running at night the blowing engine and near-by pumps; that he was obliged to go from the engine to the pumps; that between the two was a large and deep cistern, across which loose planks were laid, over which the deceased was obliged to go at night in the performance of his required duties; that the plank had become slippery from being saturated with oil; that an electric light was used to illuminate the location, and that it was so defective that it would at times almost completely die out, leaving the grounds in almost utter darkness; that on the 25th of April, 1903, owing to the defects and slippery condition of the plank and the defective light, Noah Steele, in going to the pump, without fault on his part, fell into the cistern of hot water and was drowned; and that the company was negligent in failing to cover the cistern and in maintaining the defective light. There was a demurrer on the ground that the petition set out no cause of action, and that the dangers and defects complained of were obvious to the employé, and the risks created thereby assumed by him. The plaintiff thereupon amended by alleging that the defect causing the light to grow dim was unknown to the deceased at the time of the accident, nor did he have knowledge of the fact that the water in the cistern was hot. By amendment he also alleged that all of the

defective conditions set out in the original petition were unknown to the deceased; that he had no means of knowing the same, but that the defendant well knew thereof, and was negligent in not notifying the deceased, whose employment did not embrace a line of employment connected with the light. The court sustained the demurrer, and the plaintiff excepted.

Ben T. Brock and R. J. & J. McCamy, for plaintiff in error. W. N. Jacoway and Du Bignon & Alston, for defendant in error.

LAMAR, J. (after stating the facts). The original petition was, no doubt, subject to demurrer. As drawn, it referred to defects which were apparently of a kind open to the sight of the employé. Construing the petition against the pleader, it also indicated that the periodical dimness of the light was that usual in arc lights, occasioned by the imperfect connection, but naturally caused by the gradual consumption of the carbon. But these matters were cured by the positive allegations of the amendment that the defendant did not know thereof, could not learn thereof, and that they were known to the company. Even if it be true that a demurrer does not admit an impossibility, there is nothing here to show that these allegations admitted by the demurrer could not possibly be true. It does not appear how long the deceased had been employed at this place or in this particular service. As amended, the petition set out a cause of action.

Judgment reversed. All the Justices concur, except CANDLER, J., disqualified.

(121 Ga. 346)

JEMLEY v. STATE.

PRICE v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

RIOT—WHAT CONSTITUTES.

1. "To constitute the offense of riot, there must be not only a common intent on the part of two or more persons to do an unlawful act of violence, or some other act in a violent and tumultuous manner, but also concert of action in furtherance of such intent." *Coney v. State*, 89 S. E. 425, 113 Ga. 1060. This does not mean, however, that there must necessarily have been a previous plot or conspiracy on the part of the rioters, in order to constitute the offense. The evidence for the state in the present cases fully established both concert of action and a common intent on the part of the accused persons, the verdicts of guilty were fully authorized, and it was not error to overrule the motions for new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

John Jemley and Dick Price were convicted of riot, and bring error. Affirmed.

¶ 1. See Riot, vol. 42, Cent. Dig. §§ 1, 2-5.

H. F. Strohecker and W. A. McClellan, for plaintiffs in error. William Brunson, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 437)

HEARD v. TAPPAN & MERRITT.

(Supreme Court of Georgia. Dec. 10, 1904.)

ACTION ON NOTE—ALTERATION—RELEASE OF SURETY—INSTRUCTIONS—NEW TRIAL—REVIEW.

1. Upon the trial of an action on a promissory note, it appeared that after the instrument, which included the note, and also a conveyance of property to secure the payment of the same, had been signed by the defendant as surety and by another as principal, the latter, who owned the property so conveyed, procured, without the consent of the surety or the payee, the signatures of two persons, one of whom was a justice of the peace, to the instrument as attesting witnesses; the attestation not being limited to the signature of the principal. Held, that it was not erroneous, as against the surety, at least, to instruct the jury that affixing the names of the witnesses to the instrument was not such a material alteration thereof as would affect the surety's liability thereon, unless it should appear that the same was procured by the payee, or done with his assent or knowledge, for the purpose of defrauding the surety.

2. A charge touching a matter wholly irrelevant under the pleadings, even if erroneous, is not cause for a new trial, when it appears that the jury could not have been misled by such instruction to the injury of the complaining party.

3. A ground of a motion for a new trial complaining of the admission of documentary evidence will not be considered unless the evidence objected to is set forth, either literally or in substance, in the motion itself, or attached thereto as an exhibit.

4. The verdict was not without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Greene County; J. E. Pottle, Judge pro hac vice.

Action by Tappan & Merritt against Columbus Heard. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. B. Park, for plaintiff in error. J. P. Brown and G. A. Merritt, for defendants in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 439)

MOORE v. PRITCHETT.

(Supreme Court of Georgia. Dec. 10, 1904.)

CONTRACT—CONSTRUCTION—NEW TRIAL.

1. The court having incorrectly instructed the jury as to the meaning of the written contract involved in the case, the refusal of a new trial was erroneous.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

¶ 2. See New Trial, vol. 37, Cent. Dig. § 71.

Action by William Pritchett against G. W. Moore. Judgment for plaintiff. Defendant brings error. Reversed.

See 42 S. E. 1013.

Pritchett sued out an attachment against Moore, returnable to the city court of Dublin. The attachment was levied, and declaration thereon filed. The declaration was upon an account. Moore pleaded set-off, the main item of his counterclaim being an amount charged for boring an artesian well for the plaintiff at Lothair, Ga., under a written contract, a copy of which was attached to the plea. This contract was as follows:

"Georgia, Laurens County. This contract made and entered into this the 4th day of Jan., 1898, between G. W. Moore, proprietor of the Dublin Iron Works, party of the first part, and William Pritchett, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sums of money to be paid to him by the said second party as are hereinafter set out, does hereby agree and contract to bore and construct for the said second party at the turpentine still of H. E. Pritchett & Co., in the county of Worth, said State, an artesian well of the following dimensions and capacity, to-wit: Said artesian well to be (4) four inches in diameter at the top, and if necessary for better construction of said well, it may be reduced in diameter to (2) two inches, and said well is to furnish a continuous supply of at least (25) twenty-five gallons of artesian water per minute. The said party of the first part hereby agrees and contracts to furnish all of the piping necessary and the well is to be cased to a solid foundation with first class iron piping. It is hereby agreed by and between the parties to this contract that if the necessary supply of (25) twenty-five gallons is not obtained by a flow of that amount of water as aforesaid, then the said supply of said water is to be obtained by the means of a deep well pump, if the use of such pump is necessary, after a satisfactory test of the well is made by both of said parties hereto. And also that said deep well pump, if the use of the same is necessary, shall be furnished by said second party as soon as practical after being instructed by said first party that the use of said deep well pump is necessary, and, if in this way it is necessary that such a test be made, in addition to the other amounts to be paid, the second party is to pay to the said first party the necessary traveling expenses of one man from Dublin to the said well and return.

"The said party of the second part hereby agrees and contracts to pay to the said party of the first part for said well the sum of (\$225.00) two hundred and twenty-five dollars on condition that said supply of twenty-five gallons of water per minute as aforesaid is obtained, at or before the depth of 300 feet is reached. If not so obtained, then said second party is to pay to said first

party 75 cents per foot for the first 350 feet or as many feet as it may be necessary to bore said well, if said supply of water can be had as aforesaid at or before the depth of 350 feet is reached. But if said supply of water can not be so obtained and it shall be necessary to bore to a greater depth, then the said second party is to pay to the said first party for the said well in excess of said 350 feet at the rate of \$1.00 per foot, until a depth of 1,000 feet or so much thereof as may be necessary to complete said well as aforesaid is reached, or until said party of the second part shall tell said party of the first part to stop. If said first party shall stop boring before instructed to stop by said second party, then he, the said first party, shall forfeit all amounts due under this contract.

"It is further agreed that said second party is to deliver the machinery to the said first party necessary for boring said well free of charge from Albany, Ga., to the place at which the well is to be bored, and when the well is completed to deliver the said machinery from said well at Albany.

"It is hereby agreed by said parties that another artesian well is to be bored at Lothair, Ga., of like size and capacity, the first 400 feet being charged for at the rate of 75 cents per foot, under the terms of the above contract.

"G. W. Moore,

"Per W. J. Carter, Atty.

"Wm. Pritchett.

"Signed in the presence of:

"J. P. Sanders, N. P. Laurens Co., Ga."

The well was bored to the depth of 236 feet, but no natural flow of water to the surface was obtained. Moore submitted evidence tending to show that the well, at the depth to which it was bored, would, by the use of a deep-well pump, furnish a continuous supply of artesian water of more than 25 gallons per minute. He also showed that he, through his agent, had notified Pritchett that the deep-well pump was necessary, that a flow of water could not be obtained, but that a continuous supply of more than 25 gallons of artesian water per minute could be got by the use of such a pump, and had requested Pritchett to furnish a deep-well pump as provided in the contract, which Pritchett refused to do. Moore's contention was that, this being true, he had complied with his obligation under the contract. In the opinion of the trial judge, this was not a proper construction of the contract, and, in effect, he so charged the jury. There was a verdict for the plaintiff for the full amount for which he sued, and, the defendant's motion for a new trial being overruled, he excepted.

Peyton L. Wade, for plaintiff in error.
James B. Sanders, for defendant in error.

FISH, P. J. (after stating the facts). The case turned upon the construction of the

contract set forth in the statement of facts, and one of the grounds of the motion for a new trial presents the question whether the court, in instructing the jury as to the legal effect of the contract, properly construed it. In our opinion, the meaning of the instrument is that whenever the well, without regard to its depth, would furnish a continuous supply of 25 gallons of artesian water per minute, either by natural flow to the surface or by the use of a deep-well pump, Moore's obligation would be complied with, and he would have the right to discontinue boring, whether Pritchett desired him to do so or not, provided he notified Pritchett that the use of a deep-well pump was necessary. This may not be the contract that Pritchett desired to enter into, but it seems to us that it is the contract which he actually made, and there was no question that he understood its terms, nor did he contend that he was induced to execute it by fraud, accident, or mistake. When this case was formerly here (116 Ga. 757, 42 S. E. 1013), the contract was evidently construed as we now construe it. The court, speaking through Mr. Justice Candler, then said: "The evidence offered by the defendant did not demand a finding that he had complied with his part of the contract on which he sought to recover. By the terms of that contract he was to bore for the plaintiff an artesian well which should furnish, either by natural flow or by the aid of a deep-well pump, 25 gallons of water per minute. The evidence showed that this supply of water was not obtained by natural flow, and that no deep-well pump was ever used to ascertain if it could be obtained by that means. Expert testimony was introduced to show that, if a deep-well pump had been used, the supply of water required by the contract could have been obtained; but such testimony is at best but a matter of opinion, and the jury should have been left to determine its probative value." It follows, from what we have said, that the court below erred in not granting a new trial.

Judgment reversed. All the Justices concur.

(121 Ga. 423)

SOUTHERN RY. CO. v. HOBBS.

(Supreme Court of Georgia. Dec. 10, 1904.)

EVIDENCE—WEIGHT—CARRIERS—FAILURE TO STOP AT STATION.

1. The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal. *W. & A. R. Co. v. Evans*, 23 S. E. 494, 96 Ga. 481; *Freyermuth v. R. R. Co.*, 32 S. E. 668, 107 Ga. 32; *Ray v. Green*, 39 S. E. 470, 113 Ga. 920; *Farmer v. Davenport*, 45 S. E. 244, 118 Ga. 289. And he "is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict

should be against him." *Southern Bank v. Goette*, 33 S. E. 974, 108 Ga. 796.

2. Applying the rule above stated to the testimony of the plaintiff in the present case, what she swore on the last trial was not materially different from the version she gave of the occurrence under investigation at the trial under review when the case was here at the March term, 1903 (45 S. E. 23, 118 Ga. 227, 63 L. R. A. 68), and, as was then pointed out, she was not, in view of her own sworn admissions, entitled to a recovery.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by Susie Hobbs against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hugh M. Dorsey, for plaintiff in error. James Beall and Price Edwards, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concurring.

(121 Ga. 359)

McCOY v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—FORMER CONVICTION—PLEA.

1. The accused was arraigned in a city court on June 20, 1904, upon an accusation filed at the June term, which charged merely that he did, on the 24th day of March, 1904, in a named county, "play and bet money and other things of value at a game of seven-up, five-up, skin, craps, and other games played with cards." He entered a plea of guilty to this accusation. On June 24th the accused was arraigned in the same court upon an accusation filed at the March term, which charged that he did, on the 12th day of March, 1904, in the same county, "play and bet for money or other thing of value at a game of five-up, seven-up, skin, and other games played with cards." To this accusation he entered a special plea of former conviction, setting up the plea of guilty under the accusation first referred to. Upon the trial of this plea it was admitted "that the state could show that [the accused] had played at two separate places, and at different times, and with different parties; that the two cases covered two separate transactions." The special plea was overruled. *Held*, that the accusation upon which the conviction was had being general in its allegations, and the accusation upon which the accused was last arraigned having been filed prior to the time of filing of the accusation upon which the plea of guilty was entered, it was error to overrule the special plea of former conviction. *Aliter*, if the two accusations had been specific in their allegations as to place, time, person, and other particulars, clearly showing upon their face that they related to separate and distinct transactions. *Craig v. State*, 33 S. E. 653, 108 Ga. 776 (2); *McWilliams v. State*, 34 S. E. 1016, 110 Ga. 290 (1); *Reynolds v. State*, 40 S. E. 234, 114 Ga. 265.

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Jack McCoy was convicted of gaming, and brings error. Reversed.

W. M. Graham and R. J. & J. McCamy, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

COBB, J. Judgment reversed. All the Justices concur.

(121 Ga. 471)

WOOD, Ordinary, v. BROWN et al.

(Supreme Court of Georgia. Dec. 12, 1904.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW — CONCLUSIVENESS — DECEASED PARTNER — ACTION ON ADMINISTRATOR'S BOND.

1. The judgment of the ordinary allowing a widow and her minor children a year's support is conclusive only that she is entitled to the amount of the judgment if there be assets to pay it, and such judgment is no evidence that the administrator has sufficient assets of his intestate with which to pay it.

2. The widow and minor children of a deceased partner are entitled to a year's support only in what remains of the deceased partner's interest after payment of partnership liabilities.

3. The evidence for the plaintiff was sufficient to authorize the submission of the case to the jury, and the grant of a nonsuit was error.

(Syllabus by the Court.)

Error from City Court of Dublin; Wm. Faircloth, Judge.

Action by W. A. Wood, ordinary, for the use of N. E. Brown and her minor children, against R. E. Brown and others. Judgment for defendants. Plaintiff brings error. Reversed.

Sanders & Davis, for plaintiff in error. T. L. Griner and Jackson & Orme, for defendants in error.

EVANS, J. W. A. Wood, ordinary, for the use of Mrs. N. E. Brown and her minor children, in his petition against R. E. Brown and the security on his administrator's bond alleged: In 1901 A. H. Brown died, leaving the plaintiff's usees, who were his widow and minor children. R. E. Brown qualified as his administrator, and executed to the ordinary an administrator's bond, with the American Surety Company as security, conditioned for the faithful performance of his duties as such administrator. As a breach of the bond plaintiff alleged that an estate of \$1,800 belonging to A. H. Brown went into the hands of the administrator; that on February 23, 1903, after notice to the administrator, a year's support of \$1,400 in money and household furniture was duly assigned to plaintiff's usees, and upon this judgment a *fi. fa.* issued against the administrator; that the administrator refused to pay the *fi. fa.*, and that the sheriff of the city court of Dublin made his return thereon of diligent search and no property to be found on which to levy the execution. The administrator and his security filed their several pleas. The administrator pleaded that no assets of A. H. Brown ever came into his hands as administrator, but that A. H. Brown only had a

very small amount of partnership property with defendant, which was not sufficient in value to pay the just demands and debts outstanding against the firm of A. H. & R. E. Brown. The plaintiff orally moved to dismiss this plea on the ground that the judgment of the court of ordinary allowing the year's support concluded the administrator as to there being assets in his hands sufficient to pay the same. The court overruled the motion, and the plaintiff filed his exceptions *pendente lite* to this ruling of the court.

On the trial of the case plaintiff tendered in evidence the year's support proceedings; the *fi. fa.* issued thereon against R. E. Brown, as administrator, with an entry of *nulla bona* by the sheriff of the city court of Dublin; and a certified copy of the inventory and appraisement of the estate of A. H. Brown, returned by R. E. Brown, as administrator, wherein a one-half interest in certain designated personal property was appraised at \$1,495. The plaintiff also introduced oral testimony tending to show that the administrator had received \$65 from the sale of a horse belonging to his intestate, and had paid \$86 for funeral expenses. A witness testified that the administrator told him on the day the appraisement was had that the firm of A. H. & R. E. Brown had \$2,200 in notes and accounts, and also certain timber, sufficient to pay all the debts of the firm. The ordinary testified that the administrator filed a return, and asked for letters of dismission, but upon the instituting of a citation for settlement withdrew his return and vouchers, which had not been recorded. On the conclusion of the evidence of the plaintiff the court sustained the defendants' motion for a nonsuit. The plaintiff excepts to the granting of the nonsuit and to the refusal to strike the plea filed by R. E. Brown.

1. The court properly overruled the motion to strike this plea. The judgment of the ordinary allowing a widow and her minor children a 12-months allowance is conclusive only that she is entitled to the amount of the judgment if there be assets to pay it. The widow may have her year's support assigned independently of administration on her husband's estate. Her right to the statutory allowance becomes vested on the death of her husband, and she may proceed at once to have it set apart. If there is an administrator, he must be notified of the proceeding, but the statute neither requires him to object to the setting apart of a year's support nor permits him to show lack of assets with which to pay it. *King v. Johnson*, 94 Ga. 665, 21 S. E. 895. The only issues the administrator could raise are the reasonableness of the allowance and the sufficiency of previous appropriations to her from her husband's estate. In *Tabb v. Collier*, 68 Ga. 641, the judgment was attacked because the family had already consumed enough of the decedent's estate to amount to a year's sup-

port, and the same objection was urged in *Goss v. Greenaway*, 70 Ga. 130. But in each of these cases this court held that the objection should have been made before the judgment setting aside the year's support was rendered, and it was too late to make this objection after judgment. In *Fulghum v. Fulghum*, 111 Ga. 635, 36 S. E. 602, the same principle was recognized, and the administrator was not permitted, after the judgment, to have credit for certain payments made to the widow antecedent the judgment. These cases decide that a judgment assigning a year's support is conclusive as to the amount the beneficiaries are entitled to have set apart to them. But such a judgment is neither conclusive nor prima facie evidence that the administrator has sufficient assets of his intestate with which to pay it. Inasmuch as the administrator could not file any of the pleas peculiar to administration of estates, nor had an opportunity to examine into the estate, he will not be bound as to an issue which he could not make. "The return by the sheriff of nulla bona upon the execution in favor of the widow against the administrator is of itself no evidence of a devastavit." *King v. Johnson*, 94 Ga. 665, 21 S. E. 895. When the widow undertakes to assert her judgment for a year's support by suit against the administrator and the sureties on his bond, the burden is upon her to show that assets of her deceased husband came into the hands of his administrator, and that these assets were chargeable with the payment of her judgment.

2, 3. On the trial of the case the plaintiff tendered in evidence the inventory and appraisal of the estate of A. H. Brown. This inventory described several items of property, one-half of which was alleged to be the property of the intestate, and was appraised at \$1,495. A witness testified that the administrator said that certain timber which was being prepared for market would be sufficient to pay all the debts of the business conducted by the deceased and the administrator as copartners. The judgment of year's support was introduced, and the ordinary testified that the administrator filed a return, but withdrew it and the vouchers when a citation for settlement was filed. The administrator sold a horse belonging to his intestate for \$65, but paid funeral expenses amounting to \$86. The court granted a nonsuit. The grant of the nonsuit was error, because there was sufficient evidence to take the case to the jury. The inventory required by law to be made and returned by an administrator is an admission, though not a conclusive one, of possession of such assets of his intestate as are therein described. *Smith v. Griffin*, 32 Ga. 101; *Thompson v. Thompson*, 77 Ga. 699, 3 S. E. 261. The administrator may explain any mistake or error in the inventory, or may show that his intestate had no title to the property inven-

toried. His inventory of assets as belonging to his intestate puts the burden on him to show its incorrectness. The description of the property embraced in the inventory as an undivided interest in personality raises no presumption that it was partnership property charged with the payment of partnership debts. Rather the contrary inference should be drawn where the return is made by the surviving partner. Let it be conceded that the evidence sufficiently showed that the property was partnership property, and the partnership was indebted, there was no evidence to indicate that the partnership debts were sufficiently extensive to absorb all the partnership assets. The surviving partner has the right to partnership assets to the exclusion of the administrator. And the widow and minor children are only entitled to a year's support in what remains of the deceased partner's interest after payment of partnership liabilities. *Sellers v. Shore*, 89 Ga. 416, 15 S. E. 494; *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347. In view of the testimony that the administrator had estimated that the proceeds of certain timber belonging to the firm would be sufficient to pay partnership debts, that there was no explanation of the disposition of the property inventoried and appraised at \$1,495, and of the conduct of the administrator in filing and then withdrawing his return, the court should have allowed the case to go to the jury.

Judgment reversed. All the Justices concur.

(121 Ga. 468)

SPEARMAN v. SANDERS et al.

(Supreme Court of Georgia. Dec. 12, 1904.)

NEW TRIAL—GROUNDS—WITNESS—IMPEACHMENT—QUESTIONS TO JURY—CONFLICTING EVIDENCE.

1. A ground of a motion for a new trial which complains that the verdict is contrary to a given charge of the court is in effect a complaint that the verdict is contrary to law.

2. It was not error to allow a witness, whose testimony was sought to be impeached by proof of contradictory evidence given on a former trial of the same case, to explain the alleged contradiction in the light of what was testified to in the trial then being had. *Savannah R. Co. v. Holland*, 10 S. E. 200, 82 Ga. 253, 14 Am. St. Rep. 158.

3. The range of the questions submitted to the jury for answer was wide enough to comprehend all the essential elements of the case. If counsel desired other questions submitted, a suggestion to that effect should have been made to the trial judge at the proper time. *McCook v. Harp*, 7 S. E. 174, 81 Ga. 229.

4. The jury, passing on the issues, saw and heard all the witnesses, and knew their relation to each other and to the case itself. There were many conflicts and contradictions to be solved. While the judge who passed on the motion for a new trial did not preside on the trial of the case, and hence his approval of the verdict does not carry the same force as that of the trial judge would have done, still it

¶ 2. See *Witnesses*, vol. 50, Cent. Dig. §§ 1261-1263.

is entitled to weight in determining whether the verdict should be allowed to stand. After a careful consideration of the entire brief of evidence, we are not disposed to control his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Heard County.

Action between Elizabeth Spearman and J. B. Sanders and others. From a judgment, Spearman brings error. Affirmed.

W. A. Post and W. C. Wright, for plaintiff in error. F. S. Loftin and H. A. Hall, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concur, except EVANS, J., disqualified.

(121 Ga. 421)

BALLEW v. BROACH & McCURRY.

(Supreme Court of Georgia. Dec. 10, 1904.)

AFFIDAVIT—AUTHENTICATION—INJURY TO EMPLOYÉ—PLEADING.

1. The affidavit of the plaintiff in error, in forma pauperis, under Civ. Code 1895, § 5613, made in a foreign state, before an officer of such state, is insufficient unless the official character of the attesting officer is properly authenticated.

2. The allegations of the petition did not set forth a cause of action, and the court properly sustained the demurrer and dismissed the petition.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by J. L. Ballew against Broach & McCurry. Judgment for defendants, and plaintiff brings error. Affirmed.

Henry Walker, for plaintiff in error. Denny & Harris, for defendants in error.

EVANS, J. 1. Upon the call of this case, the clerk, pursuant to his duty under the rules, directed our attention to the affidavit in forma pauperis of the plaintiff in error. This affidavit purports to have been made before a justice of the peace in the state of Tennessee, but there is no authentication of his official character. An affidavit made in a foreign state, before an officer of such state, is insufficient unless it is made to appear in some legal way that the person attesting the affidavit was in fact authorized to administer the oath. Thus, in *Behn v. Young*, 21 Ga. 213, it was held that an affidavit verifying a bill could not be recognized in courts of this state when the official character of the person administering the oath is not authenticated. The official character of a county clerk of a foreign state must be authenticated before an affidavit made before him will be received in courts of this state. *Shockley v. Turnell*, 114 Ga. 378, 40 S. E. 279; *Castellaw v. Blanchard*, 106 Ga. 101, 31 S. E. 801. The rule was also applied to notaries public. *Charles v. Foster*, 56 Ga. 612; *Brunswick Hardware Co. v. Bingham*, 107 Ga.

270, 83 S. E. 56. But since the act approved December 20, 1899 (Acts 1899, p. 79), an affidavit before a foreign notary, with his seal attached, is receivable in courts of this state. *Simpson v. Wicker*, 120 Ga. 418, 47 S. E. 965. The seal of the notary public being evidence of the genuineness of his signature and of his official character, no further authentication is required. The act of 1899, just referred to, provides that "any affidavit made out of the state of Georgia before any notary public, justice of the peace, judge of a court of law, or chancellor, commissioner or master of any court of equity of the state or county where the oath is made, or before any other officer of such state or county who is authorized by the laws thereof to administer oaths, shall have the same force and effect, and be recognized in like manner, as if it had been made before an officer of this state authorized to administer the same; provided, that this act shall not apply to such affidavits as are by law required to be made within the state of Georgia, nor have the effect to impair or render invalid any of the existing provisions of law for making affidavits out of this state." Mr. Justice Little, in *Shockley v. Turnell*, supra, construing the proviso of this act, said (page 383, 114 Ga., page 281, 40 S. E.): "If the act is not to affect any of the existing provisions of law as to the validity of affidavits made out of this state, it cannot, of course, affect the question under consideration; for, as we have shown, such affidavits, under the laws of this state existing at the time of the passage of this act, must, in order to be rendered valid, be accompanied with proof that the officer has authority to administer oaths, as well as of the fact that he is such an officer." It is clear, we think, that the necessity of presenting proper authentication of the official character of the officer administering the oath promulgated in a foreign state is not dispensed with by the act of 1899. The affidavit, being defective in this particular, was not a compliance with Civ. Code 1895, § 5613, as to payment of costs or filing an affidavit in forma pauperis. Permission was granted the plaintiff in error to pay the costs, and, upon the certificate of the clerk that the costs have been paid, the bill of exceptions will be retained.

2. The question raised in the bill of exceptions is the correctness of the judgment sustaining a demurrer to the plaintiff's petition. The petition, as amended, set forth the following facts: Plaintiff "is a skillful and competent mechanic, 23 years of age." In March, 1903, he entered the employment of the defendants, and, being "a skillful wood workman, possessed of special fitness in operating a matching machine, he was employed to run the matcher" in their planing mills. "Whilst dressing weatherboarding on the matcher, he was called by McCurry, who was then dressing flooring on the molder, to take up his work, saying,

"I want you to take this thing and go ahead with it," meaning Ballew continue his unfinished work dressing flooring on the molder." It was an old-style, secondhand machine. In operating it, McCurry became familiar with it, and knew it was hazardous to himself, but, "without a word of warning, he intentionally shifted all danger from himself to Ballew." He was ignorant of any danger in operating this machine, and "it was the duty of defendants to warn him of the risk he unconsciously assumed, which was known to them." Within five minutes after beginning work on the molder, the two-inch belt, seven feet between the pulleys, much worn by use as a feed belt, fastened at ends by iron hooks instead of leather lace, ran off the pulley. No means being furnished by defendants to put the belt on the pulley, he used a file. It caught in the hooks, which from constant use had worn thin and turned up at the ends. The belt was put on the pulley, but the file was caught by the hooks, and suddenly snatched by the belt and broken, a fragment of the file striking plaintiff's hand and seriously injuring it. Immediately after the injury, McCurry said to the plaintiff: "I came very near being hurt in the same way you are hurt, a few days ago." The belt was at the right-hand side of the molder, two feet beneath its top, not in plain view of the plaintiff while running the flooring through the machine, being hid by a large belt and the machine. When plaintiff took up his work at this machine, the belt was swiftly running, and he could not distinguish between leather lace and iron hooks, and did not know iron hooks were used to fasten the belt. Plaintiff was not employed to work at the molder, but to operate the matcher, which was a safe machine, and with the operation of which he was familiar. When called on to operate the molder, to which he was unused, he did not know the belt was fastened with worn-out hooks, unsafe and unsuited for such use, and known to be so by defendants, who willfully and negligently continued the hooks in use instead of leather lace, "which was better and safer for tying the belt." "Defendants knew, or ought to have known, of defects of this character in the machinery, and warned petitioner in respect to the same, who had not equal means with them for discovering such defects," and did not know of the same. Defendants were guilty of a breach of duty to him in putting him to work in an unsafe place, instead of employing him in his usual and customary work on the matcher. "Defendants neglected to provide any safe means to put on said belt after it ran off, and nothing at all except said file, nor was there any other means at hand for use in such emergency, and said file was unfit and unsafe for the use thus intended by defendants in putting on said belt, and they knew it, and plaintiff

did not know it." The wound received by the plaintiff was described, and he alleged that he suffered therefrom much pain. He sued for special damages, and also for counsel fees, because, he averred, the defendants had been stubbornly litigious, and had acted in bad faith, and caused him unnecessary trouble and expense. The defendants filed their demurrers, both general and special, and the court sustained the demurrers and dismissed the plaintiff's action, wherefore he excepts to the judgment thus disposing of the case.

As will have been observed, the most striking feature of the plaintiff's petition is the numerous charges of negligence preferred against the defendants. Many of these complaints are so obviously without merit that they may be summarily disposed of, in view of the fact that the plaintiff was not an employé of tender years, but "a skillful and competent mechanic, 23 years of age." He asserts that he was employed to run the matcher; that the defendants had no right to call on him to operate the molder, and he would not have been injured if he had been permitted to perform his usual and customary work. The time to have made the point that he was under no contractual duty to operate any machine other than the matcher was when McCurry told him to go to work on the molder. It was "an old-style, secondhand machine." But to put a skillful and up to date mechanic at work on such a machine is not per se actionable. In operating that machine, "McCurry became familiar with it," and "knew it was hazardous to himself," but nevertheless, "without a word of warning, he intentionally shifted all danger from himself to Ballew." Wherein this danger lay is not alleged; whether it was latent, and not such as a skilled mechanic should without warning have taken cognizance of, does not appear. Though, for a period of about five minutes, while operating this machine, the plaintiff may have been exposed to a hidden danger of which he was not warned, certain it is that he was not injured because of the defendants' failure to give him any warning in regard to such danger. One cannot recover for negligence which in no way brings about or contributes to an injury sustained by him. The plaintiff does not pretend that, because of any latent defect in the molder, the belt ran off the pulley; that it habitually did so, or had ever before done so; or that the defendants had any reason to anticipate it would do so on this particular occasion. Nor, on the other hand, is it averred that it is usual for a belt to run off a pulley, and that means for readjusting the belt should be furnished by a master. The plaintiff characterizes the stopping of the machine by the running off of the belt as an emergency he had to meet. No complaint is made of the pulley. The belt was fastened at the ends with iron hooks,

instead of leather lace, "which was better and safer for tying the belt." But a master is not bound to provide the most approved and safest appliances. The iron hooks were worn thin and turned up at the ends, and were unsafe and unsuited for such use. Yet it does not appear that they broke, or that the fact that they were worn thin and turned up at the ends caused or contributed to the injury. For aught that the plaintiff avers, the injury would not have been averted had the hooks been in the best of condition, and such as were suitable for the use to which they were put. So, in its last analysis, the grievance of the plaintiff is that he was hurt while attempting to put the belt on the pulley with a file belonging to the defendants, owing to the fact that the file was not suitable for this purpose, which fact he did not know, though they did. The question to be decided, therefore, is, can the plaintiff recover from the defendants on the theory that they were negligent with respect to any duty they owed him after he was confronted with the emergency of replacing the belt upon the pulley?

The plaintiff alleges that, "no means being furnished by defendants to put it on the pulley, he used a file." He does not aver that they furnished him this file for that purpose. Being himself a skilled mechanic, he assumed the risk of undertaking to supply their omission to furnish him with the proper means of accomplishing this task. He did not call on them to furnish him with the proper means, but used a file, not knowing it was hazardous to do so. Why he did not know, he does not undertake to explain; nor does he attempt to show liability on the part of the defendants on the ground that they, knowing the file to be unsafe and unfit for such a use, were bound to anticipate that he might attempt to so employ the instrument, and to warn him not to do so. We do not understand that a file is made for any such use, or holds out any invitation beyond that which its name implies. It would take very exact and elaborate pleading, indeed, to state a case such as that just suggested, where the person injured was an expert workman. The gravamen of the plaintiff's charge of negligence is that "defendants neglected to provide any safe means to put on said belt after it run off, and nothing at all except said file." He does not say the file was provided for the purpose for which he used it, but merely that there was not "any other means at hand for use in such emergency." Read in the light of the facts positively stated, and the plaintiff's assertion that "no means being furnished by defendants to put [the belt] on the pulley, he used a file," his further allegation that "said file was unfit and unsafe for the use thus intended by defendants in putting on said belt" is not the equivalent of an unqualified averment that the defendants in fact furnished him

with the file to be used for that purpose. Considered as an allegation that they contemplated that he should use the file as he did, notwithstanding they knew it was unfit and unsafe for the purpose, this allegation amounted to no more than a statement of a bare conclusion, unsupported by the facts recited, and resting alone upon the unwarranted assumption that, as no other means were at hand, the defendants must have intended that the plaintiff should make an improper use of the file. The defendants, by their demurrer, admitted such facts only as were well pleaded. It is not to be arbitrarily presumed that the plaintiff, in framing his pleadings, resorted to duplicity and meant to allege (1) that the fact was that the defendants furnished him with no means at all for replacing the belt on the pulley, and (2) that the fact was that the defendants deliberately furnished him with the file to be used for that purpose, intending that he should so use it, though they knew it could not with safety to him be so used. Rather should the plaintiff's petition be so construed as to render its allegations consistent. The alleged comment of McCurry, made immediately after the injury, that, a few days before, he "came very near being hurt in the same way," justifies the inference that he had himself put the file to a similar improper use, and well knew the danger of so using it. However, the plaintiff fails to allege that the danger was not one open and obvious to a mechanic of ordinary prudence, skill, and experience, or that for any reason the defendants owed him an affirmative duty to warn him against an improper use of the file. If such was the real truth of the matter, he should not have hesitated to so declare. Apparently the plaintiff was too dazed by his injury to have any clear conception as to the precise mental process whereby he arrived at the conclusion that the defendants were liable to respond to him in damages. Certain it is that he did not in his petition present any reasonable theory upon which they could be held legally responsible for his injury, and, this being so, the trial court properly sustained their demurrer to his petition.

Judgment affirmed. All the Justices concur.

(121 Ga. 461)

HOWELL v. SIMPSON GROCERY CO.

(Supreme Court of Georgia. Dec. 12, 1904.)

AFFIDAVIT—VERIFICATION—CLAIM CASE—EVIDENCE—BURDEN OF PROOF.

1. An affidavit in forma pauperis, made in another state, for the purpose of bringing a case to this court without the payment of costs, is insufficient unless there is something to show the official character of the person before whom the oath is taken. *Ballew v. Broach*, 49 S. E. 297, 121 Ga. —, and citations. The fact that the seal of a probate court is affixed to the affidavit is not sufficient to show that the person attesting the affidavit was an officer of that court, or

that he was a person authorized to administer an oath.

2. In the trial of a claim case in which the plaintiff in *fi. fa.* undertook to show that the defendant in *fi. fa.* had been in possession of the property at the time of levy, it was error to allow a witness to testify, over the objection of the claimant, that it was his understanding that the defendant was in possession, and that defendant "seemed" to be in possession. These were conclusions of the witness, and he should have been made to give the facts within his knowledge, in order that the court might determine whether such facts showed that defendant was in possession.

3. Where the levying officer does not state in his return who was in possession of the property levied on, the burden rests upon the plaintiff in *fi. fa.*, in case a claim is filed by a third person, to make out at least a *prima facie* case of possession in the defendant at the time of the judgment or of the levy. Excluding from consideration the evidence which was illegally admitted, the only evidence of such possession in the present case was that the levying officer found the property in a livery stable belonging to one not a party to the litigation, and that the defendant in *fi. fa.* was in or about the stable. This was not sufficient to make out a *prima facie* case of possession or to cast the onus upon the claimant.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by the Simpson Grocery Company against E. J. Howell. Judgment for plaintiff. Defendant brings error. Reversed.

Geo. A. H. Harris & Son, for plaintiff in error. Lipscomb & Willingham and O. E. Carpenter, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(121 Ga. 420)

CITY OF ROME v. SUDDUTH.

(Supreme Court of Georgia. Dec. 10, 1904.)

APPEAL—REMAND—AMENDMENT OF DECLARATION—TRIAL—NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.

1. Where a declaration has been demurred to in the trial court, and the demurrer overruled, and that judgment reversed by this court, upon the return of the remittitur to the lower court the plaintiff has the right to amend his declaration. *Charleston & W. O. Ry. Co. v. Miller*, 41 S. E. 252, 115 Ga. 92. It is otherwise where the lower court has sustained a demurrer, and that judgment affirmed by this court. In the latter case there is nothing in the lower court to amend. *Central R. & B. Co. v. Patterson*, 13 S. E. 525, 87 Ga. 648.

2. The ruling of this court when the case was here before was that there were not sufficient facts alleged to authorize the plaintiff to recover (*City of Rome v. Sudduth*, 42 S. E. 1032, 116 Ga. 649), but there was enough in the declaration to amend by.

3. The petition as amended was good against the general demurrers filed thereto.

4. Negligence is a question for the jury. The trial judge cannot instruct the jury what facts do or do not constitute negligence, except where declared by statute. Consequently it is error for the judge, in a suit for damages based on the negligence of the defendant, to charge that,

if the defendant's failure to do its duty "was in accordance with the allegations of the plaintiff's petition, then that would be negligence, as he charges in this case." *Augusta Ry. & Electric Co. v. Smith*, 48 S. E. 681, 121 Ga. —.

5. Taken in connection with the entire charge, no error appears in the portions of the charge, other than as just above pointed out, to which exception was taken.

6. It is not error to refuse a request to charge which is in part inapplicable to the case.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by A. F. Sudduth against the city of Rome. Judgment for plaintiff. Defendant brings error. Reversed.

Halsted Smith, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(121 Ga. 429)

LA GRANGE MILLS v. KENER.

(Supreme Court of Georgia. Dec. 10, 1904.)

DOWER—APPLICATION—VESTED RIGHT—ELECTION TO TAKE CHILD'S SHARE—LUNATIC—ACTION BY NEXT FRIEND.

1. A widow who is insane at the date of her husband's death is not barred of her right to apply for dower until seven years after the removal of her disability.

2. A widow's right to dower in the lands of which her husband died seised and possessed is a vested right, which accrues to her upon the death of her husband, and requires no act on her part to make the same complete. The right of a widow to take a child's share in her husband's estate depends upon her election so to do within one year after administration is granted, and the law makes no exception in favor of a widow who is insane or laboring under other disability.

3. A suit by a next friend for a lunatic, who has been adjudged insane, which fails to allege that the lunatic has no guardian, or any sufficient reason why she does not appear by her guardian if she has one, is maintainable, unless the failure to make allegations of this character is made ground of objection in a special demurrer, or raised by plea in abatement.

4. The petition set forth a cause of action, and was not subject to any of the objections raised in the demurrers.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by Thomas M. Kener, as next friend of Mary J. Kener, against the La Grange Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

On October 28, 1901, Thomas M. Kener, as next friend for Mary J. Kener, filed an equitable petition in her name against the La Grange Mills, a corporation, in which it was alleged that she is now insane, and was insane at the date of the death of her husband, Godfred Kener, which took place in June, 1879; that her husband died seised and possessed in his own right of a described parcel of land; that the defendant has

been in possession of this land for a term of 15 years, receiving the rents and profits thereof; that Peavy, who was administrator of her husband's estate, has been discharged, and there is now no legal representative on the estate; that the lands described in the petition were never administered by the legal representative; that dower has never been assigned to her; that she has been for years an inmate of the Georgia State Sanitarium; that she is entitled to rents of the property in possession of the defendant from her husband's death until her dower is assigned; that she claims dower in the land; that the statutory remedy for the assignment of dower is inadequate, and it is necessary to invoke the aid of a court of equity, and she prays that her right to dower be established; that commissioners be appointed to set the same apart; that, if it cannot be set apart in the land, the land be sold, and dower be assigned to her out of the proceeds of the sale; and that an accounting be had for the value of the rents, issues, and profits of the land. By amendment the allegation that the administrator had been discharged was stricken, and it was alleged that Peavy was still in office as administrator, and by proper order he was made a party to the suit. It was also alleged by amendment that after the death of plaintiff's husband an execution against him was levied upon the land, and the same was sold at sheriff's sale in 1879, and that the defendant claims under the purchaser at such sale.

The La Grange Mills filed a demurrer on the grounds that the petition set forth no grounds for the relief prayed for; that it was multifarious, containing a misjoinder of parties, and also a nonjoinder of necessary parties, to wit, the purchaser at the sheriff's sale, the children of Godfred Kener, and the trustees of the Georgia State Sanitarium; that, no application for dower having been filed within seven years from the death of the intestate, the widow is now barred from claiming dower; that a next friend, or prochein ami, has no right to apply for dower for one under disability, without authority from some court, or to elect for her between dower and a child's share; that, under the facts alleged, equity should interpose an equitable bar to the proceeding, even if there is no bar under the ordinary statute of limitations; that the widow having been, before the death of her husband, and ever since, in the State Sanitarium, at the expense of the state, as its ward, suits in her behalf should be brought by the trustees of the sanitarium; and that the petition is defective, in that it does not make the persons through whom the La Grange Mills derives title parties. The court struck all allegations of the petition which sought to charge the La Grange Mills with rents prior to the time when it went into possession, and then overruled the demurrer. The La Grange Mills excepted.

Longley & Longley, for plaintiff in error.
F. E. Callaway, W. H. Terrell, and Harwell & Lovejoy, for defendant in error.

COBB, J. 1. The right of a widow to dower is derived from the common law, but the rule of the common law in reference to the property in which this right may be asserted has undergone material modifications by statute in this state. The widow is no longer entitled to dower in all the lands which the husband held during coverture, but only in lands of which he died seised and possessed, and such as came to him by virtue of his marital rights, and which may have been aliened by him. During the lifetime of the husband the widow has an inchoate right of dower in lands of the latter character, but she has no right, in his lifetime, inchoate or otherwise, to other lands owned by him. Upon the death of the husband, the inchoate right of dower in lands which came to him through her becomes consummate, and the right to dower in other lands of which he died seised and possessed becomes completely vested. The widow has a right to compel an assignment of dower in the manner authorized by law in lands of either character, unless her right to dower has become barred for some reason which the law recognizes as sufficient to accomplish that result. It seems that at common law lapse of time alone would not be sufficient to bar the widow's right of dower, but there are cases in which it has been held that the failure for a long period of time to apply for dower, and the existence of facts which would make it inequitable on the part of the widow to assert this right, would be a sufficient reason for a court of equity to refuse to take jurisdiction for the purpose of assigning dower. In *Tooke v. Hardeman*, 7 Ga. 29, it was held that, while an application for dower might be a suit, it was not a suit to recover possession of land, within the meaning of the act of 1767, which required all such suits to be brought within seven years. See, also, *Wakeman v. Roache*, *Dud.* 123. In 1839 an act was passed which declared that an application for dower must be made within seven years after the death of the husband, or that otherwise the right to dower shall be absolutely barred. Acts 1839, p. 145 (Cobb's Dig. p. 230). See, also, *Doyal v. Doyal*, 31 Ga. 193; *Smith v. King*, 50 Ga. 192. There was nothing in this act making an exception in case of a widow who was insane or laboring under any other disability. In 1856 the General Assembly passed a general law on the subject of the time in which suits should be brought and indictments preferred. Acts 1855-56, p. 233. It was the evident intention of Judge Cone, who was the framer of this act, to bring together in one act all of the existing rules on the subject of limitation of actions, and to provide rules where there were none on the subject, and make them all a part of one

complete and comprehensive scheme. Section 13 (page 234) of this act provides "that when any widow shall be entitled to dower, application for the assignment of such dower shall be made by said widow within seven years from the time such right to dower accrued, and not after." Section 19 (page 235) provides "that when any of the persons entitled to sue as aforesaid, shall be married women, idiots, or lunatics, or imprisoned, or under the age of twenty-one years, at the time the cause of action accrues, such persons shall be entitled to sue within the time aforesaid, after their respective disabilities are removed." There can be no question that under this act the right to apply for dower, which became vested in a widow who was insane at the date of the death of her husband, would not become barred until the lapse of seven years from the time she was restored to sanity. If no change has been made in the law, either by subsequent acts or by the adoption of the different Codes, this is still the law. Our attention has not been called to any statute dealing with this subject since the act of 1856 was passed. That act does not appear in the Code in its entirety in any one place. Some of the different provisions appear in the chapter on title by prescription. See sections 3593, 3595, Civ. Code 1895. Other provisions, and the larger number, appear in the article on limitation of actions on contracts. See section 3760 et seq. Section 19 of the act of 1856 appears in this article. Other provisions appear in sections 3898-3900. That section of the act which relates to the time in which dower shall be applied for is found in paragraph 4 of section 4689, which, by a marginal note of the codifiers, is shown to have been derived from the acts of 1839 and 1856. The mere fact that the provision of the act of 1856 in reference to the time in which an application for dower shall be made has become severed from the remaining portions of the act, and placed in a different article in the Code, and one which is more appropriate for its appearance—that is, the article relating to dower—would not be sufficient reason, in our opinion, to authorize the inference that the General Assembly intended, by the adoption of the Code, to repeal the exception in favor of persons under disability which was given to such persons under the act of 1856.

2. It is contended that upon the death of the husband the widow is entitled to elect whether she shall take a child's part of the estate as heir, or take her dower, and that, as this is a right personal to the widow, no person can make this election for her, and that, therefore, until she is in a position to make this election for herself, there can be no application for dower. See, in this connection, 1 Scribner on Dower (2d Ed.) p. 461; *Ashby v. Palmer*, 1 Mer. Ch. 296; *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758. But the right to dower does not depend

upon an election. The right to a child's share in lieu of dower does depend upon an election, and an election which must be exercised by the widow within one year from the date of administration on her husband's estate. Civ. Code 1895, § 4689 (3); *Beavors v. Winn*, 9 Ga. 189, and *Van Epps' Annotations*; *Farmers' Banking Co. v. Key*, 112 Ga. 301, 37 S. E. 447. The right to dower is a vested right, accruing upon the death of the husband, and it takes no act on the part of the widow to complete this right. See *Truett v. Funderburk*, 93 Ga. 686, 20 S. E. 260; *Snipes v. Parker*, 98 Ga. 524, 25 S. E. 580; *Johnson v. Gordon*, 102 Ga. 354, 30 S. E. 507; *Starr v. Newman*, 107 Ga. 395, 33 S. E. 427. The right to dower continues vested in the widow until she has done some act which the law would construe as sufficient to divest her of the same. Her right to claim a child's part in the estate is dependent upon her action, and her right to dower is not destroyed until she has made her election to take a child's part, unless barred for some other reason. The law fixing one year from the date of the granting of administration upon the husband's estate as the time within which an election must be made, in order to entitle the widow to take a child's part, makes no exception in favor of widows who are under disability; and there are many reasons why no such exception should be made. The disability may be of a character which may not for a long time be relieved, and hence heirs and others interested in the estate would be confused as to their rights as long as the widow survived. After the lapse of one year from the date of the granting of administration, the right to elect to take a child's part is gone, and the right to apply for dower remains complete. Hence, in a case like the present, where the widow has been insane since the death of her husband, and more than a year has elapsed since the date of administration on the husband's estate, the right to elect to take a child's part is gone, and the right to apply for dower is not barred.

3. There is no distinct averment in the petition that the widow had been adjudged insane, but this may be inferred from the allegation that she has been confined for years in the State Sanitarium. There is no allegation that she has no guardian, or, if so, that there is a valid reason why the suit was not brought by him; but the demurrer does not raise this objection. The only question raised as to parties plaintiff by the demurrer is that the suit should have been brought by the trustees of the State Sanitarium. We know of no law requiring or authorizing the trustees of this institution to bring suits in behalf of persons confined therein. The law authorizes them to bring suits for claims the institution has. Pol. Code 1895, §§ 1411 (7), 1441. When a person has been adjudged insane, and a

guardian appointed, it would seem that suits in behalf of the lunatic should be instituted by the guardian, or that it should appear that some good reason exists why this could not be done. See *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846; *Dent v. Merriam*, 113 Ga. 83, 38 S. E. 334. Persons under disability may always apply with confidence to a court of equity for relief in any case where the law affords no remedy, or the remedy afforded is inadequate, or the disability under which the person labors is such that relief can not be had at law. The statute in this state provides the method for assigning dower. It makes no provision for an application by a widow who is laboring under disability, and this alone might be a sufficient reason for resorting to equity; but when the relief sought is not only the assignment of dower, but also an accounting for rents, a court of equity is the only court that can give complete relief in one suit. The allegations of the petition were sufficient to make a case authorizing the interposition of a court of equity, and the petition, as brought, was not defective as to parties for any reason set forth in the demurrer. See *Bishop v. Woodward*, 103 Ga. 287, 29 S. E. 968; *Starr v. Newman*, 107 Ga. 395, 33 S. E. 427.

4. The sheriff's sale after the death of the husband, under an execution issued upon a judgment rendered against him in his lifetime, did not divest the widow's right to dower. The purchaser and those claiming under him took subject to this right. The Code provides how dower may be barred, and such a sale is not there declared to be a bar to dower. Civ. Code 1895, § 4689. The general rule is that the widow is entitled to rents upon the dower land as finally assigned from the date of her husband's death to the date of the assignment of dower. See *Austell v. Swan*, 74 Ga. 278. In this case the judge has ruled that the widow is not entitled to rents, as against the La Grange Mills, except from the date that it went into possession. This ruling is unexcepted to, and is therefore the law of this case. The amount of rents claimed in the petition indicates that the plaintiff contends that the La Grange Mills is liable for rents on the property in its improved condition. The question whether this claim is sustainable is not raised in any way in the demurrer, and no authoritative ruling can be made thereon, but nothing said or involved in this case will prevent the defendant attacking this claim in subsequent proceedings which may be taken. There are respectable authorities both in England and in this country to the effect that the widow is not dowerable of improvements made by an alienee, and therefore the rents to which she is entitled would be based on the value of the land or the property at the time the husband was last seised, and that the widow is not entitled to the benefit of improve-

ments made either by the heir or the alienee. See *Scribner on Dower*, pp. 604 et seq., 612 et seq. When the property of the husband has, after his death, passed into the hands of an alienee, who has placed valuable improvements thereon, increasing the value of the property, it would seem that in equity a widow would not be entitled to claim as dower anything more than one-third of the value of the land as it existed at the date of the husband's death, and rents which would accrue from land of such value. Especially would this seem to be true where the application for dower was delayed. This rule appears to arise naturally from the principle that the widow is dowerable only in the property of the husband. She is not entitled to dower in the property of any other person. See, in this connection, *Iverson v. Saulsbury*, 65 Ga. 724; 10 Am. & Eng. Enc. Law (2d Ed.) 187 et seq.; *Park on Dower*, 256 et seq.

There is nothing in the petition which would authorize the court to interpose an equitable bar to the application for dower. The petition set forth a cause of action, and there was no error in overruling the demurrer.

Judgment affirmed. All the Justices concurring.

(121 Ga. 348)

TAYLOR v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

JURY — DISQUALIFICATION—OATH—HOMICIDE—THREATS—EVIDENCE—WITNESS—CROSS-EXAMINATION.

1. The inclusion of a juror within the panel of 48, who is ineligible to serve at a particular term of court, does not vitiate the entire panel. The juror's disqualification is good cause of challenge to the poll, but not to the entire array.

2. It is not necessary to administer the oath prescribed for jurors in civil cases (Pen. Code 1895, § 856) to the jury impaneled to try criminal cases. The oath prescribed in Pen. Code 1895, § 979, is the only oath designed for jurors in criminal cases.

3. Declarations by the deceased of peaceful intent, communicated to the defendant, are admissible in rebuttal of evidence of previous threats made by the deceased against the defendant.

4. The evidence excluded by the court was inadmissible, and was properly rejected.

5. The interest of a witness and his bias or freedom from prejudice may always be inquired into, and the testimony objected to was admissible in rebuttal of the testimony of the defendant's witnesses.

6. In his discretion, the trial judge may allow a leading question, and a new trial will not be granted solely because a leading question was permitted, unless it appears that the court's discretion has been abused.

7. It is not objectionable for counsel to embellish the argument with figurative speech, provided prejudicial facts extrinsic of the record are not introduced. Neither the remarks of the solicitor nor of the court offended the proprieties of a legal trial.

8. As stated by the court, the contentions comprehended the defense as presented both by

the evidence and the defendant's statement. If a more elaborate presentation was desired, a timely written request should have been made.

9. The charge of the court on the subject of threats was appropriate and correct.

10. The judge is not bound to read Pen. Code 1895, § 78, to the jury, where the general charge sufficiently presents justifiable homicide as a substantive defense.

11. The charge of the court on justifiable homicide was not too narrow or restricted, and is not open to the criticism made against it.

12. The verdict is amply supported by the evidence, and has the approval of the trial judge, and no reason is shown for disturbing it.

(Syllabus by the Court.)

Error from Superior Court, Washington County; A. F. Daley, Judge.

O. T. Taylor was convicted of murder, and brings error. Affirmed.

J. K. Hines, G. H. Howard, J. E. Hyman, and T. W. Hardwick, for plaintiff in error. W. E. Armistead, Evans & Evans, B. T. Rawlings, Sol. Gen., and John O. Hart, Atty. Gen., for the State.

EVANS, J. O. T. Taylor was indicted and tried for the crime of murder. The testimony disclosed that the deceased, W. R. Veal, and the defendant were bitter enemies, and that for a period of about three months prior to the homicide each was anticipating and was prepared for a deadly encounter. On the day of the homicide, Veal, while riding along a public road in a buggy with a negro driver, was stopped by another negro who had been working for him, and who asked that he might see him on a matter of business. Veal got out of his buggy, and went a short distance out on the side of the road, stopping by an embankment at or near a fence corner. The negro driver remained in the buggy to hold the horse. While conversing with the negro who had called him to this place on the roadside, and while engaged in tying one of his shoes, Veal was approached by another negro in his employment, who was coming down the road, followed by the defendant. The defendant, when first seen by Veal and the negro with whom he was talking, had his pistol in his hand; and, when he arrived within a few feet of Veal, he, without any warning, fired upon him, inflicting a wound in his side, under one arm. At the time Veal was sitting on the ground, tying his shoe, and was not aware until that moment of the presence of the defendant. After receiving this wound, Veal threw up his hands, quickly rose to his feet, and, apparently realizing his helplessness, started to run. As he was running away, the defendant fired three shots at him, each of which took effect in his back, and he fell to the ground. There was testimony that shortly after the shooting a pistol was found on the ground near the body of deceased, but the eyewitnesses to the homicide swore that neither before nor after the first shot did he make any effort to draw the weapon as a measure of offense or defense.

The defendant introduced testimony disclosing that the deceased had previously made repeated threats to kill him on sight, which threats had been communicated to him; that the deceased habitually carried with him a Mauser rifle, and had it in his buggy on this occasion; and that he had stated to a number of people that he had procured this rifle for the express purpose of killing the defendant with it when they next met. The defendant also sought to prove his contention that the purpose of the deceased in leaving his buggy and going to one side of the road, where he was partially concealed from view by the embankment, because of a curve in the road, was to waylay the defendant and carry out these threats; that defendant, while walking along the road, suddenly and unexpectedly came upon the deceased, who immediately threw his hand to his pocket and attempted to draw his pistol; and that, realizing his imminent peril, the defendant thereupon fired four shots at him in quick succession. The defendant also made an attempt to impeach the witnesses for the state upon whose testimony it mainly relied for a conviction. The jury returned a verdict of guilty, and the defendant made a motion for a new trial, to the overruling of which he excepts, and brings the case here for review.

1. When the panel of 48 jurors was put upon the defendant, he urged as cause of challenge to the array that one of the jurors included in the panel had served as a traverse juror at the preceding term of the court, and was therefore disqualified to serve at the then present term, and that for this reason the panel was illegal. The court overruled this challenge to the array, and the defendant excepted *pendente lite*. The inclusion of a juror within the panel of 48, who is ineligible to serve at a particular term of the court, does not vitiate the entire panel. The juror's disqualification is good cause of challenge to the poll, but not to the entire array. See *Thompson v. State*, 109 Ga. 272, 84 S. E. 579, and cases cited.

2. The first and second grounds of the amendment to the motion for a new trial set forth the complaint that the oath prescribed in section 856 of the Penal Code of 1895 was not administered to the entire panel of 48 jurors put upon the defendant. It appears that 36 of the jurors included in that panel were jurors who had been regularly drawn, and who had taken the oath just referred to. Upon the opening of the court, this oath was administered to all of the jurors who had been summoned to serve during that term of the court. As the defendant was entitled to a panel of 48 jurors, other jurors were summoned and added to the number originally summoned, in accordance with the statute providing for completing a panel to try felony cases. The oath prescribed in the above-cited section of the Penal Code should be administered only to jurors called on to serve in civil cases. Originally this was

the oath prescribed for special juries selected from the grand jury. Code 1868, §§ 3854, 3855. The act of 1869 provided for the taking of this same oath by petit juries summoned for service in civil cases during a term of court. Acts 1869, p. 145. The provisions of this act appear in their appropriate place in Code 1882, §§ 3932, 3933. In criminal cases the oath to be taken by the jury was that prescribed in section 4650 of that Code, and this oath had to be administered in each case. It was never contemplated that both oaths should be administered to jurors trying criminal cases. On the contrary, provision was made that in civil cases the taking of a prescribed oath applicable to that class of cases at the beginning of the term should suffice to render the jury competent to try all cases of that class coming on for trial before the jury at that term of court; but in criminal cases the accused was given the safeguard of having a specially prescribed oath, applicable to that class of cases, administered in each and every case the jury was called on to try. This oath now appears in Pen. Code 1895, § 979. The codifiers included therein all the law on the subject of impaneling juries and administering to them the different oaths prescribed by statute. This was done simply for convenience, as appears from section 4452 of the Civil Code of 1895, and was not intended to change the law as it had previously stood.

3. Objection was made to the admissibility of certain statements made to third persons by the deceased, which were communicated to the defendant. The purport of these statements was that the deceased intended no harm to the defendant. The record shows that for some months prior to the homicide there was a feud existing between the defendant and deceased, that the deceased had made threats against the life of the defendant, and that these threats were communicated to the defendant. The defense was that the homicide was justifiable, and an important element of that defense was that at the time of the homicide the defendant was acting under the fears of a reasonable man that the deceased intended to carry into effect his previous threats. Threats illustrated the state of mind of the defendant when he slew the deceased. These pacific messages from deceased to defendant were admissible as qualifying his other declarations. The defendant sought to justify his conduct in a measure by proving the threats of the deceased, and any declaration of peaceful intent subsequent to the threats of which the defendant was informed should have gone to the jury, to enable them to pass upon the conduct of the defendant at the time of the homicide, and determine the good faith of his defense that he was influenced by the fears of a reasonable man that the deceased was about to carry into effect his previous threats. The testimony was not objectionable as being hearsay, nor because what the deceased had

said to the witnesses amounted to nothing more than self-serving declarations on his part. It was competent for the state, in rebuttal of the defendant's evidence as to threats, to introduce this testimony with a view to illustrating the *quo animo* of the defendant in killing the deceased under the circumstances developed on the trial of the case. In this connection, see *Naugher v. State*, 105 Ala. 26, 17 South. 24; *Trumble v. State*, 25 Tex. App. 631, 8 S. W. 814; *Miller v. State*, 27 Tex. App. 63, 10 S. W. 445; *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

4. The court excluded evidence of an antecedent declaration of the defendant to the effect that he had declined to do certain work on a house located on the edge of a public road because he was afraid the deceased might kill him while he was there working. This testimony was properly excluded. A self-serving declaration of a defendant is inadmissible. *Whart. Cr. Ev. § 268*; *Monroe v. State*, 5 Ga. 132.

Complaint is further made that the court refused to allow counsel for the defendant to ask a witness for the state the terms of his employment by the deceased at the time of the homicide. The witness had testified he was a servant of the deceased, and in his employ, at that time. The terms of the employment were wholly irrelevant, and could have shed no light on any issue in the case.

Exception is also taken to the refusal of the court to allow a witness to answer the question whether he would believe a certain witness for the state on oath. The general character of the witness sought to be impeached was not known to the witness offered to impeach him, and the court properly declined to permit the question to be answered; the necessary foundation for it not having been laid. *Civ. Code 1895, § 5293*.

5. The defendant offered the testimony of one Giles and his four sons. They testified that they were not interested in the case. In rebuttal of their avowal of want of interest and freedom from bias or prejudice, the state offered evidence to show that one of the Gileses shot a near relative of the deceased some time previous to the homicide, and that the feeling of the Giles family against the Veals had been bad. Exception is taken to the admission of this evidence on the ground that it was irrelevant. The interest of a witness, and his bias or freedom from prejudice, may always be inquired into, and the testimony objected to was admissible in rebuttal of the testimony of the Messrs. Giles that there were no ill feelings on their part towards any member of the Veal family.

6. The court, over the defendant's objection, permitted the solicitor to ask a witness if the deceased was running or walking at the time he was shot. The objection was that the question was leading. In that it assumed that deceased was either walking

or running at the time he was fired upon, the question was leading; but the court may, in its discretion, allow a leading question to be propounded. A new trial will not be granted solely because the court permitted the solicitor general to ask a witness a leading question.

7. The solicitor, in his concluding argument to the jury, used the following language: "On the happening of this occurrence, the whole community ran together like the gathering of a great storm to investigate the truth of it." When this remark was made by the solicitor, counsel for the defendant objected to the same on the ground that it was based on nothing contained in the record, and as being prejudicial to the accused, and asked the court to rebuke the solicitor general, and instruct the jury to disregard this remark. The court replied: "I don't understand that he contends that it is in the record. He is only drawing an illustration as to how murder cases will excite public sentiment and create excitement. I overrule the objection." Error is assigned on this ruling, as well as upon the use by the court of the language quoted. The record discloses that, immediately after the homicide, several people in the neighborhood were attracted to the scene of the tragedy, and the solicitor doubtless had this circumstance in mind when he made the remark complained of. Nothing in the remark could have been hurtful to the defendant. It is quite natural, and by no means unusual, for an advocate, in discussing the facts of a case before a jury, to indulge to some extent in imagery and illustration. Sometimes a simile may be inapt or the metaphor mixed, or the expression may be hyperbolic. What the law forbids is the introduction into a case, by way of argument, of facts not in the record, and calculated to prejudice the accused. The language of the solicitor was somewhat extravagant, but figurative speech has always been regarded as a legitimate weapon in forensic warfare, if there be evidence before the jury on which it may be founded.

The language employed by the court in ruling upon the defendant's objection to the solicitor's remark is not open to the criticism made upon it. The court interpreted the solicitor's remark as illustrating how, in murder cases, public sentiment is aroused, and some interest and excitement created. The characterization of instances of homicide as "murder cases" cannot be construed as an expression by the court of any opinion as to the guilt of the accused. When a person is charged with the crime of murder, the case against him is, even prior to his conviction, commonly alluded to in ordinary conversation as a "murder case." The jury doubtless understood the reference to be to cases where murder was charged, and public interest was excited to a greater or less extent, and there is no reason to apprehend

that the jury drew the unwarranted inference that it was the purpose of the court to express an opinion that the accused, in killing the deceased, had committed the crime of murder.

8. There is no merit in the complaint that the defendant's contentions were not accurately summed up by the court. As stated by the court, the contentions comprehended the defense as presented both by the evidence and the defendant's statement. If the defendant desired a more elaborate presentation of his contentions, he should have submitted a timely written request embodying a summary of his contentions as presented by the evidence and his statement.

9. The next assignment of error is upon the following charge of the court: "I charge you that threats alone will not justify a killing, but such threats may be considered by the jury, in connection with any overt act of the deceased at the time of the killing, in passing upon the question of reasonable fears. Did the deceased at that time do anything which justified the defendant in believing he then intended to carry out his previous threats? And were such acts sufficient to excite the fears of a reasonable man—one reasonably courageous, reasonably self-possessed, and not those of a coward or one seeking an opportunity or an excuse for the killing?" This charge is assailed on the ground that it incorrectly stated the law, and was a limitation on the right of self-defense. It cannot be the law that mere verbal threats will alone justify a homicide. To maintain such a doctrine would be absurd. The charge of the court was in line with the principle announced in the Cumming Case, 99 Ga. 662, 664, 27 S. E. 177, 178, that there must be something more than mere threats; there "must be an appearance of imminent danger"; the "means of inflicting the threatened injury must apparently be at hand, and there must be some manifestation of an intention to inflict the injury presently." The charge of the court laid down no different standard from that prescribed in the Cumming Case; neither was it a limitation in any way on the defendant's plea of self-defense. The court, in charging upon the law with reference to threats, was not undertaking to charge the jury as to the law on the subject of justifiable homicide. The judge did that in another portion of his charge. The charge excepted to dealt only with the effect of a mere verbal threat, and the court correctly stated the law with respect thereto.

10. Another assignment of error was the failure of the court to give in charge the following provision of Pen. Code 1895, § 76: "The homicide appearing to be justifiable, the person indicted shall, upon the trial, be fully acquitted and discharged." The homicide was admitted. The evidence and the statement of the accused presented the clear-cut issue of murder or justifiable homicide.

The court charged the jury on the subject of murder and justifiable homicide, and instructed them to "apply the evidence to the law [given] in charge in defining murder and justifiable homicide, and say by [their] verdict, after giving the benefit of any reasonable doubt" resting in their "mind to the defendant, whether or not he [was] guilty of the crime with which he [was] charged." This instruction, as well as the trend of the whole charge, recognized justifiable homicide as a substantive defense. "The judge was not bound to read Pen. Code 1895, § 76; having in his general charge instructed the jury as to the form of their verdict, and as to the effect of finding that the killing was justifiable." *Robinson v. State*, 118 Ga. 193, 44 S. E. 985. In the case of *Waller v. State*, 102 Ga. 684, 28 S. E. 234, the court nowhere in its charge instructed the jury what should be their finding in the event they found defendant was justified in the act, and it was in that case held to have been error to omit to give section 76 in charge. But in the case at bar the tenor of the entire charge was to contrast murder and justifiable homicide—that the jury must find the homicide to be murder before they could convict. The only inference to be drawn from the charge was that if the homicide was justifiable the defendant should be acquitted. And the final instruction was as to the form of their verdict if they found the homicide to be murder, and, if they found that the homicide was not murder, they should return a verdict of not guilty.

In this connection it may also be said that there is no merit in the complaint that the court did not instruct the jury that if they found his statement to be true, and if they found, under his statement, that the homicide was in fact justifiable, it would be their duty to acquit the defendant. There was no request by the defendant to so charge. The court charged the law on the subject of murder and justifiable homicide, and the "faith and credit to be given the defendant's statement. The court is not expected or required to sum up various facts and circumstances favorable to the accused, whether those facts appear from many witnesses or from one witness, or from the statement of the defendant, and instruct the jury that, if such facts are found to be true, then the homicide would be justifiable. "It is not necessary for the court to apply the law given in charge to the jury to the facts of the case, when the application is plainly apparent." *Goode v. Rawlins*, 44 Ga. 593. The charge satisfies the law when the law applicable to the case is properly expounded to the jury, and they are instructed to apply it to the facts, and in that way reach a verdict.

11. The court charged the jury: "If you find that the circumstances attending the homicide were such as to cause in the mind of a reasonable man the fear that the de-

ceased was attempting, by violence or surprise, to commit a felony upon the person of the defendant, and that the defendant shot under the influence of such fears, then the homicide would, under those circumstances, be justifiable." This excerpt from the charge is assailed by the defendant as being an incorrect statement of the law, and restricting in narrower compass the right of defending one's person against a felonious attack than is given by the statute. Section 70 of the Penal Code of 1895 justifies the killing, in defense of one's person, of one who is manifestly intending or endeavoring by violence or surprise to commit a felony on the person of the slayer; and the contention is that the word "attempting," in the charge, is narrower in scope than the statutory words, "manifestly intending or endeavoring." To manifestly intend an act implies more than mental resolution to do the act. The mental resolution must find some form of expression before it becomes manifest. In cases involving force, the slightest manifestation of intent to do the act would be an attempt in the accomplishment of the act. See *Johnson v. State*, 14 Ga. 59. (2) However, it is not necessary to decide that the word "attempt" is the exact equivalent of "manifestly intends." The charge complained of was not erroneous when construed with the entire charge. Just preceding this charge, the court had read the section (section 70) defining justifiable homicide, and the excerpt is taken from that portion of the charge wherein the court was instructing the jury that the danger need not be actual; if the circumstances attending the homicide were such as to excite the fears of a reasonable man that the deceased was attempting a felony on his person, and the defendant shot under the influence of such fears, the shooting and killing would be justifiable. The defendant, in his statement, made the issue that he shot the deceased to prevent the deceased from committing a felony on his person; that at the time he fired the fatal shot the deceased was attempting to shoot him; that this attempt consisted, in part, of deceased placing his hand on his hip pocket, as if to draw a weapon. On this issue the court delivered the part of the charge above quoted. It was an appropriate and correct statement of law, as applied to the facts of the case.

12. The trial judge very properly declined to grant a new trial on the general grounds of the defendant's motion. The testimony upon which the state relied for a conviction discloses that the killing of the deceased was deliberate and without any shadow of justification. The defendant's plea of self-defense seems to have been based upon theory rather than upon fact. That the jury arrived at this conclusion, and that their finding met with the approval of the presiding judge, affords the defendant no just

cause of complaint, taking into consideration the circumstances brought to light at the trial, and the improbability that he acted under the fears of a reasonably courageous man. This being so, no reason appears for setting aside the verdict.

Judgment affirmed. All the Justices concur.

(121 Ga. 391)

SAVANNAH, F. & W. RY. CO. v. EVANS.
(Supreme Court of Georgia. Dec. 10, 1904.)

RAILROADS—INJURY TO PERSON ON TRACK—EVIDENCE—COURTS—JURISDICTION—PLEADING—PROPORTIONATE DAMAGES—INSTRUCTIONS.

1. The defendant company failed to establish by proof its special defense that the railway track on which the plaintiff's husband was killed was operated and controlled by another company having the same corporate name.

2. The court properly overruled the defendant's motion to dismiss the case on the ground that it was without jurisdiction to try the same, inasmuch as a Georgia corporation which transacts business in another state may be sued in this state by a nonresident for injuries inflicted in that state.

3. Where a plaintiff relies, as an act of negligence authorizing a recovery, upon the breach of a duty imposed upon a railway company by a statute of a foreign state, or by an ordinance adopted by a municipality thereof, it is incumbent on the plaintiff to specially plead the statute or ordinance; and, in the absence of proper pleading, proof in regard thereto is inadmissible.

4. It was not permissible for a witness in behalf of the plaintiff to state his "conclusion," drawn from facts testified to by him, that, at the place where her husband attempted to cross the company's track, there was less danger to a pedestrian than there was at a near-by crossing. Nor was it the right of the defendant to introduce evidence tending to show general knowledge on the part of the public as to the danger incident to crossing its track at the point where the plaintiff's husband was killed.

5. Where a plaintiff alleges a number of acts of negligence on the part of the defendant, it is not necessary to a recovery that proof should be made of each and all of such negligent acts, if the defendant's liability to respond in damages be shown by establishing the commission of one or more of the acts of negligence complained of.

6. The court rightly construed and upheld as constitutional the statute on which the plaintiff relied as conferring upon her the right to recover proportionate damages in the event the jury should find that both the servants of the company and her husband were at fault.

7. The charge of the court as to the measure of damages recoverable in this kind of a case was warranted by the evidence, and was not open to the criticism that the court instructed the jury to consider certain elements of damages which the law did not contemplate should be looked to in estimating the loss sustained by the plaintiff.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by Elizabeth Evans against the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. L. Clay and Walter G. Charlton, for plaintiff in error. Twiggs & Oliver, for defendant in error.

EVANS, J. The plaintiff below, Mrs. Elizabeth Evans, brought a suit for damages in the city court of Savannah against the Savannah, Florida & Western Railway Company, a Georgia corporation, which she alleged was in the month of October, 1899, operating a railroad running into and through the town of Lakeland, in Polk county, Fla. Her complaint was that the defendant company on October 5, 1899, while operating an engine along its track through that town, ran over and killed her husband as he was, at night, attempting to cross its track at a point where, by long-established license, the public in general, and the citizens of that town, including her husband, had been permitted to cross. The acts of negligence with which the company was charged were (1) that the engine was being handled by a locomotive engineer whom the company knew was incompetent to run it, and who, without any warning to plaintiff's husband, suddenly and rapidly propelled the engine backward at a greater rate of speed than allowed by law; (2) that the company had failed to provide safe or suitable crossing facilities at the point where he was attempting to cross its track, and had further failed to provide any means of warning persons crossing at that point of the danger of approaching trains; (3) that the company's servants did not give the usual and proper signals of the approach of its engine, nor display the proper light or lights on the rear of the engine; and (4) after they saw, or were in a position to see, plaintiff's husband on the track, where he had a right to be, they failed to give him any warning of his perilous situation, and failed to apply the brakes on the engine, or to use any other preventive measures by which his life could have been saved. The plaintiff averred that her husband was at the time using due care and circumspection, but was unable to hear the approaching engine because of the roar and noise of another engine pulling a heavy train of cars of defendant, which was then and there passing in close proximity to him along another track. She set forth in her petition what purported to be a literal transcript of certain statutes of Florida upon which she relied as conferring upon her, as the widow of the deceased, a right of action for his homicide; also a copy of other statutes imposing upon railroad companies the burden of overcoming a legal presumption of negligence in such cases, and providing for the recovery of proportionate damages where a person injured by the negligence of the servants of a railway company was not himself entirely free from fault. The defendant company filed an answer in which it made a general denial of the allegations of fact upon which the plaintiff relied as showing liability

on its part, and in which it specially pleaded that the tort complained of was committed by another railroad company. A verdict in favor of the plaintiff was returned by the jury, which the court declined to disturb after passing upon a motion for a new trial made by the company. It thereupon sued out a bill of exceptions, in which complaint was made of divers rulings of the court to which it had excepted *pendente lite*, and in which it also assigned error upon the judgment overruling its motion for a new trial.

1. In its answer the defendant company set up the defense that it did not own and had never operated the railroad in Florida mentioned in the plaintiff's petition, but that this line of road was owned and operated by another and distinct corporation, having the same corporate name. The evidence adduced at the trial showed, however, that the defendant railroad company was controlling and operating the engine which killed the plaintiff's husband.

2. After both sides had announced "closed," counsel for the defendant moved to dismiss the plaintiff's action on the ground that the court was without jurisdiction to entertain the same; it appearing from the evidence that at the time of the homicide she and her husband were both living at Lakeland, Fla., where she had since continuously resided; that the cause of action arose in that state; and that her husband was killed by a Florida corporation. As already intimated, the proof was that the plaintiff's husband was killed by the defendant company during the course of its operation of a railway running through the town of Lakeland, Fla. And it is well settled that a Georgia corporation which transacts business in another state may be sued in Georgia by a citizen of a sister state for injuries inflicted in that state. *South Carolina R. Co. v. Nix*, 68 Ga. 580; *South Carolina R. Co. v. Dietzen*, 101 Ga. 730, 29 S. E. 292, and cases cited.

3. Over the objection of the defendant, the court permitted the plaintiff to introduce proof of a statute of Florida imposing on railroad companies the duty of placing crossing signs at all points where their respective roads crossed over highways, providing for the ringing of the bell on every engine before crossing any street in a city, and limiting the speed of trains while running through any traveled street of a city to a rate of four miles per hour. The objection to this evidence was that the statute had not been pleaded, and that it was irrelevant to the cause of action stated in the plaintiff's petition. That, in order to gain the advantage of a foreign statute upon which a plaintiff bases his right to recover, the statute must be specially pleaded and proved, admits of no doubt. See 9 Enc. Pl. & Pr. 542; 20 Enc. Pl. & Pr. 598, and authorities cited. This is true for the obvious reason that the courts of one state cannot

take judicial notice of the laws of a sister state. *Champion v. Willson*, 64 Ga. 184; *Bolton v. Ga. Pacific Ry. Co.*, 83 Ga. 659, 10 S. E. 352; *Craven v. Bates*, 96 Ga. 78, 23 S. E. 202; *Wells v. Gress*, 118 Ga. 566, 45 S. E. 418. The provision of our Civil Code of 1895 (section 5231) that the public laws of our sister states, "as published by authority, shall be judicially recognized without proof," does not dispense with the necessity of pleading a foreign law, upon the violation of which a party relies as an act of negligence. On the contrary, this provision, which first appeared in the Code of 1863 (section 3747), and was brought forward into the Code of 1868 (section 3771), and incorporated in later codifications of our laws, merely means, as was held in the case of *Simms v. Southern Express Co.*, 88 Ga. 132-133, that, where the public laws of a foreign state are published by its authority, the authenticity of its publications need not be shown by the introduction of proof of their genuineness, but will be judicially recognized by our courts without proof, and given the same effect as though its public laws were proved by the introduction in evidence of a duly certified copy thereof, properly authenticated under the great seal of that state.

There is no hint in the plaintiff's petition that her husband was killed at a point where the company's railroad crossed a public highway, or at a point where its road ran "through" a street in a city; nor does she allege any duty resting on the company with respect to ringing the bell of its engine at street crossings, or erecting signboards bearing the prescribed statutory warning, "Look Out for the Cars." Indeed, the allegations of her petition disclose that her husband was run over at a point on the company's road where he and other citizens had long been permitted to cross as mere licensees. Her alleged right to recover was based solely upon the common-law duty the company owed him under the circumstances, coupled with the Florida statutes conferring upon her, as his widow, the right to hold the company responsible for its violation of that duty, and fixing the measure of the damages recoverable by her. She did, it is true, aver that the engine was, without any "warning whatever, suddenly and rapidly propelled backward, and at a greater rate of speed than allowed by law." But she did not even remotely suggest the existence of any Florida statute regulating the speed of trains while running through cities or elsewhere in that state. Her bare assertion that the speed of the engine was greater than that "allowed by law" amounted to no more than a mere conclusion of fact, in the absence of any attempt to specially plead the Florida statute offered in evidence. *Roots v. Merriwether*, 8 Bush (Ky.) 897; *Hempstead v. Reed*, 6 Conn. 480; *Lomb v. Pioneer Co.*, 96 Ala. 430, 11 South. 154; *Walker v. Maxwell*, 1 Mass. 104; *Bean v. Briggs*, 4 Iowa, 464;

Collett v. Keith, 2 East, 260; Fagan v. Strong, 17 N. Y. Civ. Proc. R. 438, 7 N. Y. Supp. 919; Phinney v. Phinney, 17 How. Prac. 197; Rothschild v. Railway Co., 28 Abb. N. C. 312, 13 N. Y. Supp. 361, and cases cited in note. That the plaintiff may have made certain allegations which, read in the light of the Florida statute, would disclose that the defendant company had failed to comply with its statutory duty in regard to the manner of running its engine, cannot be regarded as the equivalent of pleading that statute, or as affecting the nature of the cause of action she set forth, which was a common-law action, pure and simple, so far as the negligence charged against the defendant was concerned. Bolton v. Ry. Co., 83 Ga. 659, 10 S. E. 352. It follows, therefore, that the statute should have been excluded, as having no bearing on the case made by her petition. This ruling also disposes of certain exceptions to the charge of the court touching the duty of the company with respect to the operation of its engine at and near street crossings in the city.

The court committed further error in allowing the plaintiff to introduce in evidence a copy of section 125 of the "Revised Ordinances of Lakeland, Florida," providing that "No locomotive, car or train of cars, shall be run at a greater speed within the corporate limits than eight miles per hour." Judicial notice could not be taken of even a valid ordinance of a municipality of this state. Mayson v. City of Atlanta, 77 Ga. 663 (5). The ordinance was not pleaded by the plaintiff, nor was the company charged with a violation thereof, or of any other ordinance of the town. The admission of this evidence was, moreover, harmful, as the court followed up the error of admitting it with a charge to the jury which gave to the plaintiff the full benefit of the same.

4. A witness for the plaintiff was erroneously allowed, over the defendant's objection, to state to the jury his "conclusion," from certain facts to which he had testified, that "there was less danger to a pedestrian in crossing the railroad" at the point where the plaintiff's husband was killed "than there was in crossing New York avenue," a point near by. The relative danger of crossing at the place selected by the deceased was a question for the jury to determine from the facts brought out, and was not a proper subject-matter for the expression of an opinion entertained by the witness.

The court properly declined to admit testimony offered by the defendant which its counsel announced was intended to show general knowledge on the part of the citizens of Lakeland and the public at large as to the dangers incident to being on the company's track at the point where the homicide occurred, owing to the customary movements of its trains in that vicinity. The issue before the court was whether the deceased knew, or ought to have known, of the

danger of attempting to cross at that point, and whether or not he acted as an ordinarily prudent man in going on the track at the time and under the circumstances shown by the evidence.

5. Counsel for the company presented to the court several written requests to charge, all of which were framed upon the theory that, as the plaintiff had charged the company with a number of separate and distinct acts of negligence, she was not entitled to recover unless she sustained by proof each of the negligent acts complained of in her petition. The court refused to give these requests to charge. The ruling was sound. The theory of the defendant was unsound. One request to charge on this subject ought to have been given, as counsel for the defense embraced therein only such contentions on the part of the plaintiff as she was bound to establish as a condition precedent to a recovery under the allegations of her petition. Reference is had to the request copied in the eleventh ground of the company's motion for a new trial, which request was to the effect that it was incumbent on the plaintiff to show that where her husband was killed was a place where the company had, by long and established license, permitted the public in general and the deceased and other citizens of the town to cross, and that he had a right to be at that point at the time and under the circumstances alleged. It may be added, in this connection, that the court ought to have confined the plaintiff to proof relevant to her case as laid, and have sustained the defendant's objections to all evidence offered with a view to showing that the deceased met his death at a regular street crossing, where the public had a right to cross independently of any permission or implied license on the part of the company. The pleadings did not warrant the reception of evidence of this character, or any charge thereon giving the plaintiff the benefit of any theory of recovery based on the same.

6. The defendant, during the progress of the trial, invoked a ruling by the court upon the construction to be given a statute of the state of Florida recognizing the doctrine of comparative negligence, which the plaintiff had properly pleaded. This statute declared that no person should be entitled to recover damages from a railway company where the injury complained of was done by his consent or was caused by his own negligence; but "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." The court held that the meaning of the language quoted was that the jury should make their estimate correspond with the amount of damages the complainant was justly entitled to receive, taking into consideration the fact that he was not entirely

free from fault, and reducing the amount he would otherwise be entitled to recover in proportion to the neglect or want of care attributable to him. The company's contention is that, under the wording of this statute, the jury are left free, after determining what amount of money would be just compensation for the injury inflicted, to arbitrarily increase that amount in proportion to the degree of default attributable to the plaintiff, and that the statute, thus construed, is unconstitutional because it is in violation of the federal Constitution, "insuring due process of law." We think this a somewhat strained construction of the statute. Giving to it the meaning the court below gave it saves it from any such attack, and, we think, gives effect to the real purpose and intent of its framers. It may well be understood as expressing the idea that, if both the company and the plaintiff were at fault, the damages recoverable shall be "diminished or increased by the jury," not in proportion to the amount of money he would be entitled to receive if blameless, but in proportion to the degree of care exercised by him, charging him with "the amount of default attributable to him." Or in other words, if he be not wholly blameless, his recovery shall be greater or less in amount, so as to correspond with the default, of slight or of more serious degree, attributable to him.

7. Exception is taken to a charge of the court on the subject of the measure of damages recoverable by the plaintiff; the complaint being that the court erred in stating to the jury what were the elements of damage to be considered by them; there being no evidence to justify a charge as to certain items of loss mentioned, and other elements of damages covered by this charge not being recoverable in this kind of a case. When this case was here at the March term, 1902, a charge similar to that now excepted to was approved; it being in substantially the same language used by the Supreme Court of Florida in the case of *F. C. & P. Ry. Co. v. Foxworth*, 25 South. 338. See *F. C. & P. R. Co. v. James*, 115 Ga. 319, 41 S. E. 585. The evidence adduced at the last trial warranted, we think, the giving of the instruction of which complaint is now made. We definitely rule on this point for the guidance of the court in framing its charge on the next hearing of the case, which must, for the reasons above announced, undergo still further investigation.

Judgment reversed. All the Justices concur.

(121 Ga. 346)

DIXON v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CERTIORARI—CONVICTION IN CITY COURT—BOND—EFFECT.

1. Where the only provision for certiorari proceedings, in an act creating a city court, indi-

cates a legislative intent that the general provisions of the Civil Code of 1895, § 4637, relating to such proceedings from "inferior judicatories," should apply, no bond is required in criminal cases as a condition precedent to the issuance of the writ.

2. The writ of certiorari may stay the execution of the sentence, but of itself does not discharge the prisoner from confinement. That privilege must be secured as in all other bailable cases.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Walter Dixon was convicted of misdemeanor. His application for certiorari was dismissed, and he brings error. Reversed.

In the city court of Tifton, Dixon was convicted of a misdemeanor. He applied for a writ of certiorari, making the affidavit that it was not filed for the purposes of delay only, and that he is advised and believes that he has good cause for "certiorarying" the proceedings to the superior court; that he has not had a fair trial; that he has been wrongfully and illegally convicted; that owing to his poverty he is unable to pay the cost, but gives security and bond as required by law.

Murrow & Pate and J. J. Murray, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

LAMAR, J. The certiorari was dismissed by the judge of the superior court, upon the sole ground that no proper bond had been given by the plaintiff in certiorari. This was error. In *Daughtry v. State*, 115 Ga. 819, 42 S. E. 248 (a certiorari from the city court of Waynesboro), and in *Colvard v. State*, 118 Ga. 13, 43 S. E. 855 (a certiorari from the city court of Forsyth), it appeared that the acts creating those courts did not provide a method by which a defendant could obtain the benefit of the writ of certiorari. But it was held that the right to the remedy existed, and the clear deduction from these cases is that, if no other method is declared, the right should be made effective by the general method prescribed in the Civil Code of 1895, § 4637. The act creating the city court of Tifton (Acts 1902, p. 174) provides that certiorari from that court is "to be issued, heard and determined like certioraris from justice and other inferior courts as now, or as may be hereafter prescribed by law," thereby incorporating the provisions of this section of the Code. It added no new power to the superior court of Berrien county, but the special act was merely declaratory of an existing power to issue the writ. This being true, the language used in the *Colvard Case* (page 16, 118 Ga., page 856, 43 S. E.) is applicable. It was there held that, as the law now stands, "one found guilty of the commission of a criminal offense cannot, if convicted in a court, such as the city court of Forsyth, be legally called on to pay the costs or furnish a bond of any kind, if he

elects to carry his case by certiorari to the superior court."

But it was contended by the Solicitor General that these provisions as to certiorari in the act creating the city court of Tifton made applicable section 765 of the Penal Code of 1895, relating to such proceedings in county courts in criminal cases. But this section is special, and relates only to county courts. If the contention be correct, that section would have been equally applicable in the Daughtry and Colvard Cases, in the latter of which it was ruled that no bond was required, though Pen. Code 1895, § 765, does require a bond in such applications from the county court. The city court of Tifton stands on the same footing in this respect as the city court of Forsyth. Besides, if the general method in the Civil Code of 1895, § 4637, is not to be followed, which of the special methods is to be adopted? Shall it be that in the Penal Code of 1895, § 765, relating to county courts, or that in the act of 1902 (page 105), relating to certiorari from a municipal court? All three cannot apply. The language of the statute here clearly indicates a legislative intent that the general provisions of the Civil Code of 1895, § 4637, relating to such proceedings from inferior judicatories, should apply. No bond is required thereunder in criminal cases as a condition precedent to the issuance of the writ. This makes it unnecessary to determine whether the bond actually given was such as demanded by section 765 of the Penal Code of 1895. The writ of certiorari may stay the sentence. Civ. Code 1895, § 4645; Taylor v. Gay, 20 Ga. 77 (1). But of itself it does not discharge the prisoner from confinement. That privilege must be secured as in all other bailable cases.

Judgment reversed. All the Justices concur.

(121 Ga. 307)

NATIONAL BLDG. ASS'N v. QUINN.

(Supreme Court of Georgia. Nov. 12, 1904.)

BUILDING AND LOAN ASSOCIATION—EXISTENCE—EVIDENCE—USURY—BOND—ACTION FOR BREACH—APPEAL—REVIEW.

1. The contract declared on was clearly usurious, unless made by a building and loan association as part of a scheme authorized by its charter.

2. The averments of the petition and plea put in issue the validity of the contract, and the bona fide character of the plaintiff as a building and loan association. This burden was not carried by introducing a certificate of incorporation in a foreign state, unaccompanied by the general statute designating its powers.

3. This being so, the plaintiff failed to show that it was in fact a building and loan association, and that the scheme was one authorized by its charter.

4. The absence of the charter makes it impossible to determine whether the scheme was authorized by the statute of incorporation, or whether the exaction of payment until stock was worth \$4,500 was a device to secure usury on a loan of \$1,800; the corporation at the time of the loan appearing to have been in a

failing condition, and there being no proof that this fact was brought to the attention of the borrower.

5. If the requirement to mature \$4,500 stock in order to secure a loan of \$1,800 was usurious in its inception, the usury could not be purged therefrom by the passage of a subsequent by-law reducing the payment from \$100 to \$60 on a share.

6. The suit was not upon an unconditional contract in writing, and the burden was upon the plaintiff of establishing the amount of its damage for the breach of its bond. Dart v. Asso., 27 S. E. 171, 99 Ga. 794.

7. Treating the evidence excluded as admitted, and that admitted over the plaintiff's objection as excluded, the judgment is not shown to have been erroneous.

8. The terms of the law under which the plaintiff was chartered not being in the record, and it having failed to show the amount of damages arising from the breach of the bond, a judgment based on the admissions of the defendant's plea was not error of which the plaintiff can complain.

(Syllabus by the Court.)

Error from City Court of Washington; W. H. Toombs, Judge.

Action by the National Building Association against B. L. Quinn. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Slaton, for plaintiff in error. F. H. Colley and S. H. Hardeman, for defendant in error.

LAMAR, J. Judgment affirmed. All the Justices concur.

(121 Ga. 309)

MARIETTA CHAIR CO. v. HENDERSON.

(Supreme Court of Georgia. Dec. 10, 1904.)

MUNICIPAL CORPORATIONS—VACATION OF STREETS—RIGHTS OF ABUTTING LANDOWNERS—DAMAGES—DECREE—VACATING.

1. In the absence of constitutional restrictions, the lawmaking power of a state may vacate a street in a municipality.

2. The power to vacate may be delegated to the municipal corporation.

3. When a street is vacated, the interest of the public therein ceases, and the owners of the fee, who are presumptively the abutting landowners, become entitled to use the property without regard to the former servitude imposed upon it.

4. If the closing of a street results in damaging private property within the meaning of the Constitution of this state, the owner of the property thus damaged, by allowing the street to be closed without instituting proceedings to prevent it, waives his right to demand compensation as a condition precedent to the closing of the street, and is remitted to his action at law for damages.

5. An act of the General Assembly authorizing the closing of a street need not provide for the payment of compensation to those whose property is thereby taken or damaged, there being a general law of the state providing a method for ascertaining the compensation to be paid in all such cases.

6. Where a decree based on a consent verdict is entered, requiring the removal of an obstruction in a public street, and subsequently a state of facts arises which renders the maintenance of the obstruction lawful and proper, a

1. See Municipal Corporations, vol. 24, Cent. Dig. § 721.

petition praying for the granting of an order declaring that the decree is no longer binding should be granted.

7. While a judgment refusing in general terms to grant specified relief will be affirmed if the record shows that any valid objection was raised to the petition, none of the objections set up in the demurrers or answer in the present case were well taken.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by C. E. Henderson against the Marietta Chair Company. Judgment for plaintiff, and defendant brings error. Reversed.

Henderson brought an action against the Marietta Chair Company to enjoin it from obstructing a portion of Hansell street, sometimes called McClellan street, in the city of Marietta. The defendant claimed authority to obstruct the street under a resolution of the mayor and council, adopted on September 1, 1902, which relinquished all right in the street to the plaintiff and defendant, respectively, as the abutting landowners. At that time there was no express legislative authority for the closing of this street. A consent verdict was rendered, in which the defendant was perpetually enjoined in accordance with the prayers of the petition, and upon this verdict a decree was entered, and no exception was ever taken to the decree. Subsequently Henderson presented a petition, alleging that the defendant had failed to comply with the decree, and had violated it by continuing to obstruct the street. The defendant answered, and upon the hearing the court passed an order requiring the defendant to remove the obstruction, as required by the decree, within 20 days, or, in default, show cause why he should not be attached for contempt. To this order the defendant excepted, and the judgment was affirmed by the Supreme Court. 119 Ga. 65, 45 S. E. 725. After this judgment was affirmed, and before the expiration of 20 days from the time the judgment of the Supreme Court was made the judgment of the trial court, the Marietta Chair Company presented a petition, in which it was alleged that since the decree had been rendered a new state of facts had arisen; that the General Assembly, on August 10, 1903 (Acts 1903, p. 705), had passed an act ratifying the action of the mayor and council in authorizing that portion of Hansell street which was in controversy to be closed, and specifically authorizing them to convey that portion of the street to the adjacent landowners. The act conferred power to exercise the authority granted by a majority vote of the mayor and council either at a called or regular meeting, and with or without advertising their intention to close the street. It was alleged that pursuant to this authority the mayor and council had passed a resolution closing the street, and that the mayor, under authority of the resolution, had conveyed the interest

of the city in the street to the adjacent landowners, the north half being conveyed to the defendant as one of the adjoining owners. The petition prayed for the passage of an order relieving the petitioner from complying with the decree, and also for general relief. The defendant appeared, and filed demurrers, both general and special, and also answered. The special demurrer alleged that the petition was defective, because there was nowhere set out therein the petition, orders, and decree in the original case, which were referred to in the petition in the present proceeding. The general demurrer alleged that the petition set forth no cause of action, and no right to the relief prayed for, and constituted no defense to the order requiring the removal of the obstructions; and also attacked the act authorizing the closing of the street as unconstitutional and void. The grounds of this attack, as set forth in the demurrer, were that the act sought to take private property of the respondent and give it to the movant, a private corporation, for its own private use, without compensation, and violated those provisions of the Constitution of this state which declare that "protection to person and property is the paramount duty of government and shall be impartial and complete"; that "no person shall be deprived of life, liberty, or property except by due process of law"; that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid"; that "no law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed"; that "the General Assembly shall not, by vote, resolution or order grant any donation or gratuity in favor of any person, corporation or association"; that "all rights, privileges and immunities which may have vested in or accrued to any person * * * under any judgment, decree or order, or other proceedings of any court of competent jurisdiction in this state heretofore rendered shall be held inviolate by all courts before which they may be brought in question, unless attacked for fraud." The demurrer also set up that the act was in violation of those provisions of the Constitution of the United States which declare that "no state shall pass any law impairing the obligation of contracts," "no person shall be deprived of life, liberty or property without due process of law," nor "shall private property be taken for public use without just compensation"; that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," nor "shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The demurrer closes with a general averment that the act violates both the Constitutions of the United States and of the state by providing that the

private property of the respondent may be taken for a private use of the movant. The answer alleged that the respondent had never had any opportunity to "attack" the legislative act, no notice of such act having been published as required by law; that one of the counsel for movant was also a member of the General Assembly which passed the act, and that the case was pending in the Supreme Court at the time the act was passed; that the defendant had vested rights under the decree, which had never been attacked for fraud or set aside, and it was beyond the power of the General Assembly to interfere with such rights—one of them being the right of access from the street to his property; that the decree, being rendered by consent, was, in effect, a contract between the parties. The answer attacked the act as unconstitutional upon the same grounds as were set forth in the demurrer. Attached to the answer as exhibits were those portions of the record in the original case which the special demurrer alleged were not set forth in the petition. The motion came on for a hearing, and the court, after holding that the petition in the original case was a part of the record in this case, heard evidence consisting of a certified copy of the resolution of the mayor and council, passed subsequently to the act of the General Assembly, authorizing the closing of Hansell street, and providing for a conveyance of the city's interest therein to the adjoining landowners; it appearing from the resolution that the authority conferred by the act had been exercised, in the terms of the act, by resolution adopted by unanimous vote of the mayor and council. There was testimony of the president of the Marietta Chair Company, and also of the mayor of the city, from which it appeared that there was no collusion between the Marietta Chair Company and the city authorities in reference to the matter. It also appeared that the mayor was the guardian of a minor ward, who owns stock in the Marietta Chair Company, but that he held no stock in his own right. Henderson objected to the closing of the street, and nothing was paid by the Marietta Chair Company for the relinquishment executed by the city. The pleadings in the original suit and in the application to enforce the decree were all introduced in evidence. The judge reserved his decision, and at a subsequent date passed an order which merely declared that "the application and motion is hereby refused." To this judgment the Marietta Chair Company excepted.

N. A. Morris and King, Spalding & Little, for plaintiff in error. J. Z. Foster, for defendant in error.

COBB, J. 1-4. In the absence of constitutional limitations, the lawmaking power of the state is vested with plenary authority in reference to the public streets and highways.

It may declare an existing street vacated without providing for the submission of the question to judicial inquiry. All questions necessary to be determined in order to decide whether a street shall be vacated or abandoned and the interest of the public therein released are referred to the wisdom and discretion of the lawmaking power. *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237; *State v. Huggins*, 47 Ind. 586. In the absence of a constitutional restriction, the power to vacate a street may be delegated by the lawmaking body to municipal and other subordinate public corporations. *Polack v. Trustees*, 48 Cal. 490; *Brook v. Horton*, 68 Cal. 554, 10 Pac. 204. A municipal corporation has no power, in the absence of express legislative authority, to authorize the erection of permanent structures in a public street, which interfere with the free use of such street by the public. *Savannah R. Co. v. Woodruff*, 86 Ga. 96, 13 S. E. 156, and cit.; *Almand v. St. Ry. Co.*, 108 Ga. 424, 34 S. E. 6, and cit.; 27 Am. & Eng. Enc. Law (2d Ed.) 113. It necessarily follows that the power to entirely vacate a street does not rest in the municipal authorities in the absence of an express delegation of authority by the General Assembly. When a street has been vacated, either directly by an act of the General Assembly or by action of a municipal corporation under the authority of an express delegation of power, the interest of the public in the street ceases, the burden upon the land which has been used as a street is removed, and the owner of the fee again becomes entitled to use his property in such manner as he may see proper, without regard to the former servitude to which it was subject. If the fee in the street was in the state or in the city, the vacating of the street leaves the state or the municipality, as the case may be, in the possession of the property, to use it for any purpose that it may see proper, without reference to its former use. If the fee to the street is in the adjacent landowners, then the street, relieved of any right in favor of the public, becomes again subject to use by the abutting owners, without reference to the former rights of the public. Whenever a street is vacated, the presumption is, until the contrary appears, that the fee is in the adjacent landowners, and that the right of each extends to the middle of the way. *Harrison v. Augusta Factory*, 73 Ga. 447, and cit.

It is contended that, though the General Assembly may have authority to vacate a street by direct enactment, or to authorize its vacation by the municipal authorities, when in the exercise of this power the adjacent landowner is damaged by the loss of the right to use the land as a street, such owner must be compensated in damages for this loss. The Constitution declares that private property shall not be taken or damaged for public purposes without just and

adequate compensation being first paid. Civ. Code 1895, § 5729. It has been held that the vacating of a street is neither a taking nor a damaging of private property in such a sense as to authorize the adjacent landowner or others who have been accustomed to use the street to claim compensation for the deprivation of this right; that any loss resulting from the exercise of the power to vacate a street is *damnum absque injuria*. *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649; *Levee Dist. No. 9 v. Farmer* (Cal.) 35 Pac. 569, 23 L. R. A. 388; *Coster v. Albany*, 43 N. Y. 399; *Gray v. Land Co.*, 26 Iowa, 387. But there is also authority for the proposition that, when the vacating of the street occasions to the adjacent owner or others who had been accustomed to use the street such peculiar loss as is not of the same character as that inflicted upon the general public, equity would interfere in behalf of such owner to restrain the attempted abandonment of the street, and that such person would have a right of action against a municipal corporation who had exercised a power to vacate delegated to it by the state. *Heller v. R. Co.*, 28 Kan. 625; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369; *Brady v. Skinkle*, 40 Iowa, 576. It has also been said that, if the vacating of the street has the effect to entirely destroy or seriously impair the right of ingress and egress of a person owning property approached from the street, the loss thus sustained is not one suffered in common with the general public, and that such a person would be entitled to compensation. *Chicago v. Bldg. Ass'n*, 102 Ill. 379, 40 Am. Rep. 598; *Mills, Em. Dom.* (2d Ed.) § 318; *Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 179, 29 L. R. A. 568, 49 Am. St. Rep. 142. On the other hand, it has been held that the destruction of one means of access when another is left unimpaired will not give a right of action against a city which had proceeded to vacate a street in the manner authorized by law. *Smith v. Boston*, 7 Oush. 254; *Fearing v. Irwin*, 55 N. Y. 486; *Kings Co. Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353. There are judges of distinguished reputation and courts of high respectability holding that the owners of property abutting upon a street have such a property in the use of the street as that the same cannot be destroyed by vacating the street without compensation being made for the loss thus sustained. *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; *Webster v. Lowell*, 142 Mass. 326, 8 N. E. 64; *Haynes v. Thomas*, 7 Ind. 38; *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490; *Bannon v. Rohmeiser*, 90 Ky. 48, 13 S. W. 444, 29 Am. St. Rep. 355; *Lindsay v. Omaha*, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; *Bigelow v. Balcerino* (Cal.) 44 Pac. 307; *Cook v. Quick*, 127 Ind. 477, 26 N. E. 1007; *Pearsall v. Supervisors*, (Mich.) 42 N. W. 77. See, also, 27

Am. & Eng. Enc. Law (2d Ed.) 115. In this state it has been held that the erection of a permanent structure in a street, which may have the effect to entirely destroy or seriously impair an existing means of access to the property of an abutting owner, is not a "taking" of private property within the meaning of the constitution. *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65. But in the same case it was also held that this was a damaging of the adjacent property in such a way as would entitle the owner to compensation, but that, as the effect of the structure, which was a bridge constructed under authority of law, was such as to increase the market value of the adjacent property to such an extent that the enhancement in value equaled or exceeded the damages sustained, no recovery was permitted. See, in this connection, *Austin v. Terminal Co.*, 108 Ga. 680, 34 S. E. 852, 47 L. R. A. 755.

The act of 1903, which confirmed the action of the mayor and council in vacating Hansell street, in the city of Marietta, and authorized the municipal authorities to complete the act of vacation by relinquishing to the adjacent owners the interest of the public in the street, was valid in every respect; and the Marietta Chair Company is, and has been, at least since the date of the execution and delivery of the deed from the city, possessed of every right of property which it or its predecessors in title had in that portion of the street which was originally taken from their property, and the right of the public therein for all purposes has become completely extinguished. If Henderson, the abutting owner on the opposite side of the street, and now the complete owner of the half of the street abutting upon his property, ever had any right to demand that compensation should be first paid him before the rights of the public in the street were surrendered, for loss of any character sustained by him, he has waived that right by allowing the vacation and abandonment of the street to become complete without resorting to the courts for appropriate relief. If he ever had the right to demand of the municipality compensation for any loss sustained by him as a condition precedent to the closing of the street, he should have applied for an injunction before the passage of the resolution carrying into effect the legislative act, or at least before the deeds were executed which that act provided for. If he has any right to damages at all, he is remitted now to an action at law against the municipality; but on this question we now make no authoritative ruling, for the question is not before us in such a manner as either to authorize or require a ruling upon the subject. If he has such a right of action, nothing in the judgment now rendered will preclude him from asserting this right hereafter.

It is contended, however, that the original resolution of the mayor and council, the

legislative act, the resolution passed subsequently thereto by the mayor and council, and the deeds executed thereunder, are all merely component parts of a fraudulent and collusive scheme entered into by the Marietta Chair Company and the municipal authorities to destroy the rights of the public in the street, in order that a private use of the Marietta Chair Company might be subserved. That private property cannot be taken for a private use is a rule of practically universal application; the taking of private property for a private way being apparently the single exception. The use of public property for private use is generally, if not always, an abuse of power by those who are the custodians of the rights of the public. See *Mayor of Macon v. Harris*, 73 Ga. 428; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403. There is nothing in the record in this case that would justify a holding that there was any such scheme, even if the courts have authority to inquire into the motives of the General Assembly in passing an act of the character here involved, or into the question whether the General Assembly was imposed upon by those interested in the passage of the act. There is nothing on the face of the act or the resolutions which suggests such a scheme, all indicating merely action by the public authorities adopted for the public benefit. The presumption is that this was the case, and, even if this presumption could, under any circumstances, be rebutted by proof, there is no proof to overcome it in the present case. Neither the General Assembly nor a subordinate public corporation acting under its authority can lawfully vacate a public street or highway for the benefit of a private individual. The street or highway cannot be vacated unless it is for the benefit of the public that such action should be taken. The benefit may be either in relieving the public from the charge of maintaining a street or highway that is no longer useful or convenient to the public, or by laying out a new street or road in its place which will be more useful and convenient to the public in general. If the public interest is not the motive which prompts the vacation of the street, whether partial or entire, the act of vacation is an abuse of power; and especially would it be a gross abuse of power if it is authorized without reference to the rights of the public, and merely that the convenience of a private individual might be subserved. As the reason for vacating a highway must therefore always be that the public interest is to be subserved, it may be that the consequences of this act, which is for the benefit of the public, will give a right under the Constitution to claim damages. Upon no other theory can such a right be maintained. But upon this question we now express no decided or authoritative opinion.

5. It was also contended that the act of

1903 was unconstitutional, for the reason that it did not make any provision for compensation to those whose property might be damaged as a result of the act being carried into effect. In *Parham v. Justices*, 9 Ga. 341, it was held that private property could not be taken for public purposes without just compensation, and could not be so taken without an act of the Legislature authorizing it, and that the act itself must make provision for compensation. At the date of this decision there was no general law providing a method of ascertaining the damages resulting from the taking of private property for a public use. In 1894 the General Assembly passed an act (Acts 1894, p. 95) providing a method in which damages should be assessed in all cases where private property was taken or damaged for public purposes, and therein declared that all corporations or persons authorized to take or damage private property for public purposes should proceed as provided in the act. Civ. Code 1895, § 4657 et seq. The two things required in the decision referred to are still required—that is, authority to take or damage private property, and provision for ascertaining the compensation to be paid; but since 1894 it is no longer necessary that each act conferring the authority shall itself provide the manner of ascertaining the compensation. When the authority is conferred, the general law of the state above referred to makes provision for compensation. Hence it follows that the act of 1903 is not unconstitutional because it does not provide for the payment of compensation.

6. But it is claimed that, even if the legislative act and the proceedings of the mayor and council thereunder are all valid, the Marietta Chair Company is bound by the judgment rendered prior to the passage of that act, and cannot now question the same, and that, the decree having been rendered upon a consent verdict, it was, in effect, a contract between the parties that the status of the property as fixed by the decree should never thereafter be changed, and that it was beyond the power of the General Assembly to interfere with the vested rights of Henderson under the decree. The fact that the decree was rendered upon a consent verdict does not give it any greater validity than if it had been rendered after a sharp and protracted litigation. Parties are, of course, bound by judgments rendered by courts of competent jurisdiction to which they have submitted their controversies, and the judgments bind them whether they expressly agree to them or not, and an express agreement that a particular judgment should be rendered gives to that judgment no peculiar character, and renders it no more sacred than the ordinary judgment. While a judgment is a contract of record, the agreement which the law implies from such a contract is simply that the parties will stand to and

abide what has been decreed in the case upon the law and the facts then involved, or which could have been properly involved. But a judgment does not bind the parties as to any matter which was not directly or indirectly involved in the suit, and which, from the nature of the case, could not have been passed upon or adjudicated by the court at the time the judgment was rendered. At the time this judgment was rendered the municipal authorities of Marietta had no power to vacate Hansell street, or any part thereof. The judgment that the obstruction be removed therefrom was therefore the only legal and proper judgment that could have been rendered in the case. The power to vacate has been conferred since the judgment, and the act of vacation has been completed. While the placing of obstructions in the street was originally wrongful, the new state of facts which has arisen since the judgment has rendered their maintenance in the street lawful and proper; and we see no reason why the party placing these obstructions may not now stand upon the rights acquired under the legislative act and the resolution of the mayor and council, notwithstanding the prior judgment. A new right has been acquired, which was not and could not have been involved in the controversy resulting in the judgment. See *Pyrone v. State*, 8 Ga. 230; *Wray v. Harrison*, 116 Ga. 100, 42 S. E. 351; *Ingraham v. Water Company (Me.)* 19 Atl. 861.

7. It was suggested in the argument that, even if the Marietta Chair Company was entitled to the relief sought, it should have filed an original proceeding in the nature of a bill to reform the decree, or at least should have waited until there was some proceeding instituted to enforce the decree, and then set up the matters now relied on in answer to an attachment for contempt. None of the demurrers raise any question as to the procedure followed. The special demurrer simply alleged that certain paragraphs of the petition were defective because they did not set forth documents referred to therein, and the general demurrer set up merely that the plaintiff was not entitled to the relief sought for the various reasons set forth in the demurrer. It is said that, as the order of the judge refusing to grant the relief prayed for was general in its nature, it not appearing therefrom upon what ground the court based its judgment, if any ground taken in either demurrer was a sufficient reason for refusing the relief, the judgment should be affirmed. This is unquestionably the correct rule; but we find no sufficient reason set forth in either of the demurrers for refusing that prayer of the petition which asked that an order be entered declaring that on account of the new condition of affairs the decree, though proper at the time it was rendered, should no longer be enforced; and we will not now pass upon the question whether the proper

procedure was followed. Speaking for myself, I think the procedure followed was not only proper, but that the practice is to be commended. The company was apparently in contempt. The decree required the removal of the obstructions. The company continued to maintain them. Instead of waiting for an attachment for contempt to be issued, it comes forward in a respectful application, and shows to the court a state of facts which would relieve it from the apparent contempt. The decree was no longer operative upon it, and it was entitled to have entered upon the records of the court an order to this effect. Why should it "stand in jeopardy every hour"? A court of equity is always open for the purpose of proceeding upon mere motion to the enforcement of its orders by attachments for contempt, and I see no reason why it should not be open for one who is apparently in contempt, and who comes before it to show his willingness to abide its orders, but that at the same time, under the existing condition of affairs, his conduct, which at one time might have been a contempt of the court, was no longer such.

Judgment reversed. All the Justices concurring.

(121 Ga. 362)

TAYLOR v. STATE.

MARSHALL v. SAME.

(Supreme Court of Georgia. Dec. 9, 1904.)

INDICTMENT—QUASHING—INDORSEMENT—VARIANCE.

1. An indictment was indorsed "True bill," and signed by B. as foreman of the grand jury. In the body of the indictment the names of the grand jurors were stated, B.'s name being among the number, but the word "foreman" was written opposite the name of another juror. *Held*, that the difference in the designation of foreman in the indorsement and the body of the indictment constituted no reason for quashing the indictment.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Isaac Taylor and Samuel Marshall were convicted of crime, and bring error. Affirmed.

The indorsement "True bill" on each of the indictments in these cases is signed by O. C. Bateman, foreman. In the body of the indictments appear the names of 23 members of the grand jury, including that of O. C. Bateman, but the word "foreman" is written to the right of the name of R. G. Blewster. The accused demurred to the indictments on the ground that R. G. Blewster appears in the indictments as foreman, instead of the duly elected foreman, O. C. Bateman, who appears as such on the back of the indictments, and who is shown to be such by the minutes of the court. The court overruled the demurrers, and each of the accused excepted.

John R. Cooper, J. T. Jeter, and W. C. Lane, for plaintiffs in error. John O. Hart, Atty. Gen., and Wm. Brunson, Sol. Gen., for the State.

COBB, J. It has been held that the names of the grand jurors need not be stated in the indictment; that it is sufficient if the indorsement "True bill" is signed by the foreman; that it is immaterial on which part of the indictment the foreman's signature appears; that it is sufficient if the foreman merely signs his name, with no mention of his official character, because the latter appears of record. See *Hughes on Crim. L. & Proc.* § 2686; 10 *Enc. Pl. & Pr.* 429; 1 *Bish. Cr. Proc.* (2d Ed.) § 698; *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551; *State v. Bowman*, 103 Ind. 69, 2 N. E. 289; *State v. Murphy*, 9 Port. (Ala.) 487; *State v. Cook, Riley* (S. C.) 234. And it has also been held that where the indorsement "True bill" is signed by a person as foreman, and the record shows that another person was appointed as foreman of the grand jury, the presumption would be that the person so appointed had been discharged, and the one signing the indorsement appointed in his stead. *Mohler v. People*, 24 Ill. 27. In *McGuffie v. State*, 17 Ga. 497 (8), 510, it was held that the failure of the foreman to sign the indorsement of "True bill" on the indictment would not be a sufficient reason for arresting the judgment, and it was said that such failure would not even make the indictment defective. In *White v. State*, 93 Ga. 47, 51, 19 S. E. 49, the indorsement was signed by Quarles, "foreman," and in the list of grand jurors appearing in the indictment Quarles was designated as "foreman pro tem." There was held to be no merit in an objection based upon these facts.

Under the statutory form for indictments in this state it would seem to be mandatory that the names of the grand jurors should be inserted in the indictment. *Pen. Code* 1895, § 929. See *Williams v. State*, 107 Ga. 724, 33 S. E. 648. But there is no statutory requirement that one of the grand jurors should be designated as foreman in the indictment. In the present case there is no transcript from the minutes of the court in the record showing who was the duly appointed foreman. The indorsement on the back would seem to be the proper place to look to to determine this question. If this is true, then Bateman was the foreman, and the word "foreman" appearing after the name of Blewster in the body of the indictment may be treated as surplusage. Or it may be, as was held in the Illinois case, that the court will presume that Blewster was foreman when the indictment was drawn, that he was discharged, and that Bateman had been appointed foreman when the indorsement "True bill" was signed. At any rate, the presumption will be indulged, until

the contrary is made properly to appear, that Bateman had authority to sign the indorsement. So that, whichever view be taken, there is no merit in the objection.

This view of the matter renders it unnecessary to determine whether the objection to the indictment was properly raised by demurrer, or whether it should have been raised by a plea in abatement.

Judgment affirmed. All the Justices concurring.

(121 Ga. 344)

HILBURN v. STATE.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—CONTINUANCE—EVIDENCE—
WARRANT—STATEMENTS OF ACCUSED—
HOMICIDE.

1. The trial court did not err in refusing to grant a continuance on account of the absence of a witness for the accused, it appearing that, upon the announcement of his counsel that he would be ready if the presence of another witness was secured, the court had previously passed the case, and the attendance of this witness had been procured, and that the motion for a continuance was made when the case was thereafter again called for trial. Especially is this true in view of the counter showing made by the state, disclosing that the absent witness had said he knew nothing concerning the homicide with which the accused was charged; that the witness was a fugitive from justice, had eluded arrest for six months, and there was no probability of securing his attendance at the next term of the court.

2. A criminal warrant, signed by a judicial officer having legal authority to issue warrants of like character, is not inadmissible in evidence merely because it is not accompanied by an affidavit such as would authorize the issuance of the same. Nothing to the contrary appearing, the presumption is that the warrant was regularly and legally issued.

3. It was competent for the state to prove that the accused, after his arrest, told his custodian that "when firing at the deceased he fired under his arm, and not straight out"; it appearing that this statement, which was at variance with the testimony of one of his witnesses, was freely and voluntarily made. That the accused was a negro, and at the time was "a prisoner in the calaboose, surrounded by a crowd of white men," did not render proof of what he said on that occasion inadmissible; nor should it have been excluded for the reason that the custodian of the accused "after the alleged statement, had told the negro he had better tell the truth; that he would protect him and make him comfortable."

4. The conviction of the accused should be allowed to stand, there being ample evidence to warrant the jury's finding that he was guilty of the crime of murder.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; A. F. Daley, Judge.

Bud Hilburn was convicted of murder, and brings error. Affirmed.

Herrington & Lee, for plaintiff in error. John O. Hart, Atty. Gen., and B. T. Rawlings, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 368)

WELLS et al. v. TERRELL, Governor.

(Supreme Court of Georgia. Dec. 9, 1904.)

CRIMINAL LAW—ARRAIGNMENT—PRESENCE OF ACCUSED—BAIL—FORFEITURE—BOND.

1. The waiver of arraignment must be the equivalent of the thing waived, and be made under such circumstances as will serve the purpose of the law in requiring the formality.

2. As one of the purposes of arraignment is to identify the person on trial and raise an issue by plea, it is legally impossible to arraign the defendant, accept his waiver, or receive a plea in his absence.

3. It is universally held that a defendant in a felony case cannot be arraigned or pleaded in his absence. There is nothing in the Penal Code to suggest that there is any difference in this respect as to trials for misdemeanors, where the punishment may be by fine or imprisonment.

4. Where, therefore, one indicted for simple larceny was absent when the case was called, and his counsel offered to enter for him a plea of guilty, this afforded no defense in a proceeding to forfeit bail.

5. If the greater offense named in the bond includes the smaller offense named in the indictment, or if the smaller offense named in the bond forms an element of the greater offense named in the indictment, or if the two offenses contain a common element, the security will in either case be required to produce the body of his principal to answer to the indictment.

6. The prisoner gave bond to answer for the offense of larceny from the person. This required the bail to produce the body of the defendant to answer the indictment for simple larceny.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Proceedings by J. M. Terrell, Governor, against W. D. Wells and another, to forfeit a bail bond. Judgment for plaintiff, and defendants bring error. Affirmed.

Wells, as principal, and Morgan, as security, executed before the sheriff a bail bond payable to the Governor of the state. It was in the sum of \$500, conditioned that Wells should make his appearance before the superior court of Bibb county "on the first Monday in November, 1903, and from day to day, and from term to term, to answer to the offense of larceny from the person, or such other offense as may be returned by the grand jury as true, and shall not depart thence without leave of said court." At the November term Wells was indicted for simple larceny. The case being called in its order, the state announced ready. The defendant failing to appear, the bond was forfeited. Rule nisi issued, requiring him and his sureties to show cause at the April term, 1904, why the rule should not be made absolute. Scire facias issued, and was duly served on the security. At the April term, 1904, the case of the State v. Wells was called, the state announced ready, and, the defendant not appearing, and no answer being filed to the rule, the Solicitor General moved that it be made absolute. Thereupon John R. Cooper, attorney for the defendant Wells, offered to waive the presence of his

client, and, having authority to do so, offered a plea of guilty, and to allow the court to impose a sentence on the defendant. The defendant, through his counsel, then and there objected to taking judgment absolute upon the bond, on the ground that the defendant and his security were bound to produce Wells for the offense of larceny from the person, and not for simple larceny, and that the bond did not cover the indictment as returned. These objections were overruled, and the court permitted judgment absolute; refusing to allow the defendant, through his counsel, to plead guilty, or to pronounce sentence upon such plea, for the reason that he had no jurisdiction to allow a plea in the absence of a defendant. The bill of exceptions recites that the said Wells and Morgan, his security, except to these rulings of the court, and to the judgment making the rule absolute and forfeiting the bond, and to the execution issued thereon.

John R. Cooper, for plaintiffs in error, cites *State v. Lockhart*, 24 Ga. 420; *State v. Woodley*, 25 Ga. 235; *McDaniel v. Campbell*, 78 Ga. 188; *Candler v. Kirksey*, 113 Ga. 309, 38 S. E. 825, 84 Am. St. Rep. 247; *Williams v. Candler*, 119 Ga. 179, 45 S. E. 989; *Crutchfield v. State*, 24 Ga. 335; *Adams v. Governor*, 22 Ga. 417; *Hill v. State*, 118 Ga. 21, 44 S. E. 820; *Robson v. State*, 83 Ga. 160, 9 S. E. 610; *Nolan v. State*, 53 Ga. 137; *Franks v. State* (Ga.) 48 S. E. 148; *People v. Gaunt*, 23 Cal. 158; *McIntosh v. Lee*, 57 Iowa, 357, 10 N. W. 895; *State v. Conneham* (Iowa) 10 N. W. 877; *Edmonds v. Torrence*, 48 Ala. 41; *People v. Hunter*, 10 Cal. 502; *Clark's Cr. Proc.* pp. 98, 99.

Wm. Bennson, Sol. Gen., and A. L. Miller, for defendant in error, cite 1 Bishop's Cr. Proc. §§ 265, 268, 2645, 275; *U. S. v. Mayo*, 1 Curt. 433, 434, Fed. Cas. No. 15,754; *Foote v. Gordon*, 87 Ga. 277, 13 S. E. 512; *Gardner v. State*, 105 Ga. 662, 31 S. E. 577; *Strickland v. State*, 115 Ga. 222, 41 S. E. 713; *Blandford v. State*, 115 Ga. 824, 42 S. E. 407; *Lavender v. State*, 107 Ga. 707, 33 S. E. 420.

LAMAR, J. (after stating the foregoing facts). The defendant was charged with a misdemeanor punishable by fine or imprisonment. On the call of the case he was absent, but his authorized counsel offered to enter a plea of guilty for him. This the court refused to allow, holding that it had no jurisdiction to enter upon the trial or to receive the plea in the prisoner's absence. The rule in the several states on the subject is not uniform. In some it is in express terms provided by statute that a trial for a misdemeanor may be had in the defendant's absence. Without statute, some courts hold that, while the defendant is never entitled to this privilege as matter of right, yet, for sickness, or other good cause shown, the court may, in its discretion, permit one charged with a misdemeanor to be tried therefor in

his absence. Others limit the right to be thus tried to those cases in which the punishment can only be by fine, and in a few cases it seems to have been held that the prisoner must be present at the time the trial on any indictment begins. *Slocovitch v. State*, 46 Ala. 227; *Ex parte Tracy*, 25 Vt. 93; *U. S. v. Mayo*, 1 Curt. 433, Fed. Cas. No. 15,754, 68 Am. Dec. 220; 1 Bish. Cr. Proc. (3d Ed.) § 268; *Clark's Cr. Proc.* 427. The English decisions are not clear on the point here involved, inasmuch as it does not appear what punishment could have been inflicted in the particular cases reported. Besides, the rulings may have been affected by the fact that at common law an arraignment does not seem to have been required in prosecutions for misdemeanor. *Lynch v. State* (Tenn.) 41 S. W. 348; *Griffin v. Com.* (Ky.) 66 S. W. 740; *Salfner v. State* (Md.) 35 Atl. 885; *Johnson v. People*, 22 Ill. 317. The question has not been passed on by this court. In *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743, *Robson v. State*, 83 Ga. 167, 9 S. E. 610, and *Hill v. State*, 118 Ga. 24, 44 S. E. 820, it was held that the defendant could not, by an escape or voluntary absence on bond, nullify a trial otherwise legal, and by his own act of nonattendance prevent the rendition of a verdict. But in each of those cases the defendant was present at the time the trial began. There being, therefore, no direct ruling on the subject in this state, the question must be decided on general principles, as affected by the Penal Code. It is silent on the direct point here involved, but its provisions as to the formalities attending a trial, and particularly those on the subject of arraignment (Pen. Code 1895, § 946), are full of implications that the defendant must be present before the court may enter upon the trial, or accept a plea of guilty, which makes a trial unnecessary. Except in proceedings against corporations (Pen. Code 1895, § 938), and possibly in the trial of petty offenses in some municipal courts, a defendant charged with crime is not served with process. He may be arrested on a bench warrant, which in some respects is equivalent to process (*Brady v. Davis*, 9 Ga. 73); but jurisdiction of his person is not acquired by the arrest or confinement in prison, but by his presence at the time issue is joined on the indictment. To arraign a prisoner in his absence is legally impossible. *Smith v. State*, 60 Ga. 432. It is conceded that a trial of a felony case could not proceed without the defendant having been arraigned, or made a valid waiver thereof. But there is nothing in the Code which suggests that there is in this respect any difference between trials for felony and trials for misdemeanor. On the contrary, it seems to contemplate an arraignment in all cases. Pen. Code 1895, § 947. This formality is intended, among other things, to cut off all question as to misnomer, and to identify the person on trial as being the one named in the indictment. Regularly, this

procedure requires the defendant to stand up, face the court and jury, and listen to the reading of the indictment. In answer to the clerk's inquiry whether he is guilty or not guilty of the offense charged, he orally makes his plea. This is not a mere idle ceremony, but furnishes a safe and conclusive means of identification. It permits the court, on the rendition of a verdict of guilty, to impose sentence and put the identified defendant into execution. To secure this important end, it is therefore the state's right to have him present when the trial begins. Besides, this requirement prevents the prosecution from degenerating into the appearance of a mock trial before a moot court, with no one in apparent jeopardy. And while the arraignment may be expressly or tacitly waived (*Hudson v. State*, 117 Ga. 704, 45 S. E. 66), yet the waiver must be an equivalent of the thing waived, and be made while present, and under such circumstances as will serve the purpose of the law in requiring that formality. The administration of criminal laws should be not only impartial, but equal, with privileges to none not accorded to all. If one defendant or class of defendants may be tried without being present, so could every other person charged with a misdemeanor. To allow this privilege to one or to all would be to rob the proceedings of that serious reality which serves a wise and useful purpose. This element of impressiveness was recognized as being so important as to furnish the basis for deciding the analogous question as to whether at common law one convicted of a misdemeanor could be sentenced in his absence. If the punishment had to be by fine only, it was in the discretion of the court whether it should be imposed without the personal attendance of the defendant. But even where the punishment would be pecuniary, it by no means followed that the fine would be imposed in the defendant's absence. For it was said that, if the offense was of a public nature, the person convicted should appear to receive sentence, "for the sake of example and prevention of the like offenses being committed by other persons, as the notoriety of their being called up to answer criminally to such offenses would very much conduce to deter others from venturing to commit the like." *Rex v. Hann*, 3 Burr. 1787. Nor is the suggestion in *Smith v. State*, 60 Ga. 432, a decision to the contrary. The whole gist of the argument there was to show that the defendant was actually present when sentenced, and the case did not involve a ruling as to whether, in his absence, it could or could not be imposed in a case of misdemeanor. Compare Pen. Code 1895, §§ 947, 948; *Henry v. McDaniel*, 80 Ga. 174, 4 S. E. 906; *Dennard v. State*, 2 Ga. 188; *Bryans v. State*, 34 Ga. 323. In the present case his bail contracted for the defendant's presence. This meant actual, and not constructive, presence. The obligation was not met by ab-

sence, nor by a plea of guilty entered for him by another. As said by the Supreme Court of South Carolina in *State v. Minton*, 19 S. C. 283—a case much like the present—there is “no good reason why the court should relax his obligation and make a new contract for him.” See Pen. Code 1895, §§ 935, 936.

2. The security insists that the bond required the accused to answer to an indictment for larceny from the person, and that the indictment returned was for simple larceny. The state replies that under the decision in *Lavender v. State*, 107 Ga. 707, 33 S. E. 420, larceny from the person included the simple larceny, with which the defendant was charged, and therefore, by the very terms of his bond, he was bound to appear and answer such an indictment. Bail bonds are often given before the indictment is found, and when it is impossible to know to which of several closely related crimes the particular offense applies. If the greater offense named in the bond includes the smaller offense charged in the indictment, or, vice versa, if the smaller offense named in the bond forms an element of the greater offense named in the indictment, or if the two offenses contain a common element, the security will in either case be required to produce the body of his principal to answer the indictment. Larceny was an element both of the offense named in the bond and that charged in the indictment. The bail was bound to produce the body of the defendant. Compare *Adams v. Governor*, 22 Ga. 417; *Foote v. Gordon*, 87 Ga. 279, 13 S. E. 512.

Judgment affirmed. All the Justices concur.

(70 S. C. 167)

CAUTHEN et al. v. CAUTHEN et al.

(Supreme Court of South Carolina. Nov. 17, 1904.)

APPEAL—WHEN LIES—DISMISSAL—ADMINISTRATOR—ACCOUNTING—LIMITATIONS—RELIEF GRANTED.

1. After final decree, an appeal lies from an intermediate decree on the merits.

2. An appeal as to nonresidents will not be dismissed on the motion of resident respondents because no notice of intent to appeal was served on them, where they were not represented by counsel.

3. Where plaintiff had held the office of committee of a lunatic, and also as his administrator, and had never been discharged from either office, limitations did not run against an action brought by him against the heirs for his accounting, especially when defendants required plaintiff to hold the two said offices, when he was about to file his suit for an accounting before the statute was a bar.

4. Where an administrator, who was also an heir, agreed with the other heirs that he should rent the lands and credit the proceeds on his account, he should credit his share of the rent as well as that of the other heirs.

5. Where defendant admits the allegations of the complaint and joins in the prayer, he can only get such relief as the prayer suggests.

Appeal from Common Pleas Circuit Court of Lancaster County; Gary and Klugh, Judges.

Action by W. B. Cauthen, as administrator of John M. Cauthen, and others against Emma Cauthen and others, heirs at law of John M. Cauthen. From circuit decree, plaintiffs appeal. Reversed.

Green & Hines, for appellants. Ernest Moore, for respondents.

POPE, C. J. In the year 1881, William B. Cauthen, of Lancaster county, in the state of South Carolina, by reason of his insanity, was by legal proceedings held to be a lunatic, and his son, John M. Cauthen, was appointed the committee of his person and estate. William B. Cauthen was seised of two tracts of land—one known as “Cedar Creek Tract,” containing 470 acres, and the other known as the “Duncan Tract,” containing 384 acres—and a small personal estate. The committee took possession of all of this property, and made his annual returns to the court of probate for Lancaster county. William B. Cauthen, the lunatic, departed this life intestate on the 17th November, 1894, survived by ten children, as his heirs at law and next of kin. The said John M. Cauthen was duly appointed the administrator of all his estate. The administrator paid taxes on all his lands and made his annual returns. In 1899, when John M. Cauthen was about to institute proceedings to come to an accounting for his actings and doings, both as the committee and as the administrator of the said William B. Cauthen, deceased, so as to collect a considerable sum due him by the estate of the lunatic and by the estate of his intestate, a conference was held by all of the heirs at law within this state with the said committee and said administrator. The result was that the latter agreed to rent the Cedar Creek tract for three bales of 1,200 pounds of lint cotton, and apply the proceeds of rent to his account, until the year 1898, at which time he brought this action against all the heirs at law and next of kin of William B. Cauthen, deceased, both those living in this state and also those living beyond our state limits, in order to settle his accounts, to have land of intestate sold to pay the indebtedness he held against said estate, and partition the balance among the said heirs at law and next of kin, according to their legal right therein. The three plaintiffs owned three-tenths of said estate, having purchased one-tenth each, owned by his brother, Samuel Cauthen, and his sister, Missouri Bechham, née Cauthen. The defendants answered. One was Emma Cauthen, another was Elizabeth Cauthen, and another was Elizabeth Fleming; and the children of another who was deceased, to wit, John Cauthen, Sadie Cauthen, Janie Cauthen, Paschal Cauthen, and Phillip Hammond, being infants, made formal answer by

their guardian ad litem. Upon the court hearing a motion to that effect, Charles D. Jones, Esq., was appointed special referee to hear and determine all the issues of law and fact. The special referee took all the testimony which was offered, and made his report, by which he established the amount due John M. Cauthen, and, as his conclusions, that the two tracts of land be sold, and the proceeds applied to the payment of the claim of John M. Cauthen, and the balance be partitioned amongst the heirs at law and next of kin of William B. Cauthen, deceased.

The two adult defendants, who answered, filed exceptions to the report of the special referee, alleging therein that plaintiff's claim of \$3,540.81 should not be paid, of date September 28, 1901. It is admitted that John M. Cauthen has never been discharged as committee and administrator. These exceptions came on to be heard by his honor, Judge Ernest Gary, who filed the following decree on 7th December, 1901:

"This cause came on to be heard before me upon the report of the referee and exceptions thereto by the defendants Emma Cauthen and Elizabeth Fleming, by their attorney, Ernest Moore. Upon hearing the exceptions and argument thereon by the said attorney of the defendants, and by the attorneys for the plaintiff, it is considered that the exceptions alleging error by the referee in overruling the plea of the statute of limitations should be sustained. It is therefore adjudged that the claim or demand of the plaintiff, John M. Cauthen, as against the shares of the defendants Emma Cauthen and Elizabeth Fleming, in the lands described in the complaint herein, is barred by the statute of limitations, and that the said defendants Emma Cauthen and Elizabeth Fleming are entitled to their several shares in the said lands, free and discharged from any claim on account of the said demand in favor of the said plaintiff.

"The exceptions by the said Emma Cauthen and Elizabeth Fleming as to the plea of the statute of limitations being sustained, and such statute operating as a bar to the claim of the plaintiff as against them and their several and respective shares in the said lands, it becomes unnecessary to consider the other exceptions by the last-named defendants to said report, and no opinion is expressed as to same. The referee having reported the several shares or interests of the said Emma Cauthen and Elizabeth Fleming in the said lands described in the complaint and sought to be partitioned herein, but having failed to inquire and report whether the said land could be partitioned and divided so as to allot the said Emma Cauthen and Elizabeth Fleming their several and respective shares in kind, it is imperative that an inquiry shall be made upon this point. It is therefore ordered that it be referred back to Charles D. Jones, Esq., ref-

eree, to inquire and report as to the practicability of so dividing the said lands as to allot the said shares in kind, all parties having leave upon the coming in of the said report, and after due notice and the hearing of any exceptions to the same, to apply to the court for such orders or decrees as may be necessary and proper.

"It is further ordered that the question as to the apportionment of the costs of this action, and as to what part of the same, if any, may be equitably chargeable against the defendants Emma Cauthen and Elizabeth Fleming, be reserved for the consideration of the court upon the coming in of the further report hereby ordered."

Charles D. Jones, Esq., made a report recommending the sale of the land. On March 28, 1902, upon petition and by order, the complaint was duly amended by making the present parties defendants to the action. These defendants all answered, and among other things pleading the statute of limitations.

The plaintiff, John M. Cauthen, having died on — day of August, upon petition Judge Aldrich granted the following order of amendment:

"This is a second motion upon notice and further affidavits to substitute the administrator of plaintiff (now deceased) as plaintiff in his stead, and also to make William B. Cauthen and Arista Cauthen parties plaintiff, as alleged, grantees and successors in interest of the said John M. Cauthen. It is conceded by defendants that the motion should be granted, but it is contended that time should be allowed defendants in which to answer and traverse the allegations as to the death and administration, and as to the transfer of interest to the said grantees. It is clear that defendants are entitled to such time for answer as is here demanded. See *Cleveland v. Cohrs*, 13 S. C. 397; *Coleman v. Hiller*, Id. 491; *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829. It is therefore ordered that the complaint herein be amended by substituting William B. Cauthen as administrator of the said John M. Cauthen, deceased, in the room and stead of the said plaintiff, and also by substituting the said William B. Cauthen and Arista Cauthen, as grantees and successors in interest of the said John M. Cauthen, as plaintiffs; that the complaint be amended accordingly, with proper allegations; and that the same, with a copy of this order, be served upon the defendants or their attorneys. It is further ordered that said defendants have twenty days after such service in which to answer as aforesaid."

Under this order, the action was amended by the new plaintiffs, and answers were served raising the question as to the bar of the statute of limitations. The special referee, following the conclusions of Judge Gary, upheld the plea of the statute of limitations, interposed by the defendants. Upon

exceptions, Judge Klugh passed the following decree:

"This action was originally brought by John M. Cauthen, the father of the present plaintiffs, for partition of the lands of the father, William B. Cauthen, deceased, and also for a separate cause of action upon an account for board, nursing, and other services rendered by him as committee of his father, who in the latter years of his life was adjudged to be of unsound mind. John M. Cauthen having died, the action is now maintained by his two sons, who allege that their father, before his death, transferred to them both his interest in the lands and also his claim constituting the second cause of action. The cause was heard by me upon exceptions on behalf of the plaintiffs to report of Charles D. Jones, Esq., as referee. In a decree heretofore pronounced by his honor, Judge Ernest Gary, it was considered that the second cause of action is barred by statute. The referee, following this decision, so holds, and I concur in his conclusion. The exceptions raising this question are overruled.

"The only question raised by the exceptions is as to the accountability of the plaintiffs for the rents and profits received by them or their father, the said John M. Cauthen. The referee is correct in his conclusion that the plaintiffs are accountable to their co-tenants for the rents so received. But the statute has been invoked by the defendants for their protection, and it is but just that its benefits should inure to both sides. The plaintiffs will therefore be held to account only for the rents received by them or their father within six years prior to the commencement of this action.

"It is therefore ordered that the cause be recommitted to C. D. Jones, Esq., as referee, to ascertain and report to the court with all convenient speed the amount of rents received by the plaintiffs or their father, the late John M. Cauthen, within six years before the commencement of this action down to the date of such report, including the rent for the year 1903, if any. Let the exceptions be overruled, and the report except as herein modified be confirmed."

From this decree, as well as that of Judge Ernest Gary, the plaintiffs alone appealed on the following grounds:

"(1) Because, it is respectfully submitted, Judge Gary erred in holding and adjudging by his decree of date December 7, 1901, that the claim or demand of the plaintiff, John M. Cauthen (constituting the second cause of action in the complaint), 'as against the shares of the defendants Emma Cauthen and Elizabeth Fleming in the lands described in the complaint herein, is barred by the statute of limitations, and that the said defendants Emma Cauthen and Elizabeth Fleming are entitled to their several shares in the said lands, free and discharged from any claim on account of the said demand in fa-

vor of the said plaintiff'; whereas he should have held and adjudged that the said claim of plaintiff was not barred by the statute of limitations (as against the shares of these two defendants in said lands), and that the several shares of these two defendants should be subjected to the payment of the said claim along with the shares of the other defendants.

"(2) Because, it is respectfully submitted, his honor, Judge Klugh, erred in finding and adjudging in his decree of 8th September, 1903, as follows: 'In a decree heretofore pronounced by his honor, Judge Ernest Gary, it is considered that the second cause of action is barred by the statute. The referee, following this decision, so holds, and I concur in his conclusion;' whereas he should have held, found, and adjudged that in said decree Judge Gary considered and adjudged said cause of action barred by the statute only as against the shares of the two defendants Emma Cauthen and Elizabeth Fleming.

"(3) Because his honor, Judge Klugh, erred in said decree, in concurring with Judge Gary in his holding and adjudging that the said claim of plaintiff, Jno. M. Cauthen (constituting the second cause of action in the complaint), as against the shares of defendants Emma Cauthen and Elizabeth Fleming, is barred by the statute, and that these two defendants are entitled to their several shares in the lands in question, free and discharged from the claim on account of the said demand in favor of the said plaintiff; whereas he should have adjudged that said claim was not barred by statute (as against the shares of the two defendants in said lands), and that the several shares of these two defendants should be subjected to the payment of the said claim along with the shares of the other defendants.

"(4) Because his honor, Judge Klugh, in his said decree, erred in holding and adjudging that the claim or demand of the plaintiffs (the successors in interest of the original plaintiff, Jno. M. Cauthen), constituting the second cause of action in the complaint, as against the shares of the defendants, W. W. Cauthen, Robt. Cauthen, Gordon Cauthen, Mack Cauthen, Luther Cauthen, Mary Stough, Minor Mackey, Margaret Rhodes, J. Q. Mustin, John Mackey, Millie King, Hiram King, Frank King, Samuel King, Foster King, Justice King, William King, John King, Missouri King, Missouri Gill, Rebecca Owens, and Zilpha Buck, in the lands in question, is barred by the statute of limitations, and that these last-named defendants are entitled to their several shares in said lands, free and discharged from any claim on account of the said demand in favor of plaintiffs; whereas it is submitted that he should have held and adjudged that the said claims of plaintiffs was not barred by the statute (as against the shares of these last-mentioned defendants in said lands), and

that the several shares of these defendants should be subjected to the payment of said claims along with the shares of the other defendants.

"(5) Because it is respectfully submitted, his honor, Judge Klugh, in his said decree, erred in holding and adjudging the claim or demand of the plaintiffs constituting the second cause of action in the complaint (as against the shares of all the defendants in the lands in question) is barred by the statute of limitations; whereas it is submitted that he should have held and adjudged that said claim of plaintiffs was not barred by statute (as against the shares of those defendants who had not set up the plea of said statute), and that the several shares of those defendants should be subjected to the payment of the said claims of plaintiffs along with the shares of the other defendants.

"(6) Because his honor, Judge Klugh, in his said decree, erred in holding and adjudging 'that the plaintiffs are accountable to their co-tenants for the rents' received by 'them or their father, the said John Cauthen, within six years prior to the commencement of the action'; whereas he should have held and adjudged that said rents should be credited on the said claim of plaintiffs against the said estate.

"(7) Because his honor, Judge Klugh, in his said decree, erred in holding and adjudging that plaintiffs should account to all of their co-tenants for their respective shares of said rents and profits; whereas he should have adjudged that plaintiffs should not be required to so account to those defendants who had answered, admitting the allegations of the complaint, and joined in its prayer for relief.

"(8) Because his honor, Judge Klugh, erred in recommending the cause to Referee Jones to ascertain and report to the court, with all convenient speed, the amount of rents so received by the plaintiffs or their father, the late John M. Cauthen, within six years before the commencement of this action down to the date of such report, 'including the rent for the year 1903, if any'; whereas he should have reversed the findings of the said referee as to the statute of limitations and plaintiffs' accountability for rents."

Before we proceed to the consideration of the eighth ground of plaintiffs, we will pass upon the motion of the defendants (respondents) to dismiss the appeal from the decree of Judge Ernest Gary. We are satisfied that the decree of Judge Gary was an intermediate decree upon the merits, and, being of that character, is appealable. See section 11, note, div. 1, of the Code of Civil Procedure. *Hyatt v. McBurney*, 17 S. C. 150; *McCrady v. Jones*, 36 S. C. 136, 15 S. E. 490; *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711.

To so much of the motion to dismiss the appeal for such of defendants who are ab-

sent from the state, and who have no attorney here upon whom appellants could serve a notice of appeal, we do not feel called upon to take action. All we can say is that the shares of such respondents must be paid or retained in court for such future action as may be necessary. The motion to dismiss the appeal is refused.

We will next consider the appellants' grounds of appeal.

1. We think Judge Ernest Gary made his mistake in holding that the statute of limitations barred the plaintiff as against Elizabeth Fleming and Emma Cauthen, by overlooking the fact that John M. Cauthen had never been discharged from the duties of his two offices as committee and administrator of W. B. Cauthen, deceased. Besides all this, we think these two defendants were estopped by their conduct in requiring the plaintiff, John M. Cauthen, to hold onto the two said offices when he was about to file his suit in the year 1889, which was before the statute was a bar. This exception is sustained.

2. We think his honor, Judge Klugh, made the same mistake that was made by Judge Ernest Gary, as just pointed out. Besides, Judge Klugh erred when he failed to construe Judge Gary's order, dated 7th December, 1901, as only applying to the defendants Emma Cauthen and Elizabeth Fleming. It was so expressly ruled by Judge Gary in his decree. This ground of appeal is sustained.

3. This ground of appeal, of necessity, must be sustained by reason of our previous holdings.

4. Of course, if the statute of limitations could not be sustained as a defense for Emma Cauthen and Elizabeth Fleming, it cannot, when made upon precisely the same grounds, be sustained for the defendants enumerated in this ground of appeal. It is sustained.

5. This ground of appeal is sustained for the reasons already given. Section 121 of the Code of Procedure of this state shows this also.

6. Inasmuch as we have held that the claims of plaintiff for over \$3,500 was a valid claim, and inasmuch as said John M. Cauthen should pay seven-tenths of the rents and profits of the land known as "Cedar Creek Lands" to the defendants, we hold that seven-tenths, with his own three-tenths, should be credited upon said claim. This ground of appeal is sustained.

7. When a defendant admits the allegations of a complaint and its prayer, he is only entitled to have such relief as the complaint suggests. This ground of appeal is sustained.

8. Of course, this ground of appeal must be sustained. This follows from what has already been held.

It is the judgment of this court, that the decretal order of Judge Ernest Gary, dated

the 7th December, 1901, and also the decretal order of Judge Klugh, dated the 8th day of September, 1903, be, and the same are, reversed; and it is further adjudged that the action be remanded to the circuit court to formulate its decree, carrying out the report of special referee, Charles D. Jones, Esq., dated the 20th September, 1901, with such modifications as to names of parties as may be necessary.

(70 S. C. 148)

PROVIDENCE MACH. CO. v. BROWNING.

(Supreme Court of South Carolina. Nov. 12, 1904.)

GUARANTY—RELEASE—EXTENSION OF TIME OF PAYMENT—PARTNERSHIP—EVIDENCE—DEPOSITIONS—INSTRUCTIONS.

1. The guarantor of a debt, who agreed to indorse notes therefor on performance by the creditor of certain acts, is not released by failure of the debtor to execute the notes within a reasonable time after performance by the creditor.

2. A guarantor of the payment of a debt for which notes were to be given and indorsed by the guarantor was not relieved of liability by the fact that the time of payment was extended because the notes were not given by the debtor within a reasonable time, unless the parties intended to postpone the maturity of the original debt to the time named in the notes.

3. A statement of an account by a bookkeeper who has authority to make and alter contracts is binding on his principal.

4. Declarations of a partner are inadmissible for the purpose of establishing the fact that another is a member of the partnership.

5. Where testimony is taken under Code, § 2878, either party to the action may call for its production.

6. Testimony of a party taken *de bene esse* and used at a former trial may be introduced by the adverse party at a second trial.

7. Failure to instruct on a particular view of the law is not error, when it is not requested.

Appeal from Common Pleas Circuit Court of Laurens County.

Action by Providence Machine Company against M. E. Browning. From judgment for defendant, plaintiff appeals. Reversed.

N. B. Dial and F. P. McGowan, for appellant. Ferguson & Featherstone and H. J. Haynsworth, for respondent.

GARY, A. J. This is an action against James S. Blalock, L. W. C. Blalock, and Mrs. E. M. Browning, individually and as partners, and against the corporation known as the Goldville Manufacturing Company, of Goldville, S. C., to recover the price of certain machinery alleged to have been sold and delivered by the plaintiff to the defendants. After the commencement of the action all the defendants except Mrs. M. E. Browning went into bankruptcy, and no judgment was claimed against them. Mrs. Browning answered the complaint, denying that she was a partner, and setting up the defenses that she was released from her lia-

bility as guarantor by reason of the fact that the time for payment was extended by the plaintiff without her consent, and that the indebtedness was satisfied by notes given on the 1st day of May, 1901. On the 30th day of July, 1900, the plaintiff proposed to the Goldville Cotton Mill to furnish it certain machinery, to be delivered about the 15th of December, 1900, for \$9,104.52, upon the following terms: "One-half cash, one-fourth in six months, one-fourth in twelve months. Payments to be made in current exchange. Deferred payments secured by bankable notes bearing interest at six per cent per annum. The builders will furnish men to erect machinery, you paying \$4.00 per day for erection while at mill, and furnish common labor for unboxing, cleaning and assisting in erecting the same." This proposition was accepted.

On the 7th September, the following instrument of writing was executed:

"Whereas, the Goldville Manufacturing Company, Goldville, S. C., have purchased machinery from the Providence Machine Company, Providence, R. I., amounting to nine thousand one hundred and four dollars and fifty-two cents (\$9,104.52), payable one-half cash, one-fourth in six months; one-fourth in twelve months; deferred payments to be secured by bankable notes, bearing interest at six per cent per annum: We hereby agree to indorse the said notes, and should the Goldville Manufacturing Company fail to pay for the said machinery in terms of contract made between themselves and the Providence Machine Company, dated July 30th, 1900, or shall fail to pay any notes when due which are given in payment, we, the undersigned, do hereby bind and obligate ourselves jointly and severally each with the other and with the Providence Machine Company to make good and pay to the Providence Machine Company the amounts which may be due them in accordance with contract above mentioned. Goldville Manufacturing Co., per J. S. Blalock. J. S. Blalock. L. W. C. Blalock. M. Browning. Goldville, S. C., September 7th, 1900."

On the 1st day of May, the notes were made.

The case described in the complaint is as follows:

"\$2,317.10. Goldville, S. C., May 1st, 1901. Six months after date, we promise to pay to the order of Providence Machine Company, two thousand three hundred and seventeen and $\frac{10}{100}$ dollars, at Providence, Rhode Island, with interest thereon, and at six per cent per annum, value received. Goldville Manufacturing Co., J. S. Blalock. President. L. W. C. Blalock, Secy. and Treas." Signed on back "J. S. Blalock" and "L. W. C. Blalock."

The letter acknowledging the receipt of the notes is as follows:

"Providence, R. I., May 6th, 1901. Goldville Manufacturing Co., Goldville, S. C.

Gentlemen: Two notes duly to hand. Enclosed find statement in settlement. The item of \$81.94 is for interest on \$4,552.26, on one-half of account from date due, January 12th to May 1st, date of notes (would refer you to your letter of April 22). Yours truly, W. C. Pierce, Treas."

The following is a copy of the statement enclosed in the letter:

"Providence, R. I., May 1st, 1901.
Goldville Manufacturing Co. to Providence Machine Co., Dr.
1900. For account rendered.
Dec. 12. For merchandise per bill rendered.. \$9,104 53
1901. Cr.
Jan. 31. By cash..... \$4,552 26
108 days interest, from January 12th
to May 1st..... 81 94
_____ \$4,634 20
Cr.
May 6. By note, May 1, 6 mos..... \$2,317 10
By note, May 1, 12 mos..... 2,317 10
_____ \$4,634 20

"Settled as above, May 6th, 1901.

"Providence Machine Company,

"By F. Pierce."

The machinery was shipped on the 10th and 12th of December, 1900, to the Goldville Manufacturing Company, which was incorporated on the 23d of October, 1900. Mrs. Browning became a stockholder, if not also a director, of this corporation. The cash payment was made, but notes for the deferred payments were not signed by Mrs. Browning, nor indorsed by her. The jury rendered a verdict in favor of the defendant, and the plaintiff has appealed upon numerous exceptions.

We will first consider the assignments of error on the part of his honor the presiding judge in charging the jury that, if the notes were not given within a reasonable time after the delivery of the machinery, the defendant was released from her liability as a guarantor. After the circuit judge had submitted the case to the jury, they came into the courtroom for further instructions, and, upon being asked by the presiding judge whether their difficulty arose from a difference of opinion as to the law or as to the facts, the foreman replied, "It seems to be a diversity of opinion as to when this note should have been given." The presiding judge thus concluded his second charge to the jury, which states succinctly his construction of the contract: "The notes should have been given when the machinery was delivered, or within a reasonable time thereafter. When it was delivered is a matter of fact for you. What is a reasonable time is a matter of fact for you to find out; and if you were to find that the notes were not given within a reasonable time afterwards, then under the law that would be a change of the contract, as I construe the paper; and a change of the contract, if ever she guaranteed the contract, would release her, so far as the guaranty is concerned. I am asked to charge you, if there was a change, and she consented or acquiesced in it, what would be the effect. Well, if this

lady, if there was a change, and she consented or acquiesced in it with full knowledge that it would not release her; but if there was a change without her knowledge, without her consent and acquiescence, then she would not be." The assignments of error to this charge are as follows: "The errors being: (1) Laying down too narrow a limit for the giving of the notes. (2) In not declaring the law of reasonable time, but leaving it to the jury. (3) In not charging that three or four months, under the circumstances, was not an unreasonable time. (4) In violation of section 26, art. 5, of the state Constitution, by charging the jury in respect to matters of fact, in saying that, if the notes were not given at the delivery of the machinery, or not within a reasonable time thereafter, the contract was changed and the guarantors released. (5) The change, if any, was immaterial, a mere delay, nonaction on the part of the guarantors as well as principal debtor; and the actual delay of four and one-half months was not, as a matter of law, an unreasonable time under the circumstances. (6) Because the defendant, as guarantor, is estopped to plead delay in the execution of the notes, as she was at fault in not signing notes, and in not making request upon the creditor to hasten up the transaction, and was a director and stockholder at the time of the execution of the notes, and was represented by her agent, L. W. C. Blalock, in her connection with the mill. (7) Because the machinery had to be erected before the full performance of the contract. (8) The guaranty enlarges upon the times of sale, and stipulates for two classes of notes: First, indorsed bankable notes, as security for the credit portion of the purchase money; second, any kind or form of notes given in payment not security when due, not necessarily at six or twelve months from delivery of the machinery."

On the former appeal in this case (68 S. C. 1, 46 S. E. 550) this court said: "The contract in question is not a guaranty of collectibility but a guaranty of payment, provided the Goldville Manufacturing Company failed to do so. It was not a conditional guaranty, but an absolute guaranty." The circuit judge, under the pleadings, properly charged that, if the notes were executed within a reasonable time after the machinery was delivered, the defendant was not discharged from her liability under the guaranty. But it was error when he charged that, if the notes were not executed within a reasonable time after the delivery of the machinery, that the defendant was thereby released from liability. The only duty incumbent on the plaintiff under the terms of the agreement was to deliver the machinery and furnish men to erect it, which duty was fulfilled. It was the duty of the Goldville Manufacturing Company to deliver the notes in conformity with the requirements of the contract, and its failure to perform this duty

cannot be attributed to the plaintiff as an act of wrong, but is chargeable to the guarantors, who had obligated themselves to make payment in case the principal failed to perform its part of the agreement.

Furthermore, the charge was erroneous in that the circuit judge expressly charged, or necessarily assumed as a fact, which was set up as a defense, that the notes materially changed the terms of the contract by extending the time of payment, or that the notes were accepted in satisfaction of the indebtedness, which fact was also relied upon as a defense in the answer. Mere indulgence extended the principal by the creditor will not discharge the guarantor. *Shubrick v. Russell*, 1 De S. Eq. 315; *Witte v. Wolfe*, 16 S. C. 274. In order that a new or collateral agreement shall have the effect of discharging the guarantor from liability by reason of the fact that it fixes the day of payment beyond that mentioned in the original contract, it is necessary that it should be based upon valuable consideration and be legally binding upon the parties entering into it. *Parnell v. Price*, 3 Rich. Law, 121; *Witte v. Wolfe*, 16 S. C. 274; *Gardner v. Gardner*, 23 S. C. 588; 27 Enc. of Law (2d Ed.) 500. A collateral agreement between the principal and the creditor by which the creditor receives additional security for the debt will not suspend or postpone his right of action on the original agreement, so as to discharge the guarantor, unless it was the intention of the parties to the collateral agreement that the right of action on the original contract should be suspended or postponed until the time of maturity named in the collateral agreement. *United States v. Hodge*, 6 How. 279, 12 L. Ed. 437, cited in *Gardner v. Gardner*, 23 S. C. 588. The effect of taking a note or obligation is thus stated in 27 Enc. of Law, 491: "Much controversy has arisen as to the effect to be attached to the mere acceptance by the creditor of a negotiable note or other obligation. Several difficulties arise. There may be doubt as to whether the note is accepted in satisfaction of the old obligation, or as collateral security merely, or in conditional payment. Again, there may be a question whether the acceptance of the security operates as an agreement on the part of the creditor to extend time. The liability of the surety on the principal debt can, of course, be enforced only where the obligation is taken solely as collateral or additional security. If it be taken in satisfaction, or in conditional satisfaction, the surety is discharged. The understanding of the parties at the time of the transaction will, of course, control, but in many cases it is necessary to resort to the legal presumptions that arise. Where the creditor takes new negotiable paper from the debtor, the surety is prima facie discharged. This is true whether the question arises in those states where negotiable paper operates as prima facie satisfaction or in those states where it

operates as conditional payment only. In the one case the debt is prima facie paid; in the other there is a prima facie extension of time. If, instead of being negotiable, the security taken consists in bonds, mortgages, or other choses in action, the presumption that it was taken in satisfaction or in conditional payment does not arise, and it is prima facie treated as collateral only. The fact that such collateral matures in the future is not of itself sufficient to raise the presumption of an extension of time such as to release the surety." In the application of these principles the jury must determine whether there was such a change in the contract as to release the defendant. Merely construing the language of the warranty, it is manifest that the parties did not contemplate that the giving of the notes in "payment" of the indebtedness should be "in settlement" of the liability resting upon the obligors under the terms of the warranty. Therefore if the words "in settlement," in the letter and statement, were used in the sense of the word "payment," as intended by the parties in the guaranty, then they do not show that the plaintiff intended to release the defendant from her obligation as a guarantor. Whether the words were so used presents a question of fact for the jury. *Glover v. Gasque*, 67 S. C. 18, 45 S. E. 113; *Thompson v. Protective Union*, 66 S. C. 459, 45 S. E. 19. It will thus be seen that the liability of the defendant was dependent upon the intention with which the notes were executed, and not upon the question whether they were made within a reasonable time after the delivery of the machinery. The charge of his honor the presiding judge was therefore erroneous.

The next question for consideration is whether his honor erred "in allowing the defendant's attorney, against the plaintiff's objection, to introduce in evidence a statement of F. Pierce, the bookkeeper of the plaintiff, purporting to show an alleged settlement of the account by notes of Goldville Manufacturing Company; the error being that it does not come within the scope of the authority of a bookkeeper to make contracts for the company." The statement, as we have said, was inclosed in the letter hereinbefore mentioned, which was written in reply to one of the Goldville Manufacturing Company. The statement was adopted by W. C. Pierce, who had the authority to make or alter contracts entered into with the company, and the ruling was correct.

The first exception is as follows: "(1) His honor the presiding judge erred, it is respectfully submitted, in excluding the testimony offered by the plaintiff at the trial in the following particulars: (1) In the deposition de bene esse of William C. Pierce the statement of L. W. C. Blalock that the Goldville Manufacturing Company was a partnership composed of Jas. S. and L. W. C. Blalock and Mrs. M. E. Browning. (2) The tes-

timony of the defendant Mrs. M. E. Browning as a deposition *de bene esse*, taken upon her own motion before O. K. Mauldin, Esq., notary public, and used in evidence in the former trial of the case. (3) The questions propounded by plaintiff's attorney to the witness L. W. C. Blalock as to what was the object of the promoters of the Goldville Manufacturing Company in having it incorporated, what was the cost of building and equipping the mill, and the amount of the debts owing by the Goldville Manufacturing Company and its promoters when it was chartered on October 23, 1900. (4) The record or judgment roll of the court of common pleas for Laurens county, in said state, in the case of the C. N. & L. Railroad Co. v. the Goldville Manufacturing Co., of Goldville, S. C., the object of the testimony being to show the insolvency of the Goldville Manufacturing Company on January 6, 1901, and the extent of its indebtedness. (5) Duplicate schedules of assets and liabilities of the Goldville Manufacturing Company, of Goldville, S. C., of Jas. S. and L. W. C. Blalock, being records in bankruptcy of the District Court of the United States for the District of South Carolina. (6) The question propounded by the plaintiff's attorney to the witness L. W. C. Blalock, to refresh his memory, if he had not stated in a letter to Sexton Robbins Company, agent of plaintiff, as to who composed the firm of the Goldville Manufacturing Company."

The first assignment of error cannot be sustained, for the reason that the mere declarations of a person are not admissible in evidence for the purpose of establishing the fact that another is a member of a partnership. *Bank v. Anderson*, 28 S. C. 144, 5 S. E. 343.

Neither can the second assignment of error be sustained. The testimony seems to have been taken under section 2878 of the Code of Laws, and, if so, either of the parties to the action had the right to call for its production. *Pulaski v. Ward*, 2 Rich. Law, 119; *Petrie v. R. R.*, 27 S. C. 63, 2 S. E. 837. The fact that the witness examined was present at the trial did not deprive them of such right. *McLaurin v. Wilson*, 16 S. C. 402. After the presiding judge ruled that the testimony was inadmissible, the plaintiff's attorneys offered it as an admission against the interests of Mrs. Browning, a party to the suit. The defendant's attorneys consented to its admission for that purpose, and it was introduced. The plaintiff thus had the benefit of the testimony, and, conceding that there was error, it was not prejudicial.

The third assignment of error does not state in what particulars the ruling was erroneous.

It may be that the testimony mentioned in the fourth and fifth assignments of error was admissible under the ruling in *Fales v.*

Browning, 68 S. C. 13, 46 S. E. 545. But, as it is not set out in the record, the court cannot judge of its materiality.

The sixth assignment of error is not well taken. The testimony which the plaintiff's attorney sought to educe from the witness was irrelevant, unless the object was to show by the declarations of the witness that Mrs. Browning was a member of the partnership. We have hereinbefore shown that such testimony was inadmissible.

The tenth exception is as follows: "Because his honor erred in charging defendant's second request, as follows: 'Persons may associate themselves together for the purpose of forming a corporation without being partners and without rendering themselves liable as partners'; and, second, 'When a corporation is formed, and one takes stock therein, he does not incur any liability as partner'—the error being that said propositions were inapplicable to the case, and misleading, as the testimony shows that the promoters contracted debts as partners in building the mill and purchasing the machinery before the corporation was formed." It is not contended that the propositions of law embodied in the requests to charge were not sound, but that they were inapplicable and misleading in this case. The reason assigned by the appellant to show why they were inapplicable and misleading is that the testimony shows that the promoters contracted debts as partners. This ground rests upon the assumption of a fact that was in dispute, and hotly contested. This exception must therefore be overruled.

The eleventh exception is as follows: "Because his honor erred in charging defendant's third request, as follows: 'A person cannot be made a partner against his will; so that if one does not consent to become a partner, and does not permit his or her name to be used as a partner, there can be no ground of liability as such'—the error being to ignore the law of a silent or dormant partner, because he may be held liable as a partner upon acts merely, such as the contribution of two or more persons of property, labor or skill in some lawful purpose for their common benefit, although they may deny or be ignorant of the relation of partnership or its results." Again, it is not contended that the proposition in the request was unsound, but that his honor should have charged the law as to silent or dormant partners. If the appellant desired the circuit judge to charge the law as to dormant partners, requests should have been presented to that effect. The exception cannot be sustained.

The views hereinbefore expressed practically dispose of all the questions in the case.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(137 N. C. 374)

TROTTER v. ANGEL et al.

(Supreme Court of North Carolina. Dec. 17, 1904.)

BONDS — LIABILITY — DISCHARGE — EVIDENCE — HARMLESS ERROR.

1. Where, in an action to recover on a bond given for the price of a livery business, one of the defendants testified that he had never had any talk with the obligee about his release from the bond until after he had sold his interest in the business to his partner, it was not error to refuse to permit defendant to testify further that he sold out his interest to his partner because he was to be released from liability on the bond, and that such release was part of the consideration.

2. Where, in an action on a bond given for the price of a livery business, the court, at the request of one of the defendants, eliminated from the case the question of consideration inducing such defendant to sell his interest in the business to his partner, error, if any, in refusing to permit such defendant to testify that he sold his interest to his partner because he was to be released from liability on the bond, which was a part of the consideration, was harmless.

Appeal from Superior Court, Macon County; E. B. Jones, Judge.

Action by H. G. Trotter against T. W. Angel and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Robertson & Benbow, Jones & Johnston, and J. Frank Ray, for appellants. Horn & Mann, for appellee.

MONTGOMERY, J. The defendants Angel and Shepherd bought out the livery business of the plaintiff's assignor, and executed, together with the other defendant, Sheffield, as surety, the sealed obligation, mentioned in the complaint, for the payment of the purchase price, \$825. It is admitted that the contract was executed by the parties, that \$572.38 had been paid on the contract; and that the plaintiff was the owner thereof. The defendants Shepherd and Sheffield seek to avoid their liability for the balance which remains due on the contract by reason of an alleged release and discharge on the part of the obligee. The position of the defendant Shepherd is that the obligee agreed with him and the defendant Angel that if he, Shepherd, would sell out his interest in the livery business to Angel, the obligee would release him from his contract and agreement, and look to Angel only for its fulfillment; that he did transfer and assign his interest in the business to Angel under that agreement; and that, therefore, he is discharged from his original obligation. The position of the defendant Sheffield is that he was only a surety on the original obligation; that Shepherd was discharged and released by the obligee from liability on the original contract; and that therefore in law he was discharged. The issues tendered by the defendants were: (1) Is defendant Angel indebted to plaintiff, and, if so, in what sum?

(2) Is defendant Shepherd indebted to plaintiff, and, if so, in what sum? (3) Is defendant Sheffield indebted to plaintiff, and, if so, in what sum?

The evidence was conflicting and contradictory. It was offered to be shown by the defendant Shepherd, a witness for the defendants, that he sold out his interest in the livery business to Angel because he was to be released from the payment of liability on the bond, and that that was part of the consideration. We see no error in the refusal of his honor to receive that evidence. The witness had just said that he had never had any talk with the obligee about his release from the bond until after he had made the trade with Angel. The question, therefore, did not relate to a release from the bond by the obligee, but to what was said and done between Shepherd and Angel. If that had been the understanding between Shepherd and Angel, it could not have affected the obligee for the reason that we have given; that is, that Shepherd had sold out and traded with Angel before he had had any conversation on the subject with the obligee. However, this witness was allowed to state that he would not have sold to Angel had he not thought he would be released, and that he received nothing from Angel, but simply turned over his interest in the contract to him.

If there had been error in the exclusion of the evidence it would have been harmless, because his honor, at the request of the defendant Shepherd, eliminated the question of consideration from the case and from the jury's consideration by giving the jury the following instruction: "(1) That if they shall find from the evidence that J. S. Trotter, one of the parties in the firm of H. G. Trotter & Son, said to T. W. Angel that if he, Angel, would buy out the interest of T. B. Shepherd in the livery business of Angel & Shepherd, that in that event he, J. S. Trotter, or the firm of H. G. Trotter & Son, would release Shepherd from liability on the contract sued on, and if the jury shall further find that Angel communicated this offer to Shepherd, and in consequence thereof Shepherd did sell out his interest in the livery business to Angel, then the court charges you to answer the second issue 'No' and the third 'No.' (2) That if the jury shall find from the evidence that J. S. Trotter, of the firm of H. G. Trotter & Son, told the defendant Shepherd that he or the firm would release Shepherd from further liability on the contract sued on if he, Shepherd, would sell his interest in the livery business to Angel, and in consequence thereof Shepherd did sell his interest to Angel, then the court charges you to answer the second and third issues 'No.'"

There was no error in the charge of the court raised by section 3, for it is perfectly apparent that the word "chaffering," in the connection in which the judge used it, made the instruction consonant and of like import

with the instructions asked by the defendant Shepherd and quoted above.

There being no error in the exclusion of the evidence referred to, and no error in the charge on the subject of the alleged release and discharge of the defendant Shepherd, it follows that there was no error in the case of which the surety Sheffield could complain; for his honor, at the latter's request, told the jury (1) that if they "shall find from the evidence that the defendant Sheffield was simply surety for the defendants Angel and Shepherd on the contract sued on, and this fact was known to the plaintiff or his partner, J. S. Trotter, and shall further find from the evidence that the defendant Shepherd was released from further liability on the contract, as heretofore explained, then you shall answer the third issue 'No.' (2) If the jury shall find from the evidence that Shepherd was released by J. S. Trotter from further liability on the contract sued on, as heretofore explained, then you will answer the third issue 'No.'"

His honor submitted the case fully and fairly to the jury, with full and proper instructions on every point. The defendants were denied no proper evidence, and in fact probably got in some they were not strictly entitled to, and the jury simply accepted the evidence introduced by the plaintiff as true. No error.

(137 N. C. 251)

TURNER v. McKEE

(Supreme Court of North Carolina. Dec. 17, 1904.)

COUNTIES — COMMISSIONERS — ALLOWANCE OF CLAIMS—OFFICIAL NEGLIGENCE—ACCIDENTS—PLEADING.

1. Code, § 840, rule 5, provides that pleadings in justices' courts need not be in any particular form, but must be such as to enable a person of common understanding to know what is meant. Section 754 provides that no account shall be audited by a board of county commissioners unless it is itemized and verified. Section 711 provides that any commissioner who shall neglect to perform any duty required of him by law shall be guilty of a misdemeanor, and shall also be liable to a penalty of \$200 for each offense, to be paid to any person who shall sue for the same. *Held*, that a complaint before a justice alleging the nonpayment of \$200 due by reason of the penalty accrued under section 711 of the Code for his [defendant's] neglect of duty as a member of the board of commissioners of O. county, for his failure to require an itemized account, fully verified by the oath of L., before he audited and approved such account, as required by section 754 of the Code, stated a cause of action, although it did not particularize the account in question, and, if defendant desired fuller information, he should have asked for a bill of particulars in accordance with section 259, and should not have demurred.

2. Code, § 754, providing that no account shall be audited by a board of county commissioners unless it is itemized and verified, is mandatory, and does not confer any discretion upon the commissioners.

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Orange County; Bryan, Judge.

Qui tam action by C. D. Turner against B. H. McKee. From a judgment of the superior court on appeal from a justice's judgment dismissing the action, plaintiff appeals. Reversed.

C. D. Turner, in pro. per. Graham & Graham and S. M. Gattis, for appellee.

CLARK, C. J. Code, § 754, provides that "no account shall be audited by the board [of county commissioners] for any services or disbursements, unless it is first made out in items and has attached to, and filed with, it the affidavit of the claimant that the services therein charged have been in fact made and rendered and that no part thereof has been paid or satisfied." This is a very explicit and very wise provision of the law-making power. It is of the highest importance to the public that this requirement should always and everywhere be strictly observed. The lawmakers were so fully persuaded of the necessity of county commissioners observing this and similar provisions that it is further provided by Code, § 711, that "any commissioner who shall neglect to perform any duty required of him by law as a member of the board shall be guilty of a misdemeanor and shall also be liable to a penalty of \$200 for each offense, to be paid to any person who shall sue for the same." Not satisfied with placing the county commissioners under the supervision of the grand jury and solicitor, the Legislature added a qui tam action; thus making it to the special as well as general interest of any citizen to see that the duties imposed upon the commissioners are faithfully executed. The plaintiff accordingly brought this action against one of the county commissioners before a justice of the peace "for the penalty of \$200 accrued under section 711 of the Code of North Carolina for neglect of duty required of him as a member of the board of commissioners, for failing to require an itemized and verified account to be filed by John Laws before auditing the said account, as required by section 754 of the Code." This was stated in the summons. In his return to the appeal, the justice stated: "The plaintiff complained of the nonpayment of \$200 due by reason of the penalty accrued under section 711 of the Code for his neglect of duty as a member of the board of commissioners of Orange county, for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of the Code. The defendant demurs to the complaint in this action, for that the plaintiff in said complaint does not state facts sufficient to constitute a cause of action, in that it fails to show what accounts, if any, the defendant is liable to the plaintiff for the

¶ 2. See Counties, vol. 13, Cent. Dig. §§ 313, 314.

penalty sued for." And the justice of the peace added that he dismissed the action at the plaintiff's cost.

On appeal the judge "sustained the demurrer, and (there being no amendment asked) affirmed the judgment of the justice of the peace dismissing the action." This was error. Code, § 840, rule 5, provides, as to proceedings in the justice's court: "Pleadings are not required to be in any particular form but must be such as to enable a person of common understanding to know what is meant." The allegation of "neglect of duty in failing to require" an itemized and verified account is a charge of negligently failing to do so. The statutes (sections 754 and 711) are also referred to in stating the cause of action. The defendant certainly must have known what was meant here, and that he was sued for "a penalty of \$200, under section 711 of the Code, for neglect of duty as a member of the board of commissioners of Orange county, for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of the Code." The magistrate understood exactly what the action was for, and thus clearly states it in his return. It is impossible that the defendant and his counsel did not understand it. The defendant, a public officer, thus clearly charged with a failure to discharge a public duty, should have answered, either admitting or denying the charge, or setting up his defense. In *Staton v. Wimberly*, 122 N. C. 107, 29 S. E. 63, the court said that the statute imposing the duty, whose violation was there alleged, "allows some discretion in the board of commissioners by the express terms of the statute," and that the evidence failed to show any abuse of that discretion. Code, § 754, does not confer any discretion, but is mandatory, in requiring the account to be itemized and sworn. Whatever defense the defendant has must appear by the answer and on the trial. There has been no such failure to state a cause of action as to justify a dismissal of the action.

It does not appear that there was more than one account audited in favor of John Laws, and, if there had been, the plaintiff could have made out his allegation upon the trial by showing any one account or all of the accounts of John Laws which had been audited without being itemized and verified as required by the statute, other than those whose illegal auditing was protected by the statute of limitations, if pleaded. If the defendant desired fuller information before pleading, he should not have demurred, but should have asked for a bill of particulars. "The court may in all cases order a bill of particulars" (Code, § 259), and even in criminal cases (*State v. Brady*, 107 N. C. 822, 12 S. E. 325). See cases cited in *Clark's Code* (3d Ed.) p. 274. But here the defend-

ant was even better informed than the plaintiff. It was plain to the defendant "what was meant" by the proceeding, and he needed no further information to set up his defense.

An indictment of a public officer for neglect of duty, not more explicit than here, was sustained in *State v. Dickson*, 124 N. C. 871, 32 S. E. 961. In *State v. Hatch*, 116 N. C. 1003, 21 S. E. 430, it was held that "carelessness amounting to a willful want of care in the discharge of official duties" justified a verdict of guilty, even under section 1090 of the Code, and that honesty and good intent are not a full defense, because there may be neglect of duty without any corruption in office. This has been cited with approval in *Stanley v. Baird*, 118 N. C. 83, 24 S. E. 12; *Sanders v. Earp*, 118 N. C. 279, 24 S. E. 8; *State v. Ostwalt*, 118 N. C. 1213, 24 S. E. 660, 32 L. R. A. 396; *State v. Dayton*, 119 N. C. 882, 26 S. E. 159; *Staton v. Wimberly*, 122 N. C. 110, 29 S. E. 63; *State v. Dickson*, 124 N. C. 874, 32 S. E. 961. We are not anticipating any defense the defendant may set up, but merely hold that a sufficient cause of action has been stated, under Code, §§ 754, 711, when the facts herein alleged are admitted by a demurrer, especially when the pleading was in a court of a justice of the peace, and no repleading was ordered on the hearing of the appeal in the superior court.

The judgment dismissing the action must be reversed. The demurrer should be overruled, with leave to the defendant to answer over. Code, § 272.

Reversed.

DOUGLAS, J. (concurring). I am much impressed with the able and elaborate dissenting opinion of Justice CONNOR, and heartily agree to nearly all he says, and yet I cannot come to his conclusion. It may be that I am unduly influenced by my disinclination to permit a public officer to meet a charge of official misconduct with a mere demurrer. I think he should answer, and, if he needs any further information for his defense, let him ask for a bill of particulars, or move the court to "require the pleading to be made definite and certain by amendment," as provided in section 261 of the Code. I cannot think that the defendant is so entirely ignorant in fact as he may be in contemplation of law. I am still of the opinion that "an informer has no natural right to the penalty, but only such right as is given by the strict letter of the law," as was said in *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177. I also think that the statute, being penal in its nature, although the action thereon is said to be civil, should be strictly construed in furtherance of substantial right, and that faithful public officers, honestly striving to do their duty within the letter and spirit of the law, should not be held liable for omissions purely tech-

nical in their nature and immaterial in their results. On the other hand, no matter how high their character or how honest their general intentions, they cannot be permitted to treat with indifference laws passed for the protection of the public whose servants they are. Let them render an account when called on, and if they are faithful they will receive the fullest measure of justice. I do not mean to intimate any opinion as to the facts of this case, because I know nothing of the facts. They are to be passed on by the jury, with whose functions I have neither the wish nor the right to interfere. While this is not a criminal prosecution, it seems to me that it comes within the general rule of official conduct discussed in *State v. Dickson*, 124 N. C. 871, 32 S. E. 961. I concur in the opinion of the court.

WALKER, J. (dissenting). My first impression of this case was that the plaintiff had alleged facts sufficient to constitute a cause of action, and, while he had not pleaded with technical accuracy, and perhaps had stated his grievance somewhat inartificially, yet there was just enough said to require an answer from the defendant. A more careful and critical examination of the case, and a better understanding of the facts, convince me that my first impression was not correct, and that there are defects in the complaint, which, in the present state of the case, namely, a defective complaint, and a demurrer thereto sustained, must be fatal to the plaintiff's recovery, at least in this action. The pleadings in the justice's court were oral, but the cause of action is set out in the summons, and the substance of it, which is stated in the return of the justice as required by Code, § 840, rule 2, is as follows: "The plaintiff complained of the defendant for the nonpayment of the sum of \$200 due by reason of penalty accrued under section 711 of the Code of North Carolina, for his neglect of duty as a member of the board of commissioners of Orange county, for his failure to require an itemized account, fully verified by the oath of John Laws, before he audited and approved said account, as required by section 754 of the Code." The duty, for a breach of which the plaintiff claims a penalty, is thus prescribed by law: "No account shall be audited by the board for any services or disbursements, unless it is made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification." Code, § 754. The penalty for

a violation of the duty required by that section is imposed by section 711 as follows: "Any commissioner who shall neglect to perform any duty required of him by law as a member of the board, shall be guilty of a misdemeanor, and shall also be liable to a penalty of \$200 for each offence to be paid to any person who shall sue for the same." It will be observed that by section 754 it is provided that the duty of the commissioners to require an itemized account shall extend only to accounts for services rendered and disbursements made by the claimant for the benefit of the county, and the requirement that the statement shall be verified is confined only to accounts for services thus rendered. In the latter case the claimant must not only itemize his account, but must make oath "that the services therein charged have been in fact made and rendered and that no part thereof has been paid or satisfied." The use of the word "made" in that part of the section last quoted would indicate that it was intended that accounts for disbursements should also be verified, as the verb "made" would aptly apply to disbursements, whereas it does not to services. We would not, in correct speech, use the term "services made" by the claimant. This apparent inaccuracy in the form of expression cannot, as we will presently see, have the effect to enlarge the scope of the statute, or to extend its operation beyond the meaning of the words actually used. But if it could have such effect in the interpretation of a penal statute, and the section be construed to require an itemized and verified statement, both in the case of accounts for services performed and in that of disbursements made for and in behalf of the county, we still think that plaintiff's case as stated in his complaint is without the statute, as, from the statement of the legislation upon this subject which we have made, it seems clear, upon the settled principles of construction applicable to penal enactments, that no one of the duties required to be performed by the commissioners comes within this case, so as to subject the defendant to the penalty imposed by section 711 of the Code.

It is perfectly familiar learning—being one of the first principles of statutory interpretation—that penal laws must be construed strictly, and it is not permissible to enlarge their operation by implication nor by any equitable construction, but we must ascertain their meaning only by the express letter. They must be restricted to the plain import of the language used to convey the intent of the Legislature. *Smithwick v. Williams*, 30 N. C. 268; *Coble v. Shoffner*, 75 N. C. 42; *State v. Midgett*, 85 N. C. 538. In declaring upon a penal statute, certain rules of pleading, besides the general rules, are specially applicable to such cases. The plaintiff, in his complaint, under the general rule, must show a good title to that which he seeks to recover; and, if he fails in this respect, the

defendant may demur, move in arrest of judgment, or bring a writ of error. But the special rules require him, in an action for a penalty, to set forth every fact essential to show that his case is within the letter and spirit of the law by which it is given. He must plead with particularity, so that the court may clearly see, without the necessity of making any inference, implication, or conjecture, that the unlawful act has been done, or that the duty enjoined has been omitted, by the defendant. No intendment will be made in his favor. He must succeed, if at all, upon the facts as he states them, and not upon any deduction from them, or any mere statement of a conclusion of law. Archbold Civ. Pl. 106, 109; 1 Chitty, Pl. 372; 16 Enc. Pl. & Pr. 274, 275, 276; Wright v. Wheeler, 30 N. C. 184. While the distinction between actions at law and suits in equity and all feigned issues have been abolished, and there is now but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which is denominated a civil action (Const. art. 4, § 1), and while new rules have been prescribed for determining the sufficiency of a pleading (Code, § 231), one of which rules is that, in the construction of a pleading for the purpose of determining its legal effect, its allegations shall be liberally construed, with a view of substantial justice between the parties (Code, § 260), all this does not mean that the court shall supply necessary allegations, nor was it intended to repeal those rules of pleading so essential to producing certainty of statement, and consequently a determinate issue between the parties, for the Code provides that the complaint shall, in actions in the superior court, contain "a plain and concise statement of the facts constituting a cause of action," and in actions in justices' courts it shall state in a "plain and direct manner" the said facts; the latter being language no different in effect from that used in the case of pleadings in the higher court, but of equivalent import. However we may consider it, the law requires in every court that the pleadings shall state the facts, and all the facts, which are necessary to constitute a good cause of action, plainly and concisely. I do not see that this substantially varies the rule of the common law, or, what was sometimes called, the rule of special pleading. The two systems are in this respect essentially the same.

The plaintiff sues in what is termed a "popular action," not so called because such actions meet with popular favor or approval, but deriving its name solely from the peculiar fact that it can be brought by anybody who is willing to inform against the defendant, and who is therefore denominated a common informer or prosecutor. Blackstone defines it as an action for a statutory penalty or forfeiture, given to any such person or persons as will sue for it—an action given in England to any of the King's

subjects (3 Bl. Comm. 161), and in this country to the people in general. The recovery may go to the informer, or, if the action be *qui tam*—that is, one in which the plaintiff sues for the state as well as for himself—it is divided as the law may direct.

Having acquainted ourselves with the nature of the action, and applying the foregoing principles to this case, let us see if the plaintiff has brought it within the statute, so as to become entitled, as a common informer, to the penalty he seeks to recover. I think he has not. Section 754 applies only to cases where the account is for services rendered, and, even if a verified statement is required as to disbursements, it refers to such as have been made by the claimant. There are many other kinds of accounts filed with the commissioners upon which claims for payment are based, and the glaring defect in the complaint is that it is not stated therein that the account alleged to have been audited without being itemized or verified was either for services or for disbursements. Mr. Laws may have had some other kind of claim against the county which is not included in the terms of the statute, but, whether he had or not, the law will not require the penalty of the defendant unless we can see clearly that he has violated its mandate. There is not even room enough in this complaint for a reasonable conjecture as to the truth of the matter. The defendant is not liable to the plaintiff unless the board has failed to require an account for services to be itemized and verified, or an account for disbursements to be itemized. This is according to the letter, and, as far as we can see, also according to the spirit and intent, of the statute. The plaintiff has failed to allege that the account was for services or disbursements, if he can claim anything in respect to the latter for the failure to verify. It follows that his complaint is defective, in that "it does not set forth specially the facts upon which the plaintiff relies to constitute the offense, and it has not that certainty on its face as will enable the court to see what has been omitted." Nash, J., in Wright v. Wheeler, *supra*. For anything that appears in the complaint, the defendant may have done a perfectly lawful act. In this case the facts are surely not stated with any more certainty and precision than were the facts in the case last cited, and they were held to be insufficient to warrant a recovery for the penalty claimed. It has been said in a case where a statute similar to ours was construed, and in which the plaintiff sought to recover a penalty, that, "the main office of a complaint being to apprise the defendant of the facts upon which the plaintiff relies to establish a cause of action, the Code [of New York] requires that such facts shall be stated plainly and precisely; and, inasmuch as this action is highly penal in its nature, there was special reason why in this particular instance the rules

or pleading should not have been relaxed." *Steuben Co. v. Wood*, 24 App. Div. (N. Y.) 442, 48 N. Y. Supp. 471. This language fits our case, even applying the liberal rules of pleading under the Code.

I have not adverted to the fact that the complaint charges that the defendant, McKee, individually failed to require an itemized and verified account, whereas the statute requires that duty of the board as a corporate body or distinct entity, and not of the individual members. The latter must act together as a unit. This is certainly not good pleading. Whether, the duty being single, its omission is therefore a single offense, for which only a single penalty can be exacted, is a question I need not consider at present, though it will be one well worthy of serious consideration when we are required to decide it. There are also other important questions involved, which I need not now discuss.

The plaintiff was given an opportunity to amend his complaint, but preferred to stand upon his rights as fixed by the present state of the pleadings. The complaint being defective, I can see no error in the ruling of the court by which the demurrer was sustained.

CONNOR, J. (dissenting). Recognizing fully the liberality with which, under our Code system, pleadings are construed "in furtherance of justice" and advancement of the remedy, I cannot concur in the conclusion reached by the court in this case. I cannot think that it was ever contemplated by the authors of the code system that a party may maintain an action, not knowing, or, if knowing, refusing to inform the court of, the facts upon which his alleged grievance is based. Either the plaintiff is "fishing" for a cause of action, or he is trifling with the court in bringing the action as he does, and refusing to comply with the most reasonable, and, I think, strictly legal, demand that he state "in a plain and direct manner the facts constituting the cause of action." Rule 3, Justices' Courts (Code, § 840). The records of the commissioners, including "the books and papers of the board," are "free to the examination of all persons." Code, § 712. The plaintiff, before beginning his action, could have found, by a few moments' examination, "fled in alphabetical, or other due order, all accounts presented or acted on by the board * * * the amount allowed and the charges for which it was allowed." *Id.* In the light of these plain provisions of the law, certainly there can be no good reason for further relaxing the rules and elementary principles of pleading requiring the plaintiff to state "in a plain and direct manner the facts constituting his cause of action." This court has repeatedly held that it was necessary to do so, and has, *ex mero motu*, upon an inspection of the entire record, arrested judgment for failure to com-

ply with the rule. In *Scroter v. Harrington*, 8 N. C. 192, Henderson, J., said: "That the defendant may be informed of the nature of the charge against him, the law requires that the facts constituting it should be stated with precision." I cannot perceive any substantial difference between stating facts "with precision" and in a "plain and direct manner." In conclusion it is said: "These proceedings, it is true, originated before a justice of the peace, and as to matters of form are not to be critically scrutinized, yet matters of substance ought not to, and cannot, be overlooked." In *Wright v. Wheeler*, 30 N. C. 184, Nash, J., said: "It is a principle of pleading that the declaration must set forth a good title to that which is sought to be recovered. If it does not, the defendant may demur, or move in arrest of judgment, or bring a writ of error. In an action upon a statute to recover a penalty, the plaintiff must set forth in his declaration every fact which is necessary to inform the court that his case is within the statute; and it is laid down by Mr. Chitty in his treatise on Pleading (volume 1, p. 405), that it is necessary in all cases that the offense or act charged to have been committed or omitted by the defendant appear to have been within the provisions of the statute, and that *all the circumstances necessary to sustain the action must be alleged.*" (The italics in the original opinion.) Again it is said: "The declaration must have sufficient certainty on its face to enable the court to know what has been done. Facts are to be stated, not inferences or matters of law; nor will the conclusion *contra formam statuti* aid the omission." The court arrested the judgment *ex mero motu*. In *Drake v. McMinn*, 27 N. C. 639, Nash, J., concluding the opinion, says: "We have nothing to do with the motives of the plaintiff in instituting these proceedings. He appears before us as a public informer, seeking to enforce against the defendant a forfeiture incurred by the violation of the law. He must be prepared to show by his evidence that by law he has a right to demand and receive the money forfeited. We think that he has not done this, that there is in his declaration a defect fatal to his claim, and that his judgment must be arrested." In *Hardwick v. Telegraph Co.*, 70 Vt. 180, 40 Atl. 169, the court said: "As the statute does not prescribe the form of action, the declaration should set forth with particularity the facts upon which the plaintiff relies to constitute the offense;" saying in regard to the complaint, "It is not within the rule of certainty to a certain intent in general," and is bad on special demurrer. In *Bigelow v. Johnson*, 13 Johns. 428, it is said: "It is a well-settled rule that in declaring for offenses against penal statutes (where no form is expressly given) the plaintiff is bound to set forth specially the facts on which he relies to constitute the offense." It was formally held that the

declaration must refer to the statute, but, "under the more liberal rules of modern times, the tendency is to consider counting upon the statute when the action is strictly penal as a mere formal matter and unnecessary." 16 Enc. Pl. & Prac. 274. "It is necessary in all cases that the offense or act charged to have been committed or omitted by the defendant appear to have been within the provisions of the statute, and that all the circumstances necessary to sustain the action be alleged." *Id.* 275. To the suggestion that a different rule prevails under the Code, it may be noted that the Supreme Court of New York, construing the section of the Code of which ours is an exact copy, said: "The main office of a complaint being to apprise the defendant of the facts upon which the plaintiff relies to establish a cause of action, the Code requires that such facts shall be stated plainly and concisely; and, inasmuch as this action is highly penal in its nature, there was especial reason why in this particular instance the rules of pleading should not have been relaxed." *Steuben Co. v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471. "General allegations are always insufficient, and no material fact may be left to conjecture or inference." Enc. Pl. & Pr. 276. "When jurisdiction over action to recover penalties is granted to justices of the peace or other inferior courts, the usual manner of proceeding is not thereby changed." *Id.*

Applying these well-established rules, so essential both to orderly procedure and to the protection of the citizen against harassing and expensive litigation, I think the complaint fatally defective. No account, either by number, date, or amount, is named. The complaint is: "For his failure to require an itemized account, fully verified by the oath of Mr. John Laws, before he audited and approved said account." The words "said account" must refer to some account theretofore named or in some manner designated, but none is named or designated. It is said, "The defendant must have known what was meant here, and that he was sued for a penalty," etc. It is further said that "the magistrate understood exactly what the action was for, and thus clearly states it in his return." As the learned Chief Justice, writing for the court, makes this statement of fact, I must assume that it is correct; but I must, with all possible deference, say that I can account for it only upon the theory that their mental vision measures up to the standard fixed by Saml. Weller respecting the kind of eyes by which he was expected to see "thro' a flight o' stairs and a deal door." I must confess that I am unable to exactly understand what the plaintiff means. Without calling "in aid" the power to read the mind of the plaintiff, I am unable to see what his grievance is. Whether it was that the defendant audited an account presented by some one else not fully verified by Mr. John Laws, or whether Mr. Laws had presented

an account not itemized and fully verified, does not very clearly appear to my mind; and I am not surprised that a layman should have respectfully asked that the plaintiff, "in a plain and direct manner, inform him just how he became indebted to him," etc. This was, in my opinion, his legal right, without regard to the wisdom of the statute, or the fact that, as a county commissioner, he was under the supervision of the grand jury and the solicitor, with the additional safeguard of being subject to a *qui tam* action by the plaintiff. While, by taking upon himself the burdens and duties of a county commissioner, the defendant becomes liable to an action or indictment for acts of misfeasance and nonfeasance, I do not understand that he forfeits any of his legal rights as a citizen, or becomes liable to be prosecuted otherwise than according to the due course of the law and procedure. In demurring he simply exercises a legal right, and I cannot see why he may not do so without subjecting himself to criticism.

The suggestion that the defendant should have answered, either admitting or denying the charge, assumes the very question in controversy—that there is no charge which he was called upon to answer. He has a right to demand, before he is required to "admit or deny" anything that the complaint contain, not formal or technical language, but a "plain and direct statement of the facts." Our laws, both substantive and remedial, are the expressions of the minds and experience of a plain people, using plain and direct language to express plain thoughts. They are not intended to encourage a game of hide and seek in the courts. If one will call his neighbor into the courts, let him do so in a manner and with speech that may be understood by plain men. It is suggested that the defendants should not have demurred, but joined issue and "gone to the country." This, again, assumes the very question in issue. The issues arise upon the pleadings, and, if these raise no issue, the finding of which will enable the court to proceed to judgment, the parties and the court will at the end of the trial have performed the proverbially useless feat of coming out where they went in, or of moving around in a circle. Let us suppose the jury had found every word of the complaint true; how much nearer would the court be to "a plain and direct statement of the facts constituting the cause of action"? It is the purpose of the demurrer to prevent this result. The exact point has been decided by the Supreme Court of New York. In *Cortland v. Howard*, 1 App. Div. 131, 37 N. Y. Supp. 843, Parker, C. J., said: "There seems to be no provision in a justice's court for moving to make a complaint more definite and certain. If it is not sufficiently explicit to be understood—and by that is meant sufficiently explicit to fairly inform defendant upon what the cause of action is based—his remedy is by demurrer. This remedy the defend-

ant took in this case, and we think he was entitled to it." The defendant was under no obligation to ask for a bill of particulars. This right is given the defendant for his benefit, and not to aid a defective complaint. It is very doubtful whether section 259 applies to justices' courts. Rule 11, § 840, expressly provides, "Either party may demur to the pleading of his adversary or any part thereof when it is not sufficiently explicit as to enable him to understand it, or contains no cause of action or defense, although it be taken as true." Rule 12 prescribes the duty of the justice upon hearing the demurrer. Reasonable certainty in the statement of the cause of action is required not only to enable the defendant to answer intelligently, but to protect him from being a second time vexed with litigation for the same matter. It is said that the defendant should plead and submit his cause to the jury. I am unable to see what question would be submitted to the jury. The record will show whether the account set out or specified in the complaint was audited. The court will find, as a conclusion of law, whether it is itemized and verified as required by the statute. Why should not the plaintiff be required to give the court such information as will enable it upon demurrer to render judgment? Before the adoption of the Code the action for the recovery of a penalty was in debt. "The pleader should, in this connection, by apt, connected, and substantial averments, disclose the right of action. The pleading must be definite and certain, and should studiously avoid all tendency towards looseness in presenting the facts upon which the right of recovery is based." 5 Enc. P. & P. 918. This pertains to a substantial legal right. Let us suppose that plaintiff has judgment upon his complaint, and immediately sues the defendant, complaining in exactly the same language. How could the defendant maintain a plea of *res judicata*? He has been in office, we may assume, for two years. Hundreds of accounts have been audited by the board. Why may not the plaintiff continue to sue indefinitely, or so long as the estate of the defendant is able to respond to the execution sued out? Any system of pleading and procedure, either civil or criminal, which permits the process of the court to be used oppressively, either to the citizen or the officer, should be amended, or, if beyond the power of amendment, abolished. This court has wisely said, "An informer has no natural right to the penalty, but only such right as is given by the strict letter of the law." Douglas, J., in *Dyer v. Ellington*, 128 N. C. 941, 38 S. E. 177. General warrants have not been favorites with our people. They savor of inquisition and oppression. I find no authority for relaxing the rules which, in their wisdom, the sages of the law have laid down for the protection of the citizen against vexatious litigation and oppressive prosecutions. The record shows that the plaintiff has prosecuted to

this court three suits against the commissioners. I can see no reason, if permitted to proceed as in this case, he may not prosecute as many hundred, and take chances of finding among the records enough accounts not duly itemized and verified to make his venture profitable, and ruin the commissioners. Simplicity in the law is sometimes obtained at too high a price, even to the destruction of the safeguards of the citizen. I may be unduly sensitive in such cases, but I am sure that no injustice or harm, or even delay, can come to the state or its citizens by requiring informers to "state in a plain and direct manner the facts constituting their cause of action," or, in the language of Chief Justice Henderson, "with precision."

I respectfully, but firmly, dissent from the conclusion reached by the court. I think that the judgment of his honor should be affirmed.

(126, N. C. 684)

STATE v. SMITH.

(Supreme Court of North Carolina. Dec. 20, 1904.)

RAPE—INTENT—SUFFICIENCY OF EVIDENCE.

1. In a prosecution for assault with intent to commit rape, evidence that accused went into the field where prosecutrix was, and, after inquiring as to the whereabouts of her father and brothers, grabbed her by the left hand and started to put his right hand to her neck, that she drew her hoe and threatened to kill him, when he turned her loose, is insufficient to sustain a conviction for any crime greater than an aggravated assault.

Clark, C. J., dissenting.

Appeal from Superior Court, Bladen County; Ward, Judge.

Samuel Smith was convicted of an assault with intent to commit rape, and he appeals. Reversed.

The defendant was convicted of assault with intent to commit rape, and sentenced to imprisonment in the state's prison for five years. The testimony of the prosecutrix was: "I know the defendant. He came into the cotton patch when I was at work last summer. I was hoeing cotton in the field alone. Can't say what time of day it was; it was in the morning. Defendant asked me where my pa was and where Asa White was. He then asked me where my two brothers were. I told him they were gone to the field where pa and Asa White were. The field was one-half mile away, in 'new ground' field. He asked me when they would come back. I said, 'In a few minutes.' He then said, 'Give me the hoe, and let me hoe out that row of cotton.' I did so, and went and got another hoe. He hoed out to the end of the row, and threw the hoe in the corner of the fence. He then grabbed me by my left hand, and started to put his right to my neck, under the chin. He did not quite touch my neck with his right hand. I drew back my hoe with my right hand, and told him if he did not go away and let me alone I would kill him with

the hoe. He then turned me loose, and walked off 10 or 15 steps, and said, 'You are going to kill me,' and I said, 'Yes, I am if you don't go off and let me alone.' He went off then to his work in Mr. White's field. I then started to the field where pa was, and met my two brothers, and told them what had happened. When I told him to turn me loose, he did it; did not threaten me, but scared me." Asa White testified that the defendant was working for his mother, and he heard defendant say afterwards, in speaking of the difficulty, that he had been over there. Witness asked him what he went for, and he said to "get some." This is all he said. It was in evidence that defendant was not seen in the neighborhood again until he was at the preliminary trial. The sheriff found him in Robeson jail. This was the entire evidence.

The defendant asked his honor to instruct the jury that he could only be convicted for a simple assault. This was declined, and defendant excepted. From a judgment on the verdict, the defendant appealed.

The Attorney General, for the State.

CONNOR, J. (after stating the case). The only question presented by the exception is whether there was any evidence on the question of intent proper to be submitted to the jury. Mr. Justice Ashe, in *State v. Massey*, 86 N. C. 658, 41 Am. Rep. 478, says: "In order to convict defendant on the charge of an assault with intent to commit a rape, the evidence should show not only an assault; but that defendant intended to gratify his passions on the person of the woman, and that he intended to do so at all events, notwithstanding any resistance on her part." This language has been since the decision of that case the guide followed by the courts in this state. In that case the question bearing on the evidence of intent was much stronger than here. The woman saw the man following, threatening if she did not stop to kill her. The court held the evidence insufficient. In *State v. Jeffreys*, 117 N. C. 743, 23 S. E. 175, *Massey's Case* is approved, and may now be regarded as the settled law of the state. The case is easily distinguished from *State v. Mitchell*, 89 N. C. 521, and *State v. Page*, 127 N. C. 512, 37 S. E. 68. In both these cases there was evidence of actual violence. We can have no hesitation in adopting the language of a judge of such elevated character, learning, and jealous regard for the sanctity of virtue as Judge Ashe, when he says: "When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal."

We do not deem it necessary to discuss the facts in this case, nor have we the right to assume the existence of any facts pertinent to the decision of the case other than those certified to us by the court below.

The record states the transaction in the language of the witness. It has ever been the province and duty of the court to decide and declare the law and of the jury to decide and declare the facts. Whether there is any evidence tending to prove a fact in issue has always been regarded as a question of law for the decision of the court. But whether an inference is to be drawn from the evidence is exclusively in the province of the jury. We would be recreant to our duty as judges were we to fail to declare the law with respect to the question whether there is any evidence, for fear of offending the jury. This question the jury do not decide. We have no right to infer, either for the state or the defendant, the existence of any facts which were heard by his honor or considered by the jury other than those certified to us. To do so would be to depart from our sphere of action, and decide a question of law upon an assumption that a state of facts existed of which we have neither knowledge nor information. It is a mistake to say that this court passes upon the weight of the testimony or the conclusions to be drawn therefrom, or in any respect reviews the action of the jury. The question which lies at the threshold of every case is whether there is any evidence to be submitted to the jury. We can see no reason why in differing with the judge upon this question we are reflecting upon his intelligence or learning more than in differing with him in respect to any other question of law. To introduce considerations of this character into the decisions of this court is, to say the least, a novelty, and we think well calculated to embarrass the court and raise issues not proper for our consideration. Our own Reports contain numerous cases in which almost every judge who has sat upon this bench has concurred in reversing the opinion of the court below upon the question as to whether there is any evidence, and in doing so in this case we are not conscious of any innovation or announcing any new doctrine. If this man is guilty, he is guilty according to law, and should be so punished. To say that his honor found beyond a reasonable doubt that the defendant is guilty is to assume that it is the duty of a judge to set aside every verdict in which he is not so satisfied. This we do not decide to be the duty of the court. When, in the discharge of his duty, he shall set aside a verdict is a matter addressed to his sound judgment and is not reviewable. There is nothing in the record to show the character of the defendant except the fact that he committed an assault upon the prosecutrix. To say that every man who commits an assault upon a woman must be presumed of such character as would justify a verdict that he committed an assault with a felonious intent would be to do violence to the language of this court as found in *State v. Massey*, supra. It is said that the jury are the proper triors of the facts, and the

facts were within their province, and that we have no right to reverse their judgment on the facts. The fallacy in this position consists in a failure to distinguish between the functions of the court and the jury. We decide the question of law, not the conclusion of fact. We must discharge our duty with the light that is given us to see it. To fail to do so because of any fear that we would offend 12 sensible and intelligent men would render us unfit to discharge the duties of the high office to which we have been appointed. Upon the testimony before us the defendant is guilty of an aggravated assault.

There must be a new trial.

DOUGLAS, J. (concurring). I concur in the opinion of the court that there is no evidence inconsistent with the innocence of the defendant. I do not mean to intimate that the court either here or below can pass upon the weight of the evidence, or can in any event direct an affirmative verdict. *Sprull v. Ins. Co.*, 120 N. C. 141, 27 S. E. 89.

CLARK, C. J. (dissenting). The defendant, first ascertaining from the girl that her two brothers and her father were absent, in a field a half mile away, made a sudden and violent assault upon her—"grabbed her by her left hand, and started to put his right to her neck." The assault is unquestioned. What was his intent was an inference of fact, which only a jury is authorized to draw. The defendant afterwards confessed that his purpose in going there was to procure sexual intercourse with the girl. The jury, from the violence and manner of the assault, the seclusion of the place, the avowed purpose of the defendant in going there, from his flight, and possibly from their knowledge of the parties, might well have come to the conclusion that the intention of the defendant was to have carnal intercourse with the girl against her will. If so, he was guilty as charged.

It is true Judge Ashe has stated "that the defendant must have intended to gratify his passions on the person of the woman at all events and notwithstanding any resistance on her part." Every lawyer since, who has represented a defendant charged with this dastardly offense, has relied upon this expression. There can be no doubt that the judge so charged the jury in this case, for there is no exception to the charge. What Judge Ashe said is a correct statement of the law, but it does not mean that when the man desists from his purpose there is no evidence that he did not intend to have intercourse "at all events and notwithstanding resistance on the woman's part." That would simply repeal the statute against assault with intent to commit rape, for if the defendant succeeds the crime is rape.

What was the defendant doing when he suddenly and violently assaulted an unprotected girl, out of reach of help from her

male relatives, of whose absence he had learned upon inquiry? Was he trying to persuade her to yield, and to overcome her maiden reluctance by solicitation, or was he attempting to have carnal knowledge of her "forcibly and against her will"? Was it an attempted seduction or was it "felonious gallantry"? It was necessarily one or the other, for his purpose to procure sexual intercourse is admitted. It could be procured only with the girl's consent or against her will. There is no other alternative—no middle ground. The jury of 12 men, to not one of whom he objected, and who were doubtless sensible and intelligent gentlemen, have found, beyond a reasonable doubt in the mind of a single member of the jury, that the assault was made with an intent on the part of the defendant to have sexual connection "forcibly and against the will of the woman." The intelligent judge who presided not only thought the evidence should be submitted to the jury, but, notwithstanding the gravity of the punishment, did not think the interests of justice required him to set the verdict aside. The grand jury by a vote of at least 12 of its members found that there was prima facie evidence of defendant's guilt. Thus two full juries at least, and the judge, after seeing and hearing the witnesses, found that there was evidence. Are a majority of the lawyers who compose this court, sitting out of sight and hearing of the witnesses, without knowledge of their character or bearing on the stand, able to say that all these officers have so erred, not as to the law, but as to the facts, and that there was no evidence at all before them?

In vain shall we look for any decision in England, the home of the jury system, for a case in which an appellate court, sitting out of sight and hearing of the witnesses, has held in a criminal case that there was no evidence when the jury has unanimously held that there was enough to satisfy each of them beyond a reasonable doubt, and the presiding judge has refused to disturb the verdict. It is an innovation of recent introduction here, even in civil cases, by judicial construction, for there is no statute to authorize it. The tendency of courts to "amplify jurisdiction" is gradually extending the doctrine until this jurisdiction is invoked in nearly every criminal case that comes up to any appellate court, and in almost certainly every appeal in which a railroad company is defendant. If the expansion of such jurisdiction is continued, instead of the "ancient mode of trial by jury" the jury will become a mere advisory committee, whose findings the appellate court may disregard at will. This is already nearly attained in some states. The evils of this assumption of jurisdiction are well stated by Judge Bynum in *Wittkowsky v. Wasson*, 71 N. C. 451.

In my humble judgment, the unanimous verdict of 12 men, when not disapproved by the trial judge, is a far more accurate mode

of ascertaining the truth of disputed allegations of guilt than the majority vote of the members of an appellate court, who differ among themselves as to the effect of evidence which is necessarily imperfectly sent up in cold type. Is there a clearer insight into the inferences to be deduced from evidence given to those who did not hear or see the witnesses than to those who did? Those who wrought our constitutions thought otherwise. They believed juries were more competent than judges to find the facts, and equally impartial. The triors of fact should be subject to challenge. A judge of the law should not be. Such has always been the thought of Anglo-Saxon peoples. Justice Brewer, of the Supreme Court of the United States, well said in a recent opinion that the great difficulty now was to secure the conviction of the guilty, and expressed his conviction that the interests of justice would be best served by returning to the English system, under which, to this day, appeals are not allowed in criminal cases. In his opinion, appeals in criminal cases had been detrimental, and had not served the interests of justice in this country.

It cannot be said there was no evidence. There is more evidence here to sustain the charge than in *State v. Garner*, 129 N. C. 536, 40 S. E. 6, and fully as much as in *State v. Page*, 127 N. C. 512, 37 S. E. 66. In this case there was the forcible assault, there was the avowed intent to procure sexual intercourse, there was the lonely place remote from help, there was the inquiry as to nearness of relatives, there was the "stand off" by a determined woman with her clubbed hoe, and the defendant's flight from justice. There may have been other things which the jury were entitled to consider and which give much of its peculiar value to trial by jury. Suppose the girl was white and the defendant a negro? Would that not be a matter to be considered on the question whether this was an attempted seduction or an assault with intent to succeed against the woman's will? *State v. Garner*, supra. The jury could see for themselves the color of the parties. We cannot. It is not in the record, as many other matters cannot be sent up to us in the record. Both may have been white. We do not know. The jury knew, and they also knew the character of the witnesses and of the defendant, which was a valuable help in arriving at a true inference as to this man's intent, and whether or not the defendant was attempting to succeed "against her will" in having sexual intercourse with the girl. We know nothing of the character of the defendant beyond the fact in the record that he immediately fled and was found in jail in another county, apparently for some other offense. Would a man of that character be likely to attempt a girl of the virtue and determination shown here, unless he had expected to succeed "forcibly and against her will"? If the intent was solicitation, why

so forcible and sudden an assault made? It is possible it might be explained, perhaps, but the jury found that it was not. And because when she clubbed her hoe, and told him if he did not "let her alone she would kill him with the hoe," he believed her and turned her loose, are we to find as a matter of law that therefore when he "grabbed her" the defendant did not then intend and was not then attempting to gratify his passions on her "forcibly and against her will"? The jury, the proper triors of the fact, have passed upon defendant's intentions in making the assault. They were within their province and within their sworn duty. I do not think I have the legal right to reverse their judgment on the facts, nor that I can come to a more just conclusion thereon than the jury and the trial judge.

(126 N. C. 679)

STATE v. HUFF.

(Supreme Court of North Carolina. Dec. 17, 1904.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—ACTS AND DECLARATIONS OF THIRD PERSONS.

1. Where, in a prosecution for assault with intent to rape, defendant contended that prosecutrix consented to all that was done, evidence of a witness, who was not more than 65 feet from prosecutrix at the time of the alleged assault, that he called to her in a loud voice for the purpose of attracting her attention, together with the conversation had between witness and his wife at the time with reference to what they saw and did in consequence thereof, was admissible for the purpose of contradicting prosecutrix and corroborating defendant's testimony.

Appeal from Superior Court, Wake County; Ferguson, Judge.

George T. Huff was convicted of assault and he appeals. Reversed.

The defendant was indicted for an assault with intent to commit rape, and convicted by the jury of a simple assault. So much of the testimony as is necessary to present the exceptions is as follows: Mrs. Jones, the prosecutrix, testified: That she lived at Fuquay Springs. That defendant came to her house about dark on the day of the alleged assault. That she was sitting in the door. She first thought it was her husband, and then thought it was Alex Hobbs. He came up and said "Good evening," and she said "Good evening." He asked for her husband, and she told him he was in the store. Defendant said he was not; came and put his foot on the doorstep, and said that Mr. Jones had gone to Chalybeate to arrest a man, and would not return until 12 o'clock, and he had come to stay until he came back. "He told my little girl to hand him a match; he wanted to light a cigar." While she was gone, the defendant took her by the hand, and said: "Let us go to bed." Witness said: "You must be crazy. You leave here." Witness prepared supper, and, while she and the children were eating, the defendant came back. She saw him when he jumped up in

the door. Mr. Arnold's dog was under the house, and barked. He told the dog to "hush"; said he would kill it; put his hand in his pocket when he said that. Witness was sitting feeding the baby—the table in front of her, and the baby in her lap on her left arm. Defendant took hold of her by the hand. He pulled up a chair and sat down by her, and put his hand in her bosom. She pushed it away, and he put it back again, and tried to put his hands under her clothes, and she pushed them away. Could not push him away because he was stronger than the witness. He was there 10 or 15 minutes. Witness saw her husband coming, and told the defendant. She made no outcry, because the defendant tried to shoot the dog, and she was afraid that he would shoot her. When she saw her husband coming, she told defendant she would tell him, and he would kill defendant. He begged her not to tell him. He got up and sat down on the step. Defendant asked her husband to go to the store; that he wanted to buy something. They went to the store in a few minutes. Witness told her husband what defendant had done when he first came back from the store. Witness was asked in regard to her relations with a man in Florida and other men, all of which she denied.

Defendant testified that he went to Jones' house to get him to go to the store to get a bundle, and he asked Mrs. Jones if her husband was at home, and she said, "No." He asked her if he had gone to the store, and she said, "No." She asked defendant to have a seat; that Mr. Jones would be back in a few minutes. She was sitting in the door on the doorstep. Defendant put his foot on the doorstep, and stood there. She took hold of his hand, and said "she never expected to see him sunburned as badly as that." While holding his hand she leaned over, and his hand might have touched her bosom. She made him a proposition—told him to go out 15 or 20 minutes until she could lay the baby down, and she would come and meet him. Witness went down to the branch and waited a few minutes. He returned to the house, and asked her why she did not come. She said, "Wait a while;" that she could not get the baby asleep. She said, "Come back another time," and not to go anywhere else. Witness never offered to force her or to take any liberties with her, except what she invited. She said that she had been wanting to meet witness for some time, and asked him if he got the word she sent him. Witness never went into the house, and he was not under the influence of liquor.

The defendant introduced Benjamin Arnold, who testified that he lived at Fugate Springs, 60 or 65 feet from the house of the prosecutrix. There was no obstruction between the two houses. He could see all that passed between defendant and Mrs. Jones. He was at home, sitting on the doorstep with his wife. Defendant was standing on the

ground with one foot on the doorstep, and Mrs. Jones sat in the door. Could not hear what they said. They were talking in low tones. He told her "Good evening," and left; went to the branch. Some time after he came back and sat in the door, and the witness got his banjo and sat in his door; then went to bed. Before defendant went off the first time, and while he was standing with his foot on the steps, witness called Mrs. Jones and asked her where her husband was; called pretty loud, but she did not answer. Defendant asked witness to give his reason for calling Mrs. Jones, and the state objected. Objection sustained, and defendant excepted. Witness said that he saw nothing that looked like an assault; could have seen it, as it was bright moonlight, and there was no obstruction; that he and his wife were talking; and that Mrs. Jones could have heard the conversation if she had listened. Defendant offered to prove by the witness the conversation between him and his wife with reference to what they saw, and what they did in consequence thereof. Witness stated that he was going to call Mrs. Jones to keep her from doing wrong; that he called twice, and his wife told him to hush, that it was none of his business; and that in consequence of what he saw he got his banjo and sat in his door, but retired soon after at his wife's request. This testimony was ruled out upon objection by the state, and defendant excepted.

Mrs. Arnold was introduced, and testified the same as her husband. Defendant asked the witness: "In consequence of what you and your husband saw between defendant and Mrs. Jones, what did you and your husband do?" Objected to and ruled out. Defendant excepted. This was for the purpose of showing that the witness and her husband knew that an assignation was being made, and that they tried to stop it; that witness prevented her husband from interfering.

From a judgment upon a verdict of guilty, the defendant appealed.

B. C. Beckwith, for appellant. The Attorney General, for the State.

CONNOR, J. (after stating the case). We think that the testimony was competent, and should have been admitted. The theory of the defense was that the prosecutrix consented to all that was done by the defendant; and from this point of view, and for the purpose of contradicting the prosecutrix and corroborating the defendant's testimony, the evidence of Arnold and his wife was relevant and very material. If believed by the jury, it fully sustained the defendant's view of the transaction. For the purpose of corroborating each other, it was clearly competent for them to testify as to what they said to each other at the time, and what they did. They were 65 feet from the prosecutrix and the defendant. The relations between the families

were friendly. The fact that the witness called twice to Mrs. Jones in a loud voice, 65 feet away, was clearly competent as tending to show that she was aware that Arnold was sufficiently near to render her assistance if the defendant was committing an assault upon her.

It is well settled that a witness who is either impeached, or whose testimony is called in question by the mode of cross-examination or by contradictory testimony, may, for the purpose of sustaining his credibility, testify to statements made by him in respect to the matter about which he testifies, at or immediately after the alleged transaction. It was material in this case on the part of the defense to show that Mrs. Jones knew of the presence of Arnold and his wife at their home sufficiently near by to enable her to call for help if assaulted. When they testified that they were sitting in the door where they could see the entire transaction, and that, for the purpose of calling Mrs. Jones' attention to their presence, Arnold called her twice, it is competent to show the state of his mind as explaining his conduct. We think that what he said to his wife at the moment, and what she said to him in respect to the very matter in issue, was competent for the purpose for which it was offered. It would certainly have put the witness in a very unenviable position to have shown that he was within 65 feet of his neighbor's wife, who was being assaulted, and saw the transaction, and made no effort to rescue her. The only explanation of such conduct, consistent with that of an honorable man, whose testimony was entitled to credit before the jury, was that he thought the defendant's conduct was not objectionable to her. It was competent to show, as explaining his conduct, what his wife said to him at the moment.

There was much other testimony tending to impeach the prosecutrix. We do not deem it necessary to pass upon the many other exceptions, as they may not arise upon another trial. The rejection of the evidence offered by the defendant entitles him to a new trial.

(137 N. C. 355)

ROLLINS v. EBBS et al.

(Supreme Court of North Carolina. Dec. 20, 1904.)

STATUTORY BOND — EXECUTION — SIGNATURE — FAILURE TO INSERT AMOUNT OF PENALTY.

1. A guardian's bond, executed under Code, § 1574, requiring the giving of a bond in a sum double the value of all the personal property, etc., is not binding on the obligors where it does not contain the amount of the penalty at the time it is signed, and no one is afterward authorized to insert the amount.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Haywood County; H. B. Jones, Judge.

Action by T. S. Rollins, as guardian, against F. C. Ebbs and others. From a judgment for plaintiff, defendants appeal. Reversed.

This action was brought by the plaintiff on a guardian's bond. The defendants alleged that the amount of the penalty was not in the paper writing at the time they signed it, and this was the principal matter in controversy. Much testimony was introduced upon that question. Issues were submitted to the jury, which, with their answers, were as follows: "(1) Did the defendants I. N. Ebbs, M. L. Duckett, D. P. Plemmons, Joe M. Rector, and Jasper Ebbs make and deliver their bond, in writing, to the state of North Carolina, for the benefit of James Blaine House, as alleged in paragraph 3 of the complaint? Ans. Yes. (2) Did the defendant F. C. Ebbs, as guardian of James Blaine House, receive the sum of \$7,000, property of his ward, James Blaine House, as alleged in paragraph 4 of the complaint? Ans. Yes. (3) Did the defendant F. C. Ebbs, as guardian of James Blaine House, in violation of and in breach of said bond, use and appropriate to his own use the sum of \$4,868.66% of his ward's money, as alleged in paragraph 6 of the complaint? Ans. Yes. (4) In what sum, if any, is the plaintiff or the relators damaged because of the said breach of the said bond? Ans. In the sum of \$4,868.66%, with compound interest from the 8th day of March, 1900, until paid. (5) Was the paper writing or bond described in and mentioned in paragraph 3 of the complaint incomplete when delivered to the clerk of the superior court of Madison county, in that it contained no penalty, and in that the space where the penalty should have been written was left blank, as alleged in the first paragraph of the further defense contained in the answer? Ans. No. (6) Was the penalty of \$13,000 left out of the said bond or paper writing described and mentioned in paragraph 3 of the said complaint, and the space wherein the penalty should have been written left blank, because of the mutual mistake and inadvertence of the parties thereto, as alleged in the reply of the plaintiff? Ans. * * * (7) Was the penalty, \$13,000, left out of said bond or paper writing described and mentioned in paragraph 3 of the said complaint because of the mistake or inadvertence of the clerk of the superior court of Madison county, as alleged in the reply of the plaintiff? Ans. No. (8) Was the penalty of \$13,000 left out of said bond or paper writing mentioned and described in paragraph 3 of the said complaint, and the space wherein the penalty should have been written left blank, by reason of the fraud of the makers of said bond, perpetrated and practiced upon the clerk of the Superior court of Madison county, as alleged in the reply of the plaintiff? Ans. * * * (9) Was it the purpose and intention of the

defendants, at the time of signing the paper writing introduced in evidence, that the same should be used and filed as a guardian bond by F. C. Ebbs, as guardian of James Blaine House? Ans. Yes. (10) Was the penalty inserted in the paper writing purporting to be a bond at the time Jasper Ebbs signed the same? Ans. No. (11) Was the penalty, \$13,000, inserted in the paper writing purporting to be a bond at the time the defendant Plemmons signed the same? Ans. No. (12) Was the penalty, \$13,000, inserted in the paper writing at the time M. L. Duckett signed the same? Ans. No. (13) Have the defendants Jasper Ebbs, M. L. Duckett, D. P. Plemmons, or either of them, since the signing of the paper writing or bond, authorized any one to insert the penalty, \$13,000, in said bond? Ans. No." The defendants in apt time objected to issues numbered 1, 6, 8, and 9. Objection overruled. Defendants moved for a new trial upon exceptions. Motion overruled. Judgment for plaintiff. Defendants excepted and appealed.

Crawford & Hannah and J. M. Gudger, Jr., for appellants. Moore & Rollins, for appellee.

WALKER, J. (after stating the facts). It is clear what the court meant when it submitted the tenth, eleventh, and twelfth issues to the jury, and it is equally apparent what the jury intended to find by the answers to those issues. The inquiry manifestly was whether the amount of the penalty had been written in the bond before the time that the sureties, Ebbs, Duckett, and Plemmons, signed it, and not merely whether it was inserted at that particular time. Such an inquiry as the one last mentioned would, to say the least of it, have been immaterial. The jury found that the amount was not in the bond at the time it was signed, and that the sureties named in the issues had not authorized any one to insert the penalty.

Our opinion was at first that enough appeared in the record to bring the case within the principle stated in *Humphreys v. Finch*, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293, but we are now satisfied that a correct interpretation of the verdict renders that case inapplicable. The jury, by the tenth, eleventh, and twelfth issues, have found that the amount of the penalty was inserted after the paper writing was signed by the sureties, and by the thirteenth issue they have found as a fact that Ebbs, Duckett, and Plemmons "had not authorized any one to insert the penalty, \$13,000, in said bond." This, it seems to us, presents just such a case as was considered in *Graham v. Holt*, 25 N. C. 300, 40 Am. Dec. 408, in which Justice Daniel uses this language: "A bond is the acknowledgment of a debt under seal, the debt being therein particularly specified. In every good bond there must be an obligor

and an obligee, and a sum in which the former is bound. *Shep. Touch. 56; Com. Dig. 'Obligation,' A; Hurlston, 2.* In *New York, Ex parte Therwin*, 8 Cowen, 118, and some other of the American cases, the nisi prius decision before Lord Mansfield of *Texira v. Evans*, 1 Anst. 229, in nota, has been followed. That case was where a party executed a bond with blank spaces for the name and sum, and sent an agent, without a power of attorney under seal, to raise money on it. The agent accordingly filled up the blanks with the sum and the obligee's name, and delivered the bond to him. On the plea of non est factum, the bond was considered well executed. But the case of *Texira v. Evans* has been by this court twice overruled, as attempting to establish a distinction in the mode of executing deeds by attorney, where the object was to raise or secure money, and when it was to operate as a conveyance—the first, by a power of attorney not sealed; the other, with a power of attorney under seal. The notion with us has always been what we learned from *Co. Lit. 52 (a)*, and the *Touchstone*, 57., that he who executes a deed as agent for another, be it for money or other property, must be armed with authority under seal. The insertion of the sum in the blank space was intended to consummate the deed; it was done without legal authority, and the instrument is void as a bond"—citing *McKee v. Hicks*, 2 Dev. (13 N. C.) 379; *Davenport v. Sleight*, 2 Dev. & Bat. (19 N. C.) 381, 31 Am. Dec. 420. The same idea is also strongly expressed by Chief Justice Ruffin in *Davenport v. Sleight*, supra, as follows: "The ancient rule is certain, that authority to make a deed cannot be verbally conferred, but must be created by an instrument of equal dignity. It is owned that there are modern cases in which it seems to have been relaxed with respect to bonds. This began with the case of *Texira v. Evans*, cited 1 Anst. 229, note, on which all the subsequent cases profess to be founded. The court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences." In *Cadell v. Allen*, 99 N. C. 542, 6 S. E. 399, Justice Merrimon, referring to the principle as laid down in *Graham v. Holt* and *Davenport v. Sleight*, says, "The rule as thus stated is recognized in many cases, and must be treated as settled and of governing authority," citing *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 239, and other cases.

There has been no ratification. This court cannot give its opinion or render judgment upon evidence merely. There must either be an admission of the facts in the pleadings or in some other form in the record, or the facts must be found by a jury. There is nothing admitted, or found by the jury, which shows that the defendants have in any way, known to the law of this state,

assented to or ratified the insertion of the penalty in the bond.

If any respect is to be paid to our decisions in preference to those of other states, the findings of the jury upon the last four issues, if those issues stood alone, would entitle the appellants to a judgment. But the answers to the issues in this case, taken as a whole, are themselves conflicting. The jury have found, in response to the first issue, that the defendants made and delivered their bond, in writing, to the state for the benefit of the principal's ward, and yet, in answer to subsequent issues, they have found that the amount of the penalty was not in the paper at the time of the signing by defendants, and that it was not put there afterwards by any authorized person. The insertion of the amount, at or before the time of signing, was necessary to constitute the paper a perfect instrument—a good bond—unless the amount was afterwards inserted by some one having authority to do so, or unless the signers themselves afterwards ratified what had been done to make the instrument complete, and in the manner indicated by this court in the cases already cited. "If an instrument with a seal to it," says Hall, J., "is not completely executed by signing, sealing, and delivering, it cannot become so by any act of an unauthorized agent. It would be dangerous if the law were otherwise." *McKee v. Hicks*, 13 N. C. 380. This was said with reference to the very kind of question we are now discussing, as an extract from the syllabus of the case will show: "A deed must be perfect in all respects before its delivery. Where a blank was left in a bond for money, to be filled up when the sum was ascertained, and after the delivery the blank was fairly filled up by a stranger, held, that the instrument was void." Page 379. This was ruled to be the law even when the alleged obligor had actually received the money on the faith of its being his valid bond. In that case this court went still further, and affirmed the judgment notwithstanding a charge by which the jury were instructed that the defendant was not bound by the bond as his deed, "unless the person filling up the blank, on delivering the paper, had, at the time of the delivery, authority under the hand and seal of the defendant to do so." Page 380.

The case of *Humphreys v. Finch*, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293, as we have said, does not apply. The decision is based upon the idea of an equitable estoppel, which cannot arise in this case, as the jury have found that no authority to insert the amount in the bond was given, which was not the fact in *Humphreys v. Finch*. That case might well have been decided upon the doctrine of agency.

This is not a question of the alteration of an instrument, but a question of authority to complete the instrument so as to make it binding, as is clearly stated in 2 Cyc. 159, and it is too plainly so to require any further discussion.

Nor do we think the fact that this is a statutory bond alters the case in favor of the plaintiff. If there is any difference, in respect to the question under consideration, between such a bond and an ordinary bond or deed, that difference, in this particular case, is rather favorable to the defendants. The Code, § 1574, requires that "a guardian, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such a case must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person." It will be observed that the bond must be acknowledged before the clerk and approved by him, and the penalty must be double, at least, the value of the personal property and the rents and profits, which value the clerk ascertains. The penalty, therefore, is not fixed at any certain sum applicable to all cases. It may not be the same in any two bonds. It is at least variable, just as in the case of the amount to be paid in ordinary bonds or notes under seal, and the insertion of it is therefore just as material and essential to the completeness of a statutory bond as the amount to be paid is to that of an ordinary bond. The amount must be expressed in both. We are unable to see how any authority to fill up the blank can be implied in the case of a statutory bond that would not be equally implied in the case of other bonds. Both kinds of bonds are delivered to carry out the intention of the obligors, and in the case of a guardian bond there is the additional reason, against the implication, that the amount of the penalty is expressly required to be ascertained by the clerk. An individual in his private capacity cannot execute a statutory power.

Our purpose has not been so much to prove that the paper writing signed by the defendants is void as a bond, as to make clear the construction we put upon the verdict, and to show, consequently, the findings of the jury to be so conflicting that the court below could not proceed to judgment, and that this court cannot now intelligently pass upon the merits of the case. The view we take of the question involved leads us to the conclusion that there should be a new trial, so that the facts may be fully and consistently found by the jury. The plaintiff may be able to show that the bond is a valid obligation of the defendants.

New trial.

OLARK, C. J. (dissenting). It is not controverted that the defendant F. C. Ebbs, guardian, converted the funds of his ward to his own use, nor is there any dispute over

the finding as to the amount of such defalcation. The only contested fact is whether when the bond, which is in the regular form, was signed by three of the sureties, "13,000" was not written after "\$——." Upon this omission (if true), and the subsequent filling in of the blank with "13,000" by one of the sureties, who carried the bond to the clerk to be filed, the sureties now seek to avoid their obligation, which is set out in the bond distinctly, to be responsible for any failure of F. C. Ebbs, as guardian, to safely keep and account for the property of his ward. The evidence of the clerk is uncontradicted that the bond was handed to him by I. N. Ebbs, one of the sureties, and that it was then complete, the "\$13,000" being filled in; and his deputy, who copied it, testifies to the same effect. I. N. Ebbs, one of the sureties, certified as notary public that the other sureties appeared before him and justified to the amount set opposite their respective names. These amounts, together with the sum he himself justified to before the clerk, aggregate \$13,000, the sum which was written in the bond when handed in by him to the clerk and recorded.

The jury found, in response to the first issue, that "the defendants, I. N. Ebbs, M. L. Duckett, D. P. Plemmons, J. M. Rector, and Jasper Ebbs, made and delivered their bond in writing to the state of North Carolina for the benefit of James Blaine House, as alleged in paragraph 3 of the complaint;" and, in response to the ninth issue, that it "was the purpose and intention of the defendants, at the time of signing the paper writing introduced in evidence, that the same should be used and filed as a guardian bond by F. C. Ebbs, as guardian of James Blaine House." If, upon the facts above set forth, and which were uncontroverted, the filling in of "13,000" in the blank to total up the several justifications by the surety who was intrusted by them to bring the bond to the clerk (an addition in no wise changing the nature of the obligation) can vitiate the bond, which was perfect when handed to the clerk by one of their number, then no guardian or administrator's bond is safe unless the sureties shall all sign and justify before the clerk. The Code, § 1891, was intended to prevent just such defects in obligations of this nature, and to avoid trivial and technical objections. It provides that "whenever any instrument shall be taken or received, * * * by any person or persons, acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment such instrument, notwithstanding * * * any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for the benefit of the person injured by a breach of the condition thereof, in the same manner * * * as if the penalty and con-

dition of the instrument had conformed to law." It would seem that, as the bond contained the figures "13,000" after the "\$" mark when handed to the clerk by one of the sureties, who had taken the justification of the other sureties and who had been intrusted by them to deliver the bond to the clerk, and as the jury has found that "it was the purpose and intention of the defendants, at the time of signing the paper writing, that it should be used and filed as a guardian bond of F. C. Ebbs," if the "13,000" was written in by said co-surety before handing the bond to the clerk, it was immaterial, and the defendants cannot protect themselves by the act of their agent, of which the clerk had no knowledge. They, impliedly at least, authorized him to fill in the blank, and cannot be permitted now to deny such authority to the detriment of the ward.

But if the instrument could be taken as filed, with "\$——" blank, as the defendants allege it was when signed by them, the above section 1891 provides that "any variance in the penalty or in the condition of the instrument from the provision prescribed by law" shall not invalidate it. A smaller variance than this could scarcely happen. The penalty named merely limits the liability of the sureties, and the insertion of "13,000" after "\$——" merely restricted their liability to that sum, whereas without it their liability, by the tenor of the bond, extended to responsibility for the safe-keeping of any funds or property of the ward which might have come into the hands of the guardian, without limit as to the amount.

Independent of our curative statute, it is held that the bond "may be executed by the sureties while the penal sum is still blank, and, although the principal may have informed them that the sum is to be a certain amount, and he afterwards inserts a larger amount by direction of the judge of probate, yet the bond holds the sureties." *Crowell on Executors and Administrators*, 190; *White v. Duggan*, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437. Such bonds are unlike bonds for the payment of money (in which the amount is material), in that in these bonds the honest and faithful performance of duty by the fiduciary is the obligation, and the amount of the penalty is simply a form, and, at most, merely restricts the extent of the liability. Here, the amount (\$13,000), even if inserted without knowledge of the defendants, aggregates exactly the sums for which they severally justified. In 2 *Parsons on Contracts*, 720, it is said: "An alteration which only does what the law would do—that is, expresses what the law implies—is not a material alteration, and therefore would not avoid an instrument." All the authorities hold that an alteration to be material must change the legal effect of the instrument. This is true even as to obligations for payment of money, as negotiable bills and the like. 2 *Daniel, Neg. Instr.*

§ 1373a. When a fiduciary "receives money or property upon the faith of a bond, he and his sureties are estopped to deny the validity of the bond." Pritchard, Wills & Adm. § 536, construing a statute similar to our Code, § 1891. Here the money was paid over by the federal court to the guardian upon a certified copy of this bond. "The insertion of the penal sum of a bond left blank will not vitiate the instrument." Brown v. Colquitt, 73 Ga. 59, 54 Am. Rep. 387; South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; State v. Young, 23 Minn. 551. In the case from 53 Me. 89, Kent, J., says: "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his acts. It was one before. The filling up merely perfects an imperfect sealed deed or bond." "If one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be filled up properly, according to the agreement between the parties, and, when so filled, the instrument is as good as if originally executed in complete form." 2 Cyc. 159, and cases cited thereto in note 74. "An alteration of an instrument which merely supplies an omission therein, and conforms it to the intention of the parties, will not vitiate the writing, especially if a naked blank is left for the insertion of the omitted words." 2 A. & Eng. Enc. (2d Ed.) 212; Hunt v. Adams, 6 Mass. 519; Bank v. Stirling, 13 Nova Scotia, 439; Conner v. Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59; Boyd v. Brotherson, 10 Wend. (N. Y.) 93; Clute v. Small, 17 Wend. (N. Y.) 238. "If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same; and, as between such party and innocent third person, the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody." 2 Cyc. 159. This is not only on the ground of implied agency, but because, when one of two innocent persons must suffer, the loss must fall upon him who has put it in the power of another to do the injury. Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Spitler v. James, 32 Ind. 202, 2 Am. Rep. 334; Fullerton v. Sturges, 4 Ohio St. 529.

It is not contended here that there was any fraud practiced on defendants, and the jury find that the instrument is of the purport and effect the signers intended. But had it been otherwise, the sureties having committed the bond, with the blank unfilled, to I. N. Ebbs to file with the clerk, not only gave him implied authority to fill it, but they are estopped to claim any protection

from an act which they put it in their co-surety's power to commit, and which was unknown to the clerk. The same principle would apply if the sureties handed the bond to F. C. Ebbs or Taintor, who delivered it to I. N. Ebbs, the other surety, who handed it to the clerk.

The tenth, eleventh, and twelfth findings were that the "13,000" was "not inserted in the paper writing at the time" each of three of the sureties respectively named signed it. But taking this to mean that the "13,000" was not "in the writing" when respectively signed by them, the status is presented which we have discussed above. The first and ninth findings are not in conflict with such findings, for they are simply to the effect that, notwithstanding the "13,000" was filled in after such signing and before the bond was handed to the clerk, the bond was valid. If this was a conclusion of law submitted to the jury, the error was cured by the jury answering it correctly, and the judgment of the court to the same effect.

There are but two exceptions in the record: First, to the submission of issues 1, 6, 8, and 9. Issues 6 and 8 were not answered, and were harmless, even if erroneously submitted; and 1 and 9 arose on the pleadings. The other exception, that judgment upon the verdict should have been entered for the defendants, is discussed above.

DOUGLAS, J. (dissenting). I think the guardian bond is binding because it is a statutory bond, and, having been made and delivered for the purpose of carrying out the provisions of the statute, carried with it the inherent authority to insert such amount of penalty as would meet the statutory requirement. In any other view of the case, I would be compelled to regard the penalty of the bond as a material and essential part thereof.

(137 N. C. 322)

MONK et al. v. CITY OF WILMINGTON.

(Supreme Court of North Carolina. Dec. 19, 1904.)

TRESPASS—TITLE—ADVERSE POSSESSION—BURDEN OF PROOF—PRESUMPTION.

1. In an action for damages for trespass to real estate, where plaintiff claims title by adverse possession, the burden is on him to show continuous possession.

2. There is no presumption that the possession of real estate is adverse.

Douglas, J., dissenting.

Appeal from Superior Court, New Hanover County; Justice, Judge.

Action by John W. Monk and another against the city of Wilmington for damages for trespass to real estate. From a judgment for plaintiffs, defendant appeals. Reversed.

W. J. Bellamy, E. K. Bryan, and H. Mc-Clammy, for appellant. Jno. D. Bellamy, Bellamy & Bellamy, T. E. Brown, and Emple & Emple, for appellees.

CONNOR, J. The plaintiff seeks to recover upon a title founded upon a disseisin followed by 20 years' adverse possession. It is conceded that the original trespass by the plaintiff's ancestor was wrongful. This does not necessarily mean that it was such an ouster as put the true owner to an action of ejectment, and thereby put the statute of limitations into operation. His honor correctly told the jury that such possession, to ripen into title, must be open, notorious, continuous, exclusive, adverse, etc. The defendant insists that this has not been shown. The plaintiff John W. Monk says that his father, after purchasing the 30 acres adjoining the locus in quo in 1876 or 1877, ran his fence in the manner described by him, which it is claimed covers the land. He continued such occupancy as he had until his death, in 1882. His wife remained in the occupation of the same character until her death, in 1885. Thomas J. Kenan, one of the plaintiff's witnesses, the husband of the feme plaintiff, testified: "After she died, my wife and Jno. W. Monk rented the land to one Dodge. My wife and Mr. Monk made a division of the land in 1886. After division I put some cattle in pasture occasionally. I know the boundaries of the thirty-acre tract. That is an independent tract, and has nothing to do with the land in controversy. After the widow of Thos. Monk died, my wife and John W. Monk leased the locus for five years to Dodge." After testifying to other matters, this witness continues: "Some seven acres of the land upon which the rock quarry is situated is fit for cultivation. You could have planted a crop where the rock quarry is now. That land was fit for cultivation. After the lease to Dodge was out, Jno. W. Monk, the coplaintiff, did not lease the seven acres where the rock quarry is to Southerland, or Rhodes, or to any one else. Rhodes leased from Jno. W. Monk the thirty-acre tract east of that. It was not leased to anybody after the Dodge lease was out, but Rhodes pastured his cattle there after he leased the other land from Jno. W. Monk. Nor did Jno. W. Monk do anything on the land after the Dodge lease was out. The Dodge lease was for five years from 1885." Mr. Rhodes, a witness for the plaintiff, testified: "In 1893 I rented some land from Mr. Monk. I don't say I rented this seven acres. I rented all the land that Jno. W. Monk owned between the New Bern road and the plank road, except five acres, which was reserved on the side next to the plank road, which does not touch the place where the rock quarry now is. I pastured my cattle upon the land where the rock quarry is in 1893, until the rock quarry was started in 1899, and the fence was torn down. I used

the land for pasture where the rock quarry is, and that was all it was used for. The thirty-acre tract and the other land which I rented was used for cultivation. I rented the land that I rented from Mr. Monk for five years from 1893 and until it was sold. When I had my cattle on the land in controversy, Mr. W. A. Wright came to me one day, three or four or five years before they began to excavate rock at the rock quarry, and wanted to rent the seven acres in controversy, and I told him that I didn't wish to rent it; that I had more land than I wanted, and I hadn't already rented it; that I didn't want it. I told him I thought I already had it rented; that I had rented it from Monk. He then tried to sell it to me, and I told him that I didn't want to buy. This was in 1895, '96, or '97. It was before the rock quarry was started. I think it was three or four years before the rock quarry was started. The next thing I saw the rock quarry was going on there."

It is elementary learning that the adverse possession necessary to bar the entry of the true owner must be continuous. Ruffin, J., in *Malloy v. Bruden*, 86 N. C. 251, says: "At all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title, unless actually ousted by the personal occupation of another; and so, too, whenever that occupation by another ceases, the title again draws to it the possession, and the seisin of the owner is restored, and a subsequent entry by the same wrongdoer and under the same claim of title constitute a new disseisin from the date of which the statute takes a fresh start." In this case a break of two years was held sufficient to prevent the continuity of the possession. In *Holdfast v. Shephard*, 28 N. C. 361, a break "of four and a half or five months" was held sufficient. Here the plaintiffs' witnesses testify that there was a period of seven years during which Monk did nothing with the land. Rhodes, under a lease for an adjoining tract, pastured his cattle upon it. From 1877, the date of the first trespass, to 1890, was only 13 years. The Dodge lease expired in 1890. In 1893 Monk leased to Rhodes the 30-acre tract adjoining the locus in quo, and, so far as we can discover, asserts no claim or possession of the land after that time. Rhodes pastured his cattle on it, but says expressly, "I do not say I rented this seven acres." His entire testimony is consistent with that of Kenan, who says that Monk did not lease it to Rhodes. This is consistent with the fact shown by the plaintiffs that when Monk and his sister made partition of their father's land this seven acres was not included, although the deed of Mary E. Monk to her brother for the 30-acre adjoining tract and some other small parcels contains this language: "The foregoing described tracts, pieces or parcels of land being all the land owned by the late Thos. Monk which lies on

the north of the old plank road." The plaintiff says that after the execution of this deed his sister had no possession or occupancy of the land. It is true that Monk says, after the Dodge lease was out, "I leased the property to Mr. Southerland for five years, and after Mr. Southerland's lease was out I leased it to Isaac Rhodes." Two of his witnesses say that the locus in quo was not leased to Rhodes. It is difficult to reconcile the testimony of the plaintiffs' witnesses with this statement. The lease was not put in evidence. The burden was on the plaintiff to show the continuous possession.

The defendant asked his honor to instruct the jury: "There is no presumption that the possession of the plaintiffs and those under whom they claim is adverse." This was refused, and his honor instructed the jury: "If you should find from the evidence that Thos. Monk and his son J. W. Monk had actual possession of the disputed land, said possession is deemed to be adverse, and will be so held until the contrary appears." The defendant excepted. It must be conceded that there is some conflict in the authorities upon this question. Judge Bynum, writing for a unanimous court in *Parker v. Banks*, 79 N. C. 480, said: "The law never presumes a wrong; hence he who alleges an adverse possession must show it as well as allege it." The learned justice discusses the question with his usual clearness and force, sustaining the opinion by the most approved authorities. This seems to be in accord with section 146 of the Code: "In action for the recovery of real property or the possession thereof or damages for a trespass on such property, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." This court held in *Ruffin v. Overby*, 88 N. C. 369, "that every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." This section of the Code, which is taken from the New York Code, has never been construed by this court. We think that the defendant was entitled to the instruction asked.

Several other interesting questions are raised upon the record. The plaintiff put in evidence the deed from Adam Emple, administrator of J. S. Green, to W. A. Wright, bearing date March 16, 1873. He then shows that this deed covers the locus in quo. The defendant also puts this deed in evidence. The plaintiff asked his honor to charge the jury that, in the absence of any evidence showing that Mr. Emple was administrator, and obtained license to sell this land, the

deed conveyed no title. Whether, after putting the deed in evidence, the plaintiff can thus attack it, is not clear. It will be observed that the deed is 30 years old. How far its recitals may be taken as true by reason of its age is an interesting question. If this deed conveys the title, it would seem that the plaintiff, together with the defendant, have shown an unbroken chain of title from the state to Mr. Wright, and that the statutory presumption in regard to the character of Monk's occupancy would arise. Of course, if this deed does not convey title, his honor was correct in holding that there was a break in the paper title. It does not appear why the record was not put in evidence. It is to be hoped that, if this case shall again come to this court, the record will clearly present for construction the language of section 146 of the Code. It seems that the case of *Ruffin v. Overby* is in conflict with this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1868, as it did in *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766. The question raised by the brief and argument that the action of the defendant in making the contract and removing the rock, being in violation of the provisions of the charter of the city, is ultra vires, not being raised by the pleadings, we deem it best to express no opinion in respect thereto.

We think that there should be a new trial.

DOUGLAS, J. (dissenting). Want of time prevents me at this late day from thoroughly discussing the opinion of the court, and so I will merely indicate one or two of the salient points of error. The opinion apparently attempts to reconcile the testimony by excluding that of the plaintiff, and then proceeds to find as a fact that there was a break in Monk's possession. In the opinion appear the following significant paragraphs: "It is true that Monk says, after the Dodge lease was out, 'I leased the property to Mr. Southerland for five years, and after Mr. Southerland's lease was out I leased it to Isaac Rhodes.' Two of his witnesses say that the locus in quo was not leased to Rhodes. It is difficult to reconcile the testimony of the plaintiffs' witnesses with this statement." This court is not called upon to reconcile the testimony of Monk with that of other witnesses, nor has it the right to say his testimony is any less worthy of credit than that of others. Monk testifies that he was in actual possession, and the jury alone can pass upon the credibility of his testimony and its relative weight as compared with that of other witnesses.

Again, the opinion of the court places upon the evidence of Rhodes the construction most unfavorable to the plaintiff, while deciding against the plaintiff. It is true Rhodes said, "I do not say I rented this seven acres," but he evidently meant to say that he did not know whether he had a valid

lease. This is shown by his further testimony that when Wright wished to rent the land to Rhodes he expressly declined to rent because he had already rented the same land from Monk. His exact words as stated in the record are as follows: "I told him I thought I already had it rented; that I had rented it from Monk." This is clearly consistent with Monk's testimony, if the question of consistency can be considered by this court. This court held in *Ruffin v. Overby*, 88 N. C. 369, that "every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made"; that is, that the possessor is deemed to be holding under his own right. But suppose that this decision is in conflict with section 146 of the Code, that section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even if "it appears that such premises have been held and possessed adversely to such legal title." Monk's own testimony to facts tending to show that he was holding adversely would be sufficient to carry the case to the jury, even if he were not corroborated by others. His inclosing the locus in quo with other land, admittedly his own, by a common fence; his using it for pasture; his renting it to others, and paying no rent to himself—are all circumstances tending to prove that he was holding adversely.

This case was one peculiarly for the jury, and I do not think that their verdict should be disturbed, except for some material error of law in the trial; certainly not on account of any view we might have as to the weight of conflicting evidence.

(136 N. C. 472)

BOTTOMS et al. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Sept. 13, 1904.)

RAILROADS—DUTY TO USE SPARK ARRESTERS—ERRONEOUS INSTRUCTION—PREJUDICIAL EFFECT.

1. It is not the duty of a railroad company to equip its engines with the "best approved" spark arresters, but merely with such approved appliances as are in general use.

2. Error in charging that it was defendant's duty to equip its engines with the "best approved" spark arresters was not rendered harmless by uncontradicted evidence that the engine claimed to have set the fire was equipped with the best approved spark arrester; this fact not being expressly admitted, and there being evidence that a shower of large sparks was emitted.

Appeal from Superior Court, Northampton County; Cooke, Judge.

Action by J. D. Bottoms and others against the Seaboard Air Line Railway. From a judgment for plaintiffs, defendant appeals. Reversed.

T. W. Mason, Day & Bell, and Murray Allen, for appellant. Peebles & Harris and Gay & Midyette, for appellees.

CLARK, O. J. In this action for damages for destruction of the plaintiffs' store, alleged to have been set on fire by sparks from the defendant's engine, the court charged the jury that it was "the duty of railroad companies to equip their engines with the best approved devices and appliances for arresting sparks, * * *" and that failure to do so was negligence, making the defendant liable for damages if the jury should find that the plaintiffs' house was set on fire by sparks from the defendant's engine. The defendant excepted.

There is error. In *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125, this court said that it was not negligence to fail to adopt improved appliances merely because they are "known" and "approved"; that railroads were not to be held to so strict a rule that they must keep a lookout for improvements and inventions and buy all such as were approved; and held the correct rule to be thus: "It is negligence not to adopt and use all approved appliances which are in general use." It added that to require the purchase of approved appliances before they had come into general use would be simply to hold that every railroad must have "the latest and best," which would be an unreasonable burden. This ruling has been uniformly followed since. In *Greenlee v. Railroad*, 122 N. C. 979, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and *Troxler v. Railroad*, 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, the court cites with approval from *Witsell v. Railroad*, supra, that it was "not negligence to fail to provide the latest improved appliances," and that "a railroad company is liable for any injury caused by failure to use approved appliances in general use." The same language is again quoted and approved in *Lloyd v. Hanes*, 128 N. C. 384, 35 S. E. 611, *Dorsett v. Mfg. Co.*, 131 N. C. 262, 42 S. E. 612, and other cases, and repeated as recently as *Marks v. Cotton Mills*, 135 N. C. 290, 47 S. E. 432. The rule laid down in *Aycock v. Railroad*, 89 N. C. 326, is "usual and proper appliances" to prevent injury by escaping sparks. This is about the same ruling as in *Witsell v. Railroad*, in somewhat different language.

The learned counsel for the plaintiffs contends that the defendant's witness testified that the engine had the best approved spark arrester, and no witness testified to the contrary; hence, as the charge must be read in connection with the evidence, the error, being as to a matter not in controversy, was harmless; and that the real point in this part of the charge was as to the continued keeping of the spark arrester in good condition, as to which the court charged correctly, and not as to the nature of the spark arrest-

er, which was not denied to be the "best approved." But Mr. Allen, of counsel for the defendant, pointed out that, while no witness directly testified to the contrary, it was not admitted that it was a proper spark arrester. The plaintiffs' evidence of a shower of large sparks coming from the engine, if believed, tended to question the defendant's evidence of the spark arrester being the "best approved" pattern, fully as much as it tended to controvert the evidence of its being kept in order.

Error.

(137 N. C. 317)

BABCOCK PRINTING PRESS MFG. CO. v. HERBERT et al.

(Supreme Court of North Carolina. Dec. 19, 1904.)

REPLEVIN — INNOCENT PURCHASER — PAYMENT OF VALUE — EVIDENCE — DECLARATIONS OF DECEDENT — ADMISSIBILITY — SUPREME COURT — POWER TO RENDER JUDGMENT.

1. Code, § 957, requiring the Supreme Court to render such judgment as, on inspection of the whole record, it shall appear ought to be rendered, is not applicable to effect a reversal of a judgment for defendant as against the evidence, where the objection that there was no evidence was not raised before verdict by a prayer for instructions to the jury.

2. In an action to recover possession of a printing press sold by plaintiff by conditional sale, which passed into the hands of a publishing company as an alleged innocent purchaser, declarations of the deceased buyer are inadmissible to show that he received value from the publishing company.

3. In order to show that a person was a purchaser for value, a fair consideration must be shown, and payment of a price which would not cause surprise; and, where payment is alleged to have been made in the stock of a corporation, its condition when the stock was issued to the purchaser is material.

Appeal from Superior Court, Lenoir County; Ferguson, Judge.

Action by the Babcock Printing Press Manufacturing Company against W. M. Herbert, administrator of the estate of W. S. Herbert, deceased, and another. From a judgment for defendants, plaintiff appeals. Reversed.

W. D. Pollock, for appellant. Loftin & Varser and Land & Cowper, for appellees.

WALKER, J. This is an action for the recovery of personal property, to wit, a printing press and its fixtures. So far as we are able to gather the facts from the record, it appears that the plaintiff, a corporation, and the manufacturer of the press, claims title to the same and the right of possession by virtue of a contract with one W. S. Herbert, now deceased; the agreement being described in the case as a "contract of conditional sale." This contract was dated March 28, 1902, and was filed for registration July 24, 1902. No copy of it is set out in the record, and we are not informed as to its contents. It was introduced merely by the

general description we have already given. The plaintiff introduced in evidence a series of notes dated July 19, 1902; a copy of one of the series of notes being set out in the case. It refers to the contract of March 28th, and recites that it was given "pursuant to the agreement." The defendant claims the title and right to the possession of the press as receiver of the Kinston Publishing Company, to which company he alleges it was sold and transferred after the date of the contract of conditional sale between the plaintiff and Herbert, and before the date of its registration. It is also alleged by the receiver that the Kinston Publishing Company purchased the press for value, and without notice, in law, of the contract of conditional sale. There was much testimony introduced by the parties upon the question of the purchase of the press by the publishing company, and of the price paid for it. The jury returned a verdict in favor of the defendant. It is stated in the "case" that "the court charged the jury fully on every phase of the case, and gave the contentions of both sides. There was no exception taken to the charge." There are no assignments of error.

While it may be that the conditional sale had not been consummated by the delivery to the plaintiff of the notes for the purchase price, and that there was merely an executory contract to sell, and that, at the time it is alleged the publishing company bought, W. S. Herbert had no title to the press to sell, as contended by the plaintiff's counsel, we cannot consider or decide the question, as there is no exception in the record which raises it. If the plaintiff had asked for an instruction to the jury based upon the contract and the evidence as to the time of giving the notes, and had caused to be set forth in the case a copy of the contract, so that we might determine its nature and legal effect with reference to the time of the delivery of the notes, the proposition argued at length in the brief of the counsel would be before us. But there was no prayer for instructions either as to the plaintiff's or the defendant's evidence and no exception to the charge. There is therefore nothing to consider in respect to the charge or the failure to charge. We cannot yield to the argument that, as there is no evidence of a purchase for value by the publishing company, we should reverse the judgment or award a new trial because the statute (Code, § 957) requires that we should render such a judgment as, on inspection of the whole record, it shall appear to us ought, in law, to be rendered thereon. That section does not apply. The alleged defect does not arise in the record, as distinguished from the "case on appeal." *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266. An objection that there is no evidence must be raised before verdict, by a proper prayer for instructions to the jury, and comes too late after the objector has taken his chances upon the verdict and has

lost. *State v. Harris*, 120 N. C. 557, 26 S. E. 774.

While we cannot consider the argument of counsel upon the effect to be given to the negotiations and dealings between the plaintiff and Herbert, and between the latter and the Kinston Publishing Company, with a view of determining who has the title to the property, we yet think that an error was committed in the admission of testimony which entitles the plaintiff to a new trial. Several witnesses, and among them D. F. Wooten, were permitted to testify as to the declarations made to them or in their hearing by W. S. Herbert, tending to show, and introduced for the purpose of showing, that he had received value from the publishing company for the press. This evidence was nothing more than hearsay, and should have been excluded. It is evident that the witness Wooten had no personal knowledge of the matters to which he testified, for he closes his testimony as follows: "I do not know whether Mr. Herbert sold the press to the company, or received a penny for it." What he had previously said, as coming from Herbert, was clearly incompetent, and was calculated to prejudice the plaintiff before the jury upon the question they were trying. The plaintiff further contended that the testimony of the several stockholders was incompetent, under section 590 of the Code. It is not necessary to decide this question, as it may not again be presented, and, besides, the facts as to the insolvency of the publishing company are not sufficiently explicit for us to pass upon them intelligently.

The defendant claims that the publishing company was a purchaser for value, and, in order to sustain this plea, he must show that the purchase was at "a fair and reasonable price, according to the common mode of dealing between buyers and sellers" (*Fullenwider v. Roberts*, 20 N. C. 278), or, as is said in *Worthy v. Caddell*, 76 N. C. 82, "the party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise, or make any one exclaim: 'He got the property for nothing. There must have been some fraud or contrivance about it.'" The principle is clearly stated by Connor, J., in *Collins v. Davis*, 132 N. C. 109, 43 S. E. 579. It is alleged that Herbert received stock of the publishing company for the press. It does not appear what was the value of this stock. The company, it is said, is now insolvent. What its condition was when the stock was issued to Herbert, if it ever was issued, is a material inquiry. The publishing company must have paid something more, as we have seen, than what would be sufficient as a consideration to support a contract, if the defendant expects to show that the company was a purchaser for value. It must also appear that the press was bought by the company itself, and not merely that the negotiations for the purchase were conducted by one of the stockholders, or even by all of them when

not assembled in corporate meeting. *Duke v. Markham*, 105 N. C. 181, 10 S. E. 1008; *Pinchback v. Mining Co.* (at this term) 49 S. E. 106. The purchase must have been the corporate act of the company. While the corporation need not act directly, but may be represented by one or more individuals, in making contracts, provided he or they are duly authorized so to act in its behalf, it must at last be the act of the corporation, and not of its individual members, in order to be binding.

The questions we have mentioned may be more fully presented at the next trial, and we do not intend by what has been said to intimate any opinion in regard to them. In the present state of the evidence, we could not well do so.

For the error in admitting incompetent testimony, there must be another trial. New trial.

DOUGLAS, J., concurs in result.

(137 N. C. 731)

SUFFOLK & C. RY. CO. v. WEST END LAND & IMPROVEMENT CO.

(Supreme Court of North Carolina. Dec. 19, 1904.)

EMINENT DOMAIN — CONDEMNATION PROCEEDING—EVIDENCE—ADMISSIBILITY—MEASURE OF DAMAGES.

1. In a proceeding to condemn land, evidence to show the value of the land by its location and surroundings is admissible.

2. In a proceeding to condemn land for a right of way, a tax list is inadmissible to show the value of the land.

3. Where a railroad condemns the whole of a dedicated street, the abutting owner is entitled to compensation for the full value of the land taken.

Appeal from Superior Court, Pasquotank County; Hoke, Judge.

Special proceedings by the Suffolk & Carolina Railway Company against the West End Land & Improvement Company to condemn land. From a judgment for defendant for \$2,300 damages, plaintiff appeals. Affirmed.

This is a special proceeding to condemn a right of way for railroad purposes through certain lands owned by the defendant. It appears that the defendant bought about 130 acres of land adjoining the corporate limits of Elizabeth City, which is laid off into lots and streets. Some of the streets were improved, while others were not. Among the unimproved streets was Grice street, which was condemned as an entirety as a right of way for the use of the plaintiff, and has been taken for such use. The report of the commissioners does not state the length or width of the right of way, but describes it simply as "all that certain strip of land across the lands of the defendant company and known and described as 'Grice Street.'" The evidence and the plat show that said street is 50 feet wide, including sidewalks; that is, between the building lines. The sole issue was the amount of damages that the de-

defendant was entitled to recover, which were assessed by the jury at \$2,300. There was testimony on both sides. The plaintiff appealed from the judgment rendered.

Pruden & Pruden and E. F. Aydlott, for appellant. Ward & Thompson, for appellee.

DOUGLAS, J. (after stating the case). The principles involved in this case are few and well settled. Its determination really depends more upon the weight given to the testimony, and that has been settled by the verdict of the jury. The first exception is to the admission of the following testimony given by a witness for the defendant: "There is a street two blocks away, parallel to the one down which the railroad runs, which has been improved at considerable expense, having been paved with brick, and on this street several residences of good size and quality have been erected. The said improved street and the street covered by the right of way of the railroad are parts of the same tract of land, belonged to the defendant company, and are near each other. The said improvements placed upon the property in question increase the value of the whole tract. Cross-streets connected the improved street with Grice street." The record states that it was given on cross-examination. This is denied by the plaintiff. We must assume the truth of the record, but it makes no difference, as we think the evidence was competent in either event. It does not come within the prohibition of the rule affirmed in *Rice v. Railroad*, 130 N. C. 375, 41 S. E. 1031, following *Warren v. Makely*, 85 N. C. 12, and that class of cases. It does not seek to prove the value of one piece of land by comparison with the value of another, but to show its value by its location and surroundings. It is common knowledge that suburban property will sell better if it is in a good neighborhood, near to a macadamized road, and in the immediate vicinity of churches and schools. If this property is within two squares of a paved street and close to good houses, it would necessarily sell for more than if it were far from any house, with a mile of mudholes between it and the town. This seems to us less a question of law than of the natural and necessary effect of the evidence. The witness had testified on his direct examination that the lots on Grice street were worth \$150 on an average; that the damage would average at least 50 per cent., and would amount in his opinion to \$5,625, being an average of \$75 per lot. On cross-examination he was testifying to facts which tended to show the reasonableness of the opinion he had expressed. We do not find any exception to this evidence in the record, but, as both sides argued it under the assumption that there was an exception, we have considered it in that view. We see no error in its admission.

The second exception is to the exclusion of

the tax list which was offered by the plaintiff to show the value of the land in question. It was properly excluded as being clearly incompetent for the purpose for which it was expressly offered. There are cases in which the tax lists have been admitted as some evidence, though slight, of claim of title and of the character of possession by the party listing the same. *Austin v. King*, 97 N. C. 339, 2 S. E. 678; *Pasley v. Richardson*, 119 N. C. 449, 26 S. E. 32; *Barnhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; *Gates v. Max*, 125 N. C. 139, 34 S. E. 266. Where the mere listing of the land is the act sought to be shown, the tax lists are admissible, because the lister is the actor; but the rule is essentially different where the value of the land is sought to be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. As was said by the court, through Pearson, C. J., in *Cardwell v. Mebane*, 68 N. C. 485: "The 'tax lists' were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury." In that case the tax lists were admitted for the purpose of proving the good faith of the vendees, who were charged with paying their father an exorbitant or fictitious price for the land, but not for the purpose of showing its actual value. In *Ridley v. Railroad*, 124 N. C. 37, 32 S. E. 379, this court, speaking through Clark, J., says: "Acquiescence in listing and payment of taxes by another is evidence against the party out of possession. But the tax valuation being placed on the land by the tax assessors, without the intervention of the landowner, no inference that it is a correct valuation can be drawn from his failure to except that the valuation is too low. Such valuation was *res inter alios acta*, and is not competent against the plaintiff."

The third and last exception is to the following part of his honor's charge, to wit: "The jury would estimate the damages, if any, arising from the impaired value of defendant's land caused by condemnation of plaintiff's right of way; would deduct therefrom any advantages and benefits arising from the construction of plaintiff's railroad which were peculiar to this land, but not such benefits and advantages as were common to this and the public generally; and, on applying this rule, the excess, if any, of the damages over the benefits and advantages, would be the amount to award defendant in response to this issue." It is needless to discuss this question, in view of the recent and well-considered case of *Railroad v. Owners of Platt Lands*, 133 N. C. 266, 45 S. E. 589, in which the rule laid down in the charge is expressly approved. In fact, the plaintiff does not seem to question it as a general proposition of law, but in its brief explains the nature of its objection

in the following words: "The objection to the charge of the court is that the court left it with the jury to estimate full damages for the right of way of plaintiff. We think this is error. The street had been appropriated for the public. The property had been laid off in lots, and the streets were necessary for the use of the lots. They are marked on the plat, and the property is being offered for sale in lots, so that the defendant owning this property would be entitled to damages by reason of the additional burden placed upon Grice street, and not for the full damage for the right of way. Grice street, as shown by the plat, is donated for the use of the public, being laid off in lots, and the defendants cannot withdraw the right to the street, and do not claim or desire to do so; therefore they are not entitled to the street which they have donated for the use of these lots and means to sell them, and they can only recover, by reason of the ownership of the adjoining lots, such additional burden as the right of way for the plaintiff shall place upon said Grice street. It is admitted by both plaintiff and defendants that where the railroad right of way goes is Grice street." The plaintiff relies upon *White v. Railroad*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, and *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572, in support of its contention that the defendant can recover only for the additional burden of the railroad right of way. To the same effect is *Phillips v. Tel. Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868. We presume that the principle itself is not questioned by either party to this proceeding, however they may differ as to its application. In the case at bar the plaintiff does not in practical effect impose an additional burden upon the street, but takes the street itself from building line to building line, thus rendering it useless as a highway, and destroying the essential purpose of its dedication. It is stated in the evidence that the plaintiff is digging up the entire street, and that the track is above the level of the surrounding land. This will virtually compel the owners to cut off from the abutting lots enough land to make a street on each side of the right of way, which would not leave sufficient depth for suburban lots in the absence of public sewerage. Moreover, under these circumstances the street would be practically impassable from side to side, and could never be made a handsome or convenient thoroughfare. It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damage thereby caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff actually does, but what it acquires the right to do, that determines the quantum of damages. If the plaintiff acquires the right to

use the entire street, that land is, in contemplation of law, just as much taken for the purposes of the easement as if it were filled with railroad tracks. Of course, this rule does not apply to subsequent acts of tort not contemplated in the original condemnation. This distinction is clearly pointed out in *Railroad v. Wicker*, 74 N. C. 220, and the rule therein laid down has been uniformly followed by this court. *Brown v. Railroad*, 83 N. C. 128; *Knight v. Railroad*, 111 N. C. 80, 15 S. E. 929; *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833. We are somewhat struck with the action of the original commissioners who assessed the defendant's net damages at \$100, stating in explanation that they had estimated and deducted "the increased value peculiar to part of said abutting land that the said railroad would bring." What this increased value would be, or how it would be brought about, they do not state. The only evidence we find of any such probable increase in value is the statement, made by both the plaintiff's witnesses, that the railroad "opened up the property for factories, and increased the value of the same more than the damages sustained." To destroy property for the purpose for which the owners alone intend it, and turn it into factory sites when there are no factories in sight, is a benefit entirely too remote and contingent to be capable of present estimation. Some of us may have heard of factory sites before, and, as we listened to the siren voice of the real estate agent, have seen lofty factories rise in the air, pouring forth their countless thousands of well-paid operatives seeking to buy a few choice lots in the neighborhood of Eden. Perhaps we have revisited in after years the scene of once bright but faded anticipations, only to find a lonely cow grazing in the middle of Broadway, or a solitary pig pen standing as a monument to buried hopes. It is due to the plaintiff's counsel to say that they did not press this contention in this court either in brief or argument.

There is another matter which, while not under exception, we think deserves attention. The commissioners, in their report condemning the land, describe it as follows: "Did proceed to condemn, and by these presents do condemn, all that certain strip of land across the lands of the defendant company, and known and described as 'Grice Street,' for a right of way to be used by the plaintiff company for the purposes set out in said petition." It is true the said right of way was fully and correctly described in the plaintiff's petition, which referred to a plat properly filed; but it seems to us that, as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, the said easement should be therein described as fully and correctly as it would be in a grant. Indeed, it might be better if the extent of the easement were also set

out in the judgment of the court, although in the present case his honor's judgment could not have been other than it was as the case was presented to him.

The judgment of the court below is affirmed.

(137 N. C. 310)

BOARD OF EDUCATION OF MACON COUNTY v. BOARD OF COM'RS OF MACON COUNTY.

(Supreme Court of North Carolina. Dec. 19, 1904.)

TAXATION—POLL TAX—PURPOSES OF TAX—USE OF FUNDS—CONSTITUTION.

1. Const. art. 5, § 1, makes it the duty of the General Assembly to levy a capitation tax on every male inhabitant between certain ages, which will be equal to the tax on property valued at \$300, but that the state and county tax combined shall not exceed \$2 on the poll. Section 2 provides that the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor. Section 7 provides that every act of the General Assembly levying a tax shall state the object to which it is to be applied, and that it shall be applied to no other purposes. Laws 1903, p. 303, c. 240, authorized Macon county to levy a special tax of 30 cents on the \$100 worth of property, and 90 cents on each taxable poll, for the benefit of the public roads, and provided that such tax should not be applied to any other purposes. *Held*, that Const. art. 5, § 7, does not apply merely to taxes on property, and, the limit of \$2 poll taxation having been reached in Macon county for general purposes, taxes collected under the act of 1903 did not belong to the school and poor fund, but could only be used for the purpose specified in the statute.

Appeal from Superior Court, Macon County; Ferguson, Judge.

Mandamus by the board of education of Macon county to compel the board of commissioners of the county to apply the proceeds of a certain tax to the support of the public schools. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The plaintiff board of education in its complaint alleges: That the defendant board of commissioners at their regular meeting on the first Monday in June, 1904, levied a tax of \$1.58 on each taxable poll in the county for school purposes, and 30 cents for the support of the poor. The state had theretofore levied 12 cents on each poll for pensions, all of which aggregated \$2 on the poll; being the constitutional limit. That, at the session of 1903 of the General Assembly, an act was duly passed authorizing the commissioners of Macon county to levy a special tax of 30 cents on the \$100 worth of property, and 90 cents on each taxable poll, for the purpose of working the public roads of said county. That by said act it was provided that the special taxes levied and collected pursuant to the authority thus conferred should constitute a special fund for working the roads, and that they should not be applied to any other purpose. Chapter

240, p. 303, Laws 1903. The plaintiff asked that a mandamus issue, commanding the defendant board to apply the proceeds of the tax levied on the polls by said act to the support of the public schools of Macon county. The defendant board demurred to the complaint. His honor Judge Ferguson sustained the demurrer, and rendered judgment against the plaintiff for costs. Plaintiff excepted and appealed.

T. J. Johnston, for appellant. Horn & Mann, for appellee.

CONNOR, J. (after stating the facts). Well-prepared and well-considered briefs were filed in this case by counsel on each side. They have aided us in considering and deciding the interesting question presented for the first time for decision. The plaintiff's counsel say, "The decision of the case turns upon the question whether a capitation tax levied by the commissioners in pursuance of a special act of the Legislature for a special purpose, as contemplated by article 5, § 6, of the Constitution, must be appropriated in the manner prescribed in section 2 of the same article." The defendant resists the construction contended for by pointing us to section 7 of the same article.

Section 2, art. 5, provides "that the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor," etc. Section 6 provides that "the taxes levied by the commissioners of the several counties for county purposes, shall be levied in like manner with the state taxes and shall never exceed the double of the state tax, except for a special purpose, and with the approval of the General Assembly." Section 7: "Every act of the General Assembly levying a tax shall state the object to which it is to be applied, and it shall be applied to no other purpose."

The plaintiff contends that, by section 2, the proceeds of all capitation taxes, whether derived from the general revenue act, made to meet the ordinary and necessary expenses of the state and county government, or from special acts authorizing the levy of a tax for a special purpose, exceeding the constitutional limit, must be applied to the support of the public schools and the poor; that section 2 controls the application of all capitation taxes, thus confining the language of section 7 to property taxes. The defendant contends that section 2 should be confined in its application to capitation taxes levied pursuant to the requirement of section 1, art. 5, to meet the equation prescribed for ordinary expenses of the state and county government; that section 7 controls the application of not only all property taxes, but all capitation taxes levied pursuant to special laws for a special purpose. The defendant suggests that, whether this is correct as to all capitation taxes, it is certainly so as to all such taxes in excess of \$2. It must be conceded that there is an apparent con-

dict between the two sections. It is our duty to reconcile them, so that, if possible, both be given force and effect. It is said by Judge Cooley: "If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." Const. Lim. 92. Article 5 of the Constitution has been the subject of much controversy. The construction and reconciliation of the different sections have given the court much difficulty. There can be no doubt that the restrictions and limitations therein have seriously embarrassed the Legislature in providing necessary revenue to meet the demands of a growing, progressive community. It is impossible to read the many opinions of the justices of this court without being impressed with this fact. It would seem that to arrive at satisfactory, or at least workable, results, the court has run very close to the line which separates construction from making the law. We may, however, in the light of the decisions, treat some questions as settled. By the express language of article 5, § 1, it is made the duty of the General Assembly to levy a capitation tax on every male inhabitant between the ages of 21 and 50, which shall be equal to the tax on property valued at \$300 in cash; that such state and county tax combined shall never exceed \$2 on the poll. Mr. Justice Rodman, who was a member of the constitutional convention of 1868, at the June term, 1869, of this court, in *University R. R. v. Holden*, 63 N. C. 427, said: "It is too plain to admit of an argument that the intent of this section was to establish an invariable proportion between the poll tax and the property tax, and that, as the former is limited to two dollars on the poll, the latter is limited to two dollars on the three hundred dollars worth of property." That, with the exceptions pointed out in *Jones v. Com'rs*, 107 N. C. 248, 12 S. E. 69, and *Wingate v. Parker* (at this term) 48 S. E. 774, observance of this equation is essential to the validity of all revenue or taxing laws, is shown by the uniform decisions of this court. *Russell v. Ayer*, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246. In *Jones v. Com'rs*, supra, it was held that the necessity for observing the equation applied to all laws providing for revenues for the ordinary and necessary expenses of the state and county government, and all special acts authorizing counties to levy a special tax to meet the necessary expenses, such as building a courthouse, a bridge, or improving the roads, etc. It was therefore essential to the validity of the tax of 30 cents on property that a tax of 90 cents on the poll be levied and collected. We then have two provisions in article 5 of the Constitution; one requiring "the proceeds of the state and county capitation tax to be applied to the purpose of education," etc.; the other de-

claring that "every act of the General Assembly levying a tax shall state the special object to which it is to be applied," etc. If sections 1 and 2 are construed together, we have an express direction to the General Assembly to levy on every male inhabitant between certain ages a capitation tax, with the limit fixed at the amount of tax levied on property valued at \$300, with the further limit that such capitation tax shall not exceed \$2, followed by the provision that the proceeds of the capitation shall be applied, etc. These two sections express the purpose to require a capitation tax; to fix its limits; to establish an equation between such tax and the property tax; the application of such capitation tax. Section 3 prescribes a rule of uniformity. Section 4 deals with the state indebtedness, etc. Section 5 prescribes what property shall be exempt from taxation. Section 6 provides for the levy of county taxes. The very important command to the Legislature concludes the article with section 7—that "every act of the General Assembly," etc. Article 9, § 2, imposes the duty upon the Legislature to provide, by taxation and otherwise, for a general and uniform system of public schools, etc. Article 11 imposes the duty upon the General Assembly of providing for the poor, etc.

Adopting the construction placed upon the Constitution by this court in *Jones v. Com'rs*, supra, we are constrained to hold that the act under which the tax to work the roads of Macon county was authorized necessarily provided for the capitation tax, and that its collection is lawful. We are of the opinion that, in order to give full force and effect to section 7, the entire tax must be applied to the purpose for which it was levied and collected. We think that it would be doing violence to this section to say that it applied only to taxes levied on property. It would be a singular result if every tax levied by a county, by permission of the General Assembly to build a courthouse, bridge, or improve the roads, should carry with it a poll tax for an entirely different purpose. General taxes are levied for the support of the schools, the rate of which is fixed with reference to the amount to be received from polls, in accordance with section 1, art. 5. It is to be presumed that this tax, with the added amount from polls, is deemed by the General Assembly sufficient to meet the needs of the public schools. A tax is likewise levied in each county for the support of the poor, and the commissioners may, if they think proper, appropriate so much as one-fourth of the poll tax to that purpose. The provisions of section 2 of article 5 are fully met and complied with by confining its application to the capitation tax levied for the ordinary expenses of the state and county. The question, it must be conceded, is not free from difficulty. In *Long v. Com'rs*, 76 N. C. 273, Rodman, J., uses language which the plaintiff insists indicates an opinion different from

that which we have expressed. It does not appear whether the tax levied for repairing the courthouse was by permission of the General Assembly. It does appear, however, that the entire levy did not exceed the constitutional limit. The question is not clearly presented. In *Board of Education v. Com'rs*, 113 N. C. 385, 18 S. E. 663, Avery, J., says: "The language of the Constitution is plain and peremptory, and forbids the application of the fund arising from the tax on polls to any purposes other than to education and the support of the poor, or of any greater proportion for the maintenance of the poor than that prescribed in the instrument, until the levy reaches the limit of two dollars." The only question decided in that case was that the Legislature was authorized to levy a tax for the payment of pensions under the power granted in article 11, § 7, and that it could appropriate so much of the poll tax to that purpose, under the provisions of article 2, § 5, as did not exceed one-fourth of the whole. The state, by general taxation and by special appropriation, provides for the maintenance of public schools. The Constitution appropriates the net proceeds of all fines, forfeitures, and penalties, and the proceeds of the sale of all public lands, etc. To adopt the construction of article 5, § 7, contended for by the plaintiff, we would be compelled to write into the section the words "on property," so that it would read, "Every act," etc., "levying a tax on property." This the court should never do. We must construe, and not make, the Constitution. To weaken the very essential safeguard against the abuse of the taxing power found in section 7, art. 5, would expose the property of the citizen to dangers which experience has shown to lurk in every form of government, because of the fact that "the power to tax involves the power to destroy." We should be slow to adopt a construction which would carry the capitation tax which must accompany every special tax for necessary purposes into a channel different from that "stated," setting at naught the peremptory command, "It shall not be applied to any other purpose." To do so would seriously embarrass the counties in meeting the ever-increasing demands of a progressive people for better roads, bridges, and public buildings.

It is suggested that, until the limit of \$2 is reached, the provision of section 2 controls, and carries the capitation tax into the school and poor fund. We think it best to decide only the question before us. It is conceded that the limit had been reached in Macon county for general purposes, and that the levy authorized by the special act is in excess of the limit.

The judgment of his honor sustaining the demurrer must be affirmed.

WALKER and DOUGLAS, JJ., concur in result.

(137 N. C. 337)

JONES v. AMERICAN WAREHOUSE CO.

(Supreme Court of North Carolina. Dec. 20, 1904.)

INJURY TO EMPLOYEES—CAUSES OF INJURY—EXPERT EVIDENCE—INSTRUCTIONS—NEGLIGENCE—ASSUMPTION OF RISK.

1. Where there was evidence that plaintiff's injury was sustained by his falling from a truck six inches high, as claimed by defendant, and also that it was the result of being caught in a belt a week later and thrown against a post in the wall, as claimed by plaintiff, it was proper to ask a physician his opinion, under all the circumstances surrounding both accidents, as to which he would attribute plaintiff's injury.

2. In an action for personal injuries, a physician was asked, "A person falling vertically, what is the result?" and he answered, "It might cause concussion of the spinal cord." Held that, while the form of the question may be open to criticism, the answer was harmless, as it was merely what common experience would suggest to any mind.

3. Where a master directed a servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed was the proximate cause of injury to the servant, the master was guilty of actionable negligence.

4. Where plaintiff had worked at a machine for four weeks, and the danger of being injured if he was caught in the driving belt and pulley attached to it was open, obvious, and known to him, and after such knowledge he continued to work at such machine, he assumed the risk incident thereto.

Montgomery, J., dissenting.

Appeal from Superior Court, Forsyth County; W. R. Allen, Judge.

Action for personal injuries by R. A. Jones against the American Warehouse Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff alleges: That he was in the employment of the defendant company in its finishing mill, near the town of Spray, N. C. That he was directed by the defendant's superintendent to work at a machine known as a "napper." That there was attached to said machine a large pulley, run by belting connecting with the shafting overhead. On the inner or lower side of the machine was a smaller pulley, which drove a fan, or other part of the machinery, and is run by a smaller belt. This smaller pulley is not grooved, and the belt at times slips, and has to be replaced by the operator. Defendant's superintendent, who had control of the department where plaintiff worked, and directed and controlled plaintiff, told him not to stop the machine when the smaller belt slipped—that he could safely replace the belt without stopping the machine—and ordered him not to stop the machine, but to replace the belt, if it should slip, while the machine was in operation. That plaintiff was ignorant of the machinery, having only a few months' experience, as defendant well knew. That plaintiff, un-

¶ 4. See *Master and Servant*, vol. 34, Cent. Dig. § 583, 587.

der the command and direction of the superintendent, whom he thought an experienced operator and well acquainted with the machinery and its operation, attempted to replace the slipped belt as directed, when he was caught by the larger belt and hurled against the wall of the building—his back striking a post or wooden beam—and injured. That to attempt to fix said belt while the machine was in motion was a dangerous and hazardous undertaking, well known to defendant, or ought to have been well known to it, and, notwithstanding this fact, the defendant's superintendent carelessly, negligently, and recklessly ordered plaintiff, who was ignorant of the danger, to attempt to adjust the slipped belt during the operation of said machine. That, by reason of being thrown against the post as aforesaid, he was seriously injured, etc. The defendant admitted the manner in which the machine was constructed and operated, the way the belt was adjusted, etc., but denied the allegation in all other respects. It also alleged that the "napper" was the newest and most approved pattern, standard in make, and equipped with all approved safety appliances and safeguards in general use, etc.; that necessarily the operation of such machine was attended with some risk, which is apparent upon an inspection of it, and this plaintiff well knew when he accepted the employment; that he operated two months without injury, etc.; that he assumed the risk incident to the employment. Defendant also alleged that, if plaintiff was injured, it was the result of his contributory negligence. The court submitted upon the merits three issues: (1) Was the plaintiff injured by the negligence of defendant? (2) Did plaintiff by his own negligence contribute to his injury? (3) Was there an assumption of risk on the part of the plaintiff? An issue as to damage. The jury answered the first issue, "Yes," and the second and third, "No." From a judgment upon the verdict, defendant appealed.

R. D. Reid, R. W. Winston, Pou & Fuller, Watson, Buxton & Watson, and Lindsay Patterson, for appellant. Glenn, Manley & Henderson, for appellee.

CONNOR, J. (after stating the facts). The record contains 63 exceptions, many of which are directed to the same question, and are properly taken to save the point. There was a motion at the close of the testimony to nonsuit, which was properly denied, thus disposing of exceptions 1, 2, 8, 9, and 10.

We will first discuss the exceptions to the admission and rejection of testimony. Exceptions from 12 to 16, inclusive, cannot be sustained. Exceptions 17 to 18 are directed to the ruling upon the following question to Dr. A. P. Davis: "Suppose the facts to be, and the jury so find, that he [plaintiff] on the 28th or 29th of June fell from

a truck six inches high to a floor, upon his buttocks, or partially so; that he made no complaint about it to any one as having received any injuries from it; that on the morning of the 3d of July he was thrown by a belt, with his back striking a studding in the wall; suppose the jury should find that to be the fact; and he worked then for a night, perhaps two nights, complaining of pain—to which of these causes would you attribute the injury?" To understand the purpose of this question, it is proper to say that there was evidence that on the 28th of June plaintiff was thrown from a truck six inches high, and caught on his buttocks and his hands; that he did not feel any pain from this fall; that he was caught by the belt and thrown against the post on the latter part of the night of July 2d. He explained the manner in which he was injured, etc. There was evidence tending to show that plaintiff had said that he sustained the injury by falling from the truck, and evidence that he said that he sustained it by being caught in the belt. Several physicians who attended him were examined as to his condition and the cause of it, etc. It was also in evidence that Dr. Davis had attended plaintiff. The plaintiff was insisting and seeking to show to the jury that he was injured by being caught in the belt, while the defendant was insisting and seeking to show that the injury was the result of the fall from the truck. It thus became relevant to have the opinion of the physician.

Dr. Davis testified that he saw plaintiff on August 10th, and the condition in which he found him (paralyzed, almost completely, from his lower extremities, etc.), and that he was permanently paralyzed (his limbs very much emaciated); that he would never walk, etc.; that his nerves were almost destroyed. In answer to the question objected to, Dr. Davis said: "Granting that the suffering was only after the last injury, I would more than likely attribute it to the latter." He was then asked: "A person falling vertically, what is the result?" Answer: "It might cause concussion of the spinal cord." The record shows that defendant objected to the question, but not to the answer. This is necessary to present the question of its admissibility upon appeal, when it is not responsive to the question. *Perry v. Jackson*, 88 N. C. 103; *Bost v. Bost*, 87 N. C. 477. Passing this objection, however, we think that, while the form of the question may be open to criticism, the answer is so vague and indefinite that no possible harm could have been done to the defendant. The physician simply said what common experience would have suggested to any mind. It would seem quite self-evident, without the aid of expert testimony, that if a man has a fall which causes no suffering, as in this case, one would more likely attribute the suffering to the last fall. This might have been found

by the jury as a matter of common experience and observation or as material evidence. The exception cannot be sustained.

Dr. Thomas was asked the same question, and answered: "I would say this second injury, because a common fall—sitting-down fall on that end on a smooth floor—is so frequent, with no bad results. Still, from a direct violence against the spine, this is almost sure to produce some serious results." In this instance the defendant excepts to the answer as well as to the question. We can see no valid objection to the answer. The witness simply tells the jury what every man of common sense and observation knows to be true. This witness, after an examination as to the formation of the vertebrae, spinal cord, etc., was asked a hypothetical question as to whether, in his opinion, the injury to the plaintiff is permanent. The defendant objects to the question, but not to the answer. We can see no valid objection to either. There was a great deal of testimony introduced by both parties of this character. We think that the exceptions to it are without merit. It was very important to enable the jury to come to a satisfactory conclusion in regard to the cause of the condition in which the plaintiff was conceded to be. The physicians were intelligent and, so far as we can see, there was no marked difference in their opinions. All of the testimony showed that the plaintiff is seriously and permanently injured. We have examined the other exceptions to the admission and rejection of testimony, and find no error.

His honor instructed the jury upon each issue. Among other instructions, he gave the following:

"Negligence is a want of ordinary care—a failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances. It is a failure to perform some duty imposed by the law. The law imposes upon the master the duty of using ordinary care to provide for the servant reasonably sound and safe appliances and machinery, and a reasonably safe place and methods to do his work; and on entering into employment the servant has the right to assume that these duties have been performed, and may, without blame, act upon this assumption until some defect becomes so apparent that it may be discovered by the exercise of ordinary care. The master is not required to furnish the best machinery and appliances, nor is he required to provide the safest place or methods, but such as are reasonably safe. The law also requires the servant to exercise ordinary care for his own safety. It is also a part of the contract of employment that the servant assumes the ordinary risk of his employment, and also the risk incident to dangerous work or dangerous methods of work, if they are obvious.

"If you find from the evidence, and by the

greater weight of the evidence that the defendant directed the plaintiff to put the belt on the smaller pulley by placing his hands through the larger belt while in motion, and that this was not a reasonably safe way to do what he was required to do, and that while so doing he was injured, and that the unsafe way, as stated above, in which he was doing the work according to directions, was the proximate cause of the injury to the plaintiff, then it will be your duty to answer the first issue, 'Yes.'

"If the plaintiff has failed to satisfy you that the method adopted was not a reasonably safe method, the jury should answer the first issue, 'No.'

"If the plaintiff has satisfied you that the method adopted was not a reasonably safe method, and he has failed to satisfy you that this was the real cause of his injury, the jury should answer the first issue, 'No.'

"If the injury to the plaintiff was the result of an accident, the jury should answer the first issue, 'No.'

"If, upon a careful consideration of the evidence, you cannot find how the fact is from the evidence, the jury should find the first issue, 'No,' for the reason that the burden upon that issue is upon the plaintiff.

"While the law imposes a duty upon the master, it also imposes a duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working, and the appliances used, and to discover those dangers which a man of ordinary prudence would discover; and, if he fails to perform his duty, and is injured thereby, he cannot recover damages.

"If you find from the evidence that the plaintiff had worked at this napper machine for four weeks, and that the danger of being injured if he was caught in the driving belt and pulley attached to it was open and obvious and known to him, and that after such knowledge he continued to work at said machine, you will answer the third issue, 'Yes.'

"If you find from the evidence that the plaintiff knew of the danger of attempting to replace the belt on the pulley while the machine was in operation, and appreciated the danger, and continued to work at said machine, and attempted to replace the belt when it slipped off the pulley, then the plaintiff assumed the risk, and you would answer the third issue, 'Yes.'

"Assumption of risk does not mean that, in all cases where the defendant has knowledge of the defects of dangerous machinery and goes on with the work that he assumes the risk; but the law is that, where the defendant fails to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, the plaintiff will

not be held to assume the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probability of the injury is greater than those of safety, or unless it is a danger ordinarily incident to the employment, or unless obvious, or one which the servant may discover by the exercise of ordinary care."

The court charged the jury fully upon the question of damages.

We have examined the charge and exception thereto with care, and find no error in the charge. The questions were largely for the jury, under the application of general and well-recognized principles of law. The charge is clear and full. The damages awarded are large, but that was a matter for the jury. The plaintiff is a physical wreck.

While we do not undertake to do more than suggest, from the cases which have been before us in which injuries have been sustained by operatives in cleaning or otherwise putting their hands into dangerous places while the machine is in motion, it would seem that economy, as well as a regard for the safety of operatives, would suggest that rules be made prohibiting, instead of commanding, such action by them. The courts recognize that persons working in mills and other employments where powerful and dangerous machinery is used assume certain risks, but it is the duty of superintendents and others having charge of the employes to use every reasonable precaution to protect them from injury.

The judgment must be affirmed.

WALKER, J., concurs in result.

MONTGOMERY, J. (dissenting). This action was brought to recover damages from the defendant because of personal injuries alleged to have been sustained by the plaintiff on account of the negligence of the defendant. The defendant denies that it was negligent, and avers that the plaintiff was injured by his own negligence, and that he assumed the risk of any injury which he suffered. The plaintiff, in his complaint, alleges that the defendant was negligent in two respects: First, that it furnished the plaintiff, carelessly and knowingly, a dangerous and unsafe machine with which to do his work; and, second, that it directed him to use the dangerous and unsafe machine in a manner which was not reasonably safe—the plaintiff being alleged to be an unskilled workman and ignorant of the nature of the machine—and that by reason thereof he was injured in the operation of the machinery. After the evidence was all in, the court said that the defendant need not offer evidence for the purpose of showing that the machine at which the plaintiff was hurt was a standard machine, as there was no evidence to the contrary. That was true, and he might have gone further, and said

that the machine, by all the evidence, was without fault. In his charge, also, the judge eliminated from the case the allegation that the defendant had furnished an unsafe and dangerous machine for the plaintiff to do his work with, and told the jury that the negligence of the defendant depended upon the question whether the defendant adopted and required the plaintiff to use a method which was not reasonably safe. Nevertheless he afterwards instructed the jury that it was the duty of the defendant to provide for its operatives not only safe machinery, but reasonably safe methods. That was an erroneous instruction, even if it be conceded that the defendant was to furnish safe machinery, for there had been a great amount of evidence on the character and construction of the machine, offered by plaintiff in trying to prove an unsafe method of operating it; and, under the first branch of that instruction, the jury might have arrived at the conclusion that the machine itself was unsafe and dangerous, when that question had been eliminated by the judge, as a matter of law, upon the evidence from the trial of the case. Instead of giving that instruction, I think he should have said to the jury that all the evidence in the case went to show that the machine was a standard one, and, in that connection, that the only question for them to consider was whether or not the superintendent had compelled and directed the plaintiff to use the machinery in an unsafe and dangerous method.

The evidence in this case in some respects is most remarkable. The plaintiff himself testified that he was injured on the night of July 2, 1901, by being thrown by a belt in motion, attached to the machinery, against a post in the wall, while engaged in adjusting a part of the machinery in the manner he was directed to do by the defendant's superintendent. Several physicians, two of whom performed a surgical operation on him, attended the plaintiff in his sickness, and they testified that they examined him about the cause of his trouble, and that he told them he was hurt by having been thrown by one of the employes of the defendant, in a frolic, from a truck about six inches high, used in the warehouse of the defendant, and that he never mentioned to them that he had received any injury through the means of the defendant's machinery. He admitted himself that for months he had not told the managers of the defendant's warehouse that he had been injured by the machinery, and that it was 18 months after the alleged injury before this suit was brought. He also told his foster father—a man by the name of C. E. Jones—that he was hurt by being thrown from the truck by one of the defendant's employes, and he did not mention that he had been hurt by the machinery until some time after he had stated he had been hurt by being thrown from the truck. There was evidence offered

and received tending to show that the plaintiff, while standing on a truck in the defendant's warehouse, was suddenly thrown to the floor, catching partly on his hands in a sitting position, by the truck having been kicked from under him by an employé of the defendant. Upon the evidence, the plaintiff's counsel asked Dr. Davis, an expert witness, this question: "Suppose the jury should find that he was injured on the 28th or 29th of June; that he fell from a truck 6 inches high to a floor upon his buttocks, or partially so; that he made no complaint about it to any one as having received any injuries from it; that on the morning of the 3d of July he was thrown by a belt, with his back striking a studding in the wall; suppose the jury should find that to be the fact; and he worked then for a night, perhaps two nights, complaining of pain—to which of these causes would you attribute the injury?" The question was allowed over the objection of the defendant. The objection was well taken, and the question ought not to have been allowed. It was incompetent. It is not necessary to go at length into a discussion of the question whether the evidence justified the recital in the question as to whether the plaintiff fell from the truck to the floor of the warehouse upon his buttocks. The evidence was that he fell from the truck to the floor, and caught upon his hands in a sitting position. The difference in statement as to how he fell may not be serious enough to amount to a reversible error; but there are faults in the question, both as to its substance and form, which make it under our decisions wholly incompetent. In the first place, there is no recital in the question of any evidence going to show the nature of the injury, the extent of it, or the condition of the plaintiff either before or at the trial; and, second, there is assumed in the question the conclusion that whatever injuries the plaintiff might have sustained (if they had been stated in the question) were caused by his falling from the truck, or by being thrown by the belt against the wall. That was the very question to be decided by the jury, and expert testimony on the part of the witness could only be admitted on the ground that his scientific knowledge could aid the jury in arriving at a conclusion. The condition of the plaintiff and the nature of his injuries, as brought out in the evidence, were not repeated to the witness, and his opinion asked thereon (in case the jury should find the evidence to be true) as to whether the fall from the truck, or being thrown by the belt against the wall, could or might have caused the injury to the plaintiff. It assumed that one or the other did cause the injury. It might have been that, if the question had been properly asked, the witness might have answered that, the facts being believed by the jury, in his opinion the plaintiff's injuries were or could have been caused by his having been thrown by the

belt against the wall, or also that, in his opinion, the fall from the truck might have produced the same result. And he might have said, further, that, in his opinion, the injuries were more likely to have been produced by the one or the other, as his judgment and scientific skill might dictate. The question should have been stated in a hypothetical form, and not upon any assumption that the plaintiff's injuries had been received in either of the ways mentioned in question. Rogers, *Expert Testimony*, § 27; *State v. Bowman*, 78 N. C. 508; *Summerlin v. Railroad*, 133 N. C. 550, 45 S. E. 898.

I think there should be a new trial.

(127 N. C. 368)

HOLLAND v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 20, 1904.)

MASTER AND SERVANT—NEGLIGENCE—INJURIES —LAST CLEAR CHANCE.

1. A brakeman, whose duty it was, when his train went onto a siding, to lock a switch and to remain within 10 feet of it, after his train went onto a siding retired to the caboose; and another train ran into the switch, which was open, whereby he was killed. In an action for the death, it appeared that the engineer of the approaching train, running at a speed of 40 miles per hour, could not have seen the standing train until within 70 or 80 yards of it, owing to a curve at that point. *Held*, that the doctrine of "last clear chance" was not applicable as against the railroad.

Clark, C. J., and Douglas, J., dissenting.

Appeal from Superior Court, Moore County; Bryan, Judge.

Action by M. H. Holland, administrator, against the Seaboard Air Line Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. D. Shaw, U. L. Spence, and Murchison & Johnson, for appellant. W. J. Adams and Seawell & McIver, for appellee.

MONTGOMERY, J. The plaintiff's intestate, employed by the defendant as rear brakeman and flagman on its extra freight train No. 578, going south, was on duty when, on the morning of October 18, 1902, the train passed into the siding over the switch at Rockingham, there to await the passage of other trains of the defendant. He was acquainted with the rules of the company, one of which (rule J) reads as follows: "When a train takes the side track to be met or passed by another train, the conductor or flagman must remain at the switch used by his train to enter the siding, and when the train is clear of the main line and the switch is properly set, he will take a position not less than 10 feet from the switch and give the 'go ahead' signal to the approaching train, and must remain not less than 10 feet from the switch until the approaching train has entirely passed the switch. No train will pass the switch which

has been used by the train in taking the siding, unless the 'all right' signal is given." The signal used after dark must be white. When the train was well on the siding, the conductor went to the railroad office on business, and remained there until the collision hereafter to be described occurred; and the intestate went back to the switch, and, according to the evidence of the conductor, changed it and locked it to the main line. The intestate also had been ordered by the conductor when they left Raleigh that morning to "always, when he headed in a switch, to change it and lock it to the main line, and, in my absence, to look out for the safety of the train." The intestate left the switch, returned to the caboose, at the northern end of his train, entered it, and never returned to the switch. While train No. 578 (intestate's) was on the siding, two trains of the defendant (33 and 40), coming from the south and going north, passed along the main line in safety. Afterwards, probably 20 or 30 minutes, train No. 33, a fast passenger train, with engine and several heavy coaches, coming from the north and going to the south, with the right of way, and at a speed of 40 miles an hour, ran into the switch which the intestate ought to have closed and guarded, under the rules of the company and the instructions of the conductor, and collided with the caboose on train 578, and killed H. L. Holland, the plaintiff's intestate.

On the question of negligence the usual three issues were submitted to the jury, which, with their responses, are as follows: "(1) Was the death of Holland caused by the negligence of the defendant, as alleged in the complaint? Yes. (2) Did Holland by his own negligence contribute to his death? No. (3) Notwithstanding the contributory negligence of Holland, could the defendant, by the exercise of ordinary care, have prevented his death? Yes."

At the request of the plaintiff, his honor instructed the jury as follows: "If the jury should find from the evidence that the plaintiff's intestate was an employé upon the defendant's train, and was killed in the collision of the defendant's trains in the daytime, there is a presumption of negligence upon the part of the defendant, and in that case the burden is thrown upon the defendant to disprove negligence on its part." We think there was error in giving that instruction. So far as passengers are concerned, injuries suffered by them from contact with anything under the control and direction of the carrier, or which the carrier ought to have taken precautions against, or from the want or absence of anything which the carrier ought to have furnished, is sufficient to put him to his proof to show that he was not negligent; and therefore, upon that principle, a prima facie case of negligence is made out against a carrier upon the mere fact of a collision between trains. 2 Shear.

& Red. § 516. In such a case the maxim *res ipsa loquitur* applies. The affair speaks for itself. And it must be that the same rule applies as to employés of a carrier. In such case neither the passenger nor the employé has anything to do with the management or control or with the schedule of the trains. But in the case before us it cannot be said that the maxim *res ipsa loquitur* applies. One of the trains was on a side track, and had been there for some little time. Who was at fault because of the collision—whether the defendant, through its engineer of train 33, or the intestate whose duty it was to guard the switch against train 33—was a matter not explained by the collision itself, but dependent entirely upon the circumstances attendant upon the collision, to be shown by the evidence. And there was evidence, outside of the rules under which he was doing service, going to show that the intestate was negligent. It would be a strange rule of law, if, under such conditions, a presumption of negligence on the part of the carrier, the defendant, should arise upon proof of the collision.

There was another error in the failure of his honor to give to the jury a special instruction, asked by the defendant, in the following words: "If you answer the first issue 'No,' you need not answer the other issues. That, if you answer the first issue 'Yes,' then, under all the evidence, you will answer the second issue 'Yes,' and the third issue 'No.'" There was exception made by the defendant for the failure to give each of these instructions. We think each of them should have been given. Rule J of the company, which we have quoted in full, and of which the intestate had full notice, required him not only when his train went in on the siding to change the switch, but it also required him to take his position at the switch, and remain not less than 10 feet from it until the approaching train had entirely passed the switch. The whole of the evidence tended to show that he left the switch, and went into the caboose, and was killed in it; having never returned to the switch. There is no dispute about the truth of that evidence, and but one conclusion can be drawn from it, in reason. *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 428; *Neal v. Railroad*, 112 N. C. 841, 17 S. E. 538. He neglected a duty to stand by and guard that switch, and the court should have instructed the jury to answer the second issue "Yes." It was a question of law, upon all the evidence. The jury answered the second issue "No," notwithstanding all the evidence tended to show that he did, and it is probable that the jury answered that issue as they did because of an erroneous instruction from the judge on that point. The following is that instruction: "If the jury find from the evidence, under the rules of the company, that Holland, the intestate, was required to throw the switch to the main line, lock it, remain at or near it, and failed

to do so, and that by reason of such failure he was killed, and that such failure was the *proximate* [italics ours] cause of death, then he is guilty of contributory negligence, and the jury should answer the second issue "Yes." In actions for negligence, where the three issues are submitted, the matter of proximate cause cannot be considered by the jury on the second issue. *Dunn v. Railroad*, 126 N. C. 343, 35 S. E. 606.

We think, too, the jury should have been instructed to answer the third issue "No." There was evidence tending to show that, because of a sharp curve in the railroad track just before reaching the switch from the direction of Hamlet, the engineer of train 83 was prevented from seeing the switch signal at a greater distance than 70 or 80 yards—a distance too short in which to stop his train if he had discovered the danger signal at the switch; and the plaintiff contends that that faulty construction of the track, taken in connection with the location of the switch, was a continuing negligence on the part of the defendant, and that, even though the plaintiff might have been negligent in leaving the switch, yet the defendant, because of its continuing negligence, had the "last clear chance" to prevent the injury. We are not of that opinion. We think that the proximate cause of the injury was the failure to stand by and guard that switch; to stand there and see that it was locked to the main line; to see that it was kept locked to the main line until the very moment the engine of train 83 reached it; to stand there and see that no other person interfered with it. If he had stood there and discharged his duty, as the rules of the company and the instructions of the conductor required him to do, he could have prevented the accident, even though the engineer had failed to observe, or could not have observed because of a defect in the construction of the track, the signal at the switch in time to have stopped his train before reaching it.

New trial.

CONNOR, J. (concurring). His honor instructed the jury on the first issue that if they found that No. 33 was a first-class train, and No. 578 was an extra freight train, under the rules No. 33 had the right of way, and it was not the duty of the engineer to protect his train against the extra at Rockingham; that, under the rules of the company, the engineer had a right to presume that he could pass the switch at the siding where No. 578 was standing unless he was signaled not to do so; that if he did not know when he left Hamlet that No. 578 was on the siding, a quarter of a mile east of Rockingham, then he had a right to presume that his track was clear, and he would not be required to stop or slow up for the siding; that, if they believed the evidence, the engineer of No. 33 did not know that No. 578 was on the siding; that if the jury find from the evidence that it was the duty of

the flagman, Holland, after his train, extra 578, had entered the siding at Rockingham, if they find that he had so entered, to remain at said switch, and to signal the engineer of No. 33 to come ahead if it was all right, or to stop if it was wrong, and that said Holland was not at said switch as No. 33 approached, then the engineer on No. 33 had the right to presume that the train on the siding had not used the siding switch, and that the same was set to the main track. The defendant asked his honor to instruct the jury that if they found that Holland, the intestate of the plaintiff, was required by the rules of the company to be at or near said switch north of Rockingham, about 400 yards from the station, when No. 33 passed, and he was not there, and they further "find that his failure to be there caused the said train to enter said switch, then you will answer the first issue 'No.'" His honor gave the instruction, adding the words, "provided you further find that the defendant used ordinary care." Defendant excepted. Defendant instructed his honor to instruct the jury "that if they find from the evidence, under the rules of the company, that Holland, the intestate, was required to signal train No. 33 as it approached the switch leading to the siding upon which extra 578 was, and that the switch was set to the siding, and that he failed to do so, and that his failure contributed to, and was the proximate cause of, his death, then you will answer the first issue 'No.'" His honor gave the instruction, adding the words, "if you find that defendant used ordinary care." Defendant excepted.

I am of the opinion that these two last instructions were complete and correct propositions of law, and that the words, "if the defendant used ordinary care," should not have been added. His honor had explained to the jury the defendant's measure of duty. Certainly, if the plaintiff's intestate was guilty of negligence, and such negligence was the proximate cause of his death, the first issue, "Was the death of Holland caused by the negligence of defendant, as alleged in the complaint?" could not have been answered in the affirmative, even if the defendant had not used ordinary care. It is not the failure to use ordinary care which gives a right of action, but it is such failure resulting in—that is, being the proximate cause of—the injury. *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886, and many other cases. The jury might well have concluded that, notwithstanding the finding that the plaintiff's intestate was guilty of negligence which was the proximate cause of his death, yet, if the defendant failed to use ordinary care, they should answer the issue in the affirmative. Of course, his honor did not intend to so instruct them, but I think his language capable of that construction. Again, the jury were left without any instruction as to what was meant by "ordinary care," as applied to the facts of this case as they

might find them to be. If, as his honor had just told the jury, the engineer had a right to presume that the switch was set to the main track, and was under no obligation to slow down, I cannot see any evidence of want of ordinary care on his part. It is said that there was negligence in the construction of the road approaching the switch. In respect to this question there is not sufficient evidence in the case to enable me to form any opinion. I could not say, as a matter of law, that there was a want of ordinary care in the construction of the road. By the plaintiff's own evidence, the switch was in good condition and working order. Some one must have changed it after No. 38 and No. 45 passed. There is some evidence tending to show that the plaintiff's intestate did so. The witness Crump says that he saw the plaintiff's intestate, after No. 38 and No. 45 passed, about halfway between the caboose and the switch, when he said: "We will back out and go down on the main line, where Mr. Simpson is. I reckon we can get ahead of No. 38." The testimony of the witness is not very clear. In fact, there is an embarrassing want of clearness in all of the testimony. This was, however, for the jury.

I can see no reason for submitting the third issue in this case. There is to my mind no element of the "last clear chance" presented. The decision of the first issue practically settled the case.

In another trial there may be evidence in regard to the construction of the road and placing the switch, and the reasons for making the curve so near to the switch.

I concur in the opinion that there should be a new trial.

WALKER, J. (concurring). I concur in the result and in the opinion of Mr. Justice CONNOR. All things considered, the question, at last, is, was the situation a safe one if the intestate had kept the position assigned to him by the defendant, at or near the switch, so that he could prevent any interference with it and guard against any resulting danger? If so, his failure so to act was the proximate cause of his death, as it was the sole efficient cause. The company had provided a perfectly safe method for the management of its trains at that point, which, if adopted, would have saved the life of the intestate. As he alone disregarded it, and the engineer on No. 33 was not required to anticipate this negligence, his untimely death is referred by the law to his own fault in leaving his post of duty at a critical moment. If he did not leave the switch open, but it was changed by some one else after he left his place, or even by any accident, it could have been readjusted to the main track by him, if he had been there, and No. 33 would have passed, and not have taken the siding.

It is suggested that rule J was introduced by the plaintiff, and on objection by

the defendant was withdrawn, and that this rule prescribed the duty of Holland in respect to the switch. Let this be granted, and there is still evidence in the case on the part of the plaintiff which shows that it was his duty to remain at the switch until No. 33 passed. Plaintiff's witness, Conductor Simpson, testified that he instructed Holland that morning to change the switch and lock it to the main line when he headed in, and in his absence to look out for the safety of the train. There was but one possible thing to do after locking the switch to the main line, in order to further protect his train, which was on the siding, and that was to watch the switch, and see that it was not changed by any one else so as to endanger his train. The conductor further stated that he instructed him to look after the switches in his absence. If he had done this, the accident would not have occurred. There was only one inference to be drawn from the evidence, and that was against the plaintiff.

DOUGLAS, J. (dissenting). I am unable to concur in the opinion of the court in any aspect—either in its construction of the law or its understanding of the facts. The plaintiff, who knew nothing of the accident, introduced only two witnesses besides himself—Thompson and Simpson—both at the time of the accident being in the employ of the defendant, and now running as conductors on other roads. All the other witnesses were introduced by the defendant. The book of rules was produced by the defendant, and identified by defendant's witnesses alone. The record states that the "plaintiff offers in evidence the special rules printed on the time-table, numbered Q and J. Upon objection by defendant, rule Q was ruled out by the court, and plaintiff excepted." The record also states that "Plaintiff introduced in evidence Rules 47-I, 47-J and 47-K from the book of rules of defendant. Defendant objected to the introduction of these rules, as not being applicable to the train in question. Plaintiff withdrew 47-J and 47-K. Rule 47-I was admitted, and read in evidence, as follows: 'I. They are required to observe the position of all switches, and know that such switches are right before passing over them.'" It does not directly state whether rule J was admitted, but, in any event, there is no evidence whatsoever that the intestate had ever been given a copy of the time-table containing the rule, or, indeed, had ever seen or heard of it. The opinion says that the intestate had full notice of rule J. I find no evidence of that fact. If the opinion means that rule J was in the book of rules for which the defendant introduced the intestate's receipt, I can only say that I find no evidence of that fact. If it means that rule J in the time-table is the same as rule 47-J in the book introduced by the plaintiff, I see no proof of that; but, if there were, it was withdrawn upon the ob-

jection of the defendant, who contended that these rules were not applicable to the train in question. If these rules are not applicable to the train in question, they should not be ground for a new trial. There is no evidence that the intestate actually knew he was required to remain at the switch. The mere receipt of the book of rules by the intestate certainly does not tend to prove his knowledge of a rule that is not shown to have been in the book.

Simpson, the conductor of intestate's train, testified as follows: "When I went to the office, Holland was coming from the switch towards the caboose. I saw him change the switch and lock it to the main line. After my train went in, I saw him do that. * * * Q. Did you leave anybody especially in charge of it, except as regulated by the rules? A. No more than the instructions I gave to the man when I left Raleigh that morning—always when he headed in a switch to change it and lock it to the main line, and in my absence to look out for the safety of the train. * * * Q. How far was Holland from the switch when you last saw him? A. I guess he was 70 or 80 feet, coming towards the caboose. He was about where the frog would be—70 or 80 feet from the switch tank, coming towards the caboose. * * * I did not give him any instructions as to this certain switch, because I did not know that we were going to use that switch. My instructions were to look after the switches in my absence. * * * Q. You say you saw Mr. Holland go around there and throw the switch back to the main line? A. He got off the caboose at the switch, and threw it to the main line and locked it. Q. That was done in your presence? A. Yes, sir. Q. And that was the last time you saw Holland at the switch? A. Yes, sir. Q. When you saw him, he was going back to the caboose? A. Yes, sir." This evidence shows that the intestate was not told to remain at the switch, but was told to lock it to the main line; that he did so in the presence of his conductor, and came to the caboose with the assent of his superior officer, or at least in his presence and without any objection on his part; that no one saw him go near the switch again; and that two trains thereafter passed the switch in safety. The instruction of his conductor to "look after the safety of the train," if construed in the light most favorable to the plaintiff, as should be done on a motion for an adverse direction of the verdict, might mean that the intestate must go back and look after the train. We must remember that the intestate is dead—killed by the act of the defendant—and is not here to tell his story. Many a dead man is made to bear a living sin.

The opinion of the court says that it was error to give the following instruction: "If the jury should find from the evidence that the plaintiff's intestate was an employé upon the defendant's train, and was killed in the collision of the defendant's trains in the day-

time, there is a presumption of negligence upon the part of the defendant; and in that case the burden is thrown upon the defendant to disprove negligence on its part." The court seems to admit that it is correct as a general principle of law, applicable equally to employes as to passengers, but that it is not applicable to this case, on account of some assumed state of facts contrary to the verdict of the jury. I cannot concur in any such opinion. The opinion says that the following instruction should have been given: "If you answer the first issue 'No,' you need not answer the other issues. That if you answer the first issue 'Yes,' then, under all the evidence, you will answer the second issue 'Yes,' and the third issue 'No.'" The court again says that "the intestate had full notice of rule J," and bases its opinion upon such assumption of notice. I would be very glad to have evidence of this fact pointed out to me, as I have not been able to find it. It is not shown to be in the book of rules receipted for by the intestate, and I find no evidence whatever offered either by the plaintiff or the defendant that the time-table was ever issued to the intestate, or even ever seen by him. Moreover, the above instruction included the evidence of the defendant, the credibility of which can never be assumed in directing a verdict against the plaintiff. This goes far beyond Neal's Case. I am aware that this was held in *Dunn v. Railroad*, 128 N. C. 343, 35 S. E. 606, but I am not aware of any other case to the same effect. The contrary doctrine that no negligence can be considered that is not directly or concurrently the proximate cause of the accident, has been since fully recognized. In the recent unanimous opinion of *Butts v. Railroad*, 133 N. C. 82, 45 S. E. 472, this court held that "an instruction which makes the liability of the defendant depend on its negligence, without regard to whether such negligence was the proximate cause of the injury, is erroneous." *Edwards v. Railroad*, 129 N. C. 79, 39 S. E. 730; *Curtis v. Railroad*, 130 N. C. 437, 41 S. E. 929. It will scarcely be contended that any difference in proof, either as to nature or amount, can be required to establish the negligence of the defendant, than that of the plaintiff. Both are entitled to the benefit of the same principles of evidence and the equal enforcement of the law.

The doctrine of the last clear chance would seem to apply to the action of the engineer on the incoming train, as he violated the rules of the company in passing the switch without receiving the "all-right signal," as required by rule J, and without "knowing that such switches are right before passing over them," as required by rule 47-I. Moreover, it would seem to be an act of continuing negligence on the part of the defendant to construct a side track and switch at the end of a curve, where they could not be seen in time to stop. In the equal administration of the law, it would seem that rules

binding upon the intestate would be equally binding upon the defendant and its other agents.

CLARK, C. J., concurs in the dissenting opinion of DOUGLAS, J.

(56 W. Va. 670)

STAFFORD v. BOARD OF CANVASSERS OF MINGO COUNTY.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

ELECTIONS—CUSTODY OF BALLOTS—KEYS OF BOXES.

1. When the clerk of a county court has laid before the board of canvassers of the county, for the purposes of a recount, the ballots, poll-books, and other returns of the election, and, without just cause, has refused to receive back into his custody the ballots and care for them during the recesses of the board, while engaged in the recount, such board may lawfully commit the care and custody of the ballots to the sheriff of the county.

2. Retention of one or both of the keys to the ballot boxes, although the ballots are in the boxes, by the board of canvassers or a member thereof, does not justify the refusal of the clerk to preserve and be responsible for the ballots.

3. When all the ballots cast at all the precincts in an election held in the county have been kept in proper custody, and the packages of ballots voted at one of the precincts nevertheless bear evidence of having been tampered with, that fact does not vitiate the ballots cast at the other precincts.

(Syllabus by the Court.)

Petition of John L. Stafford for a writ of mandamus to the board of canvassers of Mingo county. Writ denied.

John H. Holt, Geo. J. McComas, and S. D. Stokes, for petitioner. Mollohan, McClintic & Mathews, John A. Sheppard, Wells Goodykoontz, and S. U. G. Rhódes, for respondents.

POFFENBARGER, P. John L. Stafford, who was a candidate on the Democratic ticket for the office of prosecuting attorney of Mingo county, at the election held in that county in November last, asks for a writ of mandamus to compel the board of canvassers of that county to reject all the ballots cast at said election in said county, and declare the result of the election between himself and his competitor, John A. Sheppard, the candidate for the same office on the Republican ticket, from the returns as certified by the precinct election officers, on the ground that all of said ballots are discredited and vitiated as evidence because of their having been in improper and illegal custody for several days, while the recount in said election was pending. Simultaneously with this application, like petitions, based on the same ground, were filed by the Democratic candidates for sheriff, house of delegates, assessor, commissioner of the county court for short term, and commissioner of the county court for full term.

The facts are as follows: After the board of canvassers had canvassed the returns of the election of the county and declared the result as ascertained by them from the face

of the returns, the Republican candidates demanded a recount as to nine precincts specified by them. After having gone through the nine precincts and counted all of the undisputed ballots, the board of canvassers was asked by the Republican candidates to recount all the other precincts of the county. Thereupon the clerk of the court, in whose custody the ballots and other returns were, was required to produce them to the court. Though not required by law to be kept in the ballot boxes, the ballots of each precinct were in the ballot box used thereat, and locked up therein, each box having two locks and a separate key for each. Upon taking a recess, for some purpose, the board retained one of the keys to each of the ballot boxes, and directed the clerk to take charge of the ballots and boxes and keep them in his custody until the reassembling of the board, and during other recesses while the recount was pending. Because of the retention of the keys by the board, he declined to accept and take care of the ballots. Thereupon the board directed the sheriff of the county to guard and take care of the ballots and ballot boxes in the courtroom. There is some conflict between the petition and the return as to the circumstances which led up to this final action on the part of the board, but there is no substantial difference as to the ground upon which the clerk attempts to justify his act, nor as to the ground upon which the board relies for justification, in requiring the sheriff to guard the ballots. The petition alleges the retention of the keys, but the return denies it. All the ballots cast at all the precincts in the county remained in the courtroom, guarded by the sheriff, except as hereinafter stated, from the 18th day of November until the 25th day of November. At such times as the sheriff was compelled to absent himself for meals or other necessary purposes, he left another man of his selection in charge of the ballots. At times, while the ballots were so in the courtroom under the care of the sheriff, persons having business with the sheriff went in there and transacted the same with him, just as people would have gone into the clerk's office and transacted business with the clerk; and the sheriff and his assistant both swear that nobody was permitted to examine, or in any way interfere with, the ballots or ballot boxes while they so remained in his custody.

The sole question upon which this application turns is whether, under the circumstances, these ballots were vitiated by reason of their custody by the sheriff. It is unnecessary to enter upon a discussion of the extent of the power of the board of canvassers in respect to the custody of the ballots after they have been laid before them by the clerk. It is enough to say that, when the clerk of the county court refuses to take charge of the

ballots and keep them during the recesses of the board, without just cause for such refusal, the law of necessity justifies the board in adopting some other means for the care and preservation of the ballots. The only matter relied upon by the clerk as justification for his refusal to take back and keep the ballots is the alleged retention of the keys to the ballot boxes. That is not sufficient. The law does not require him to keep them in the ballot boxes, nor under lock in any particular kind of a box or drawer, but only in his office. For protection against tampering, the law relies upon the seal on the bags containing the ballots. For anything the law says to the contrary, the clerk may keep these sealed packages on shelves or in open drawers or boxes in his office. They had been, for convenience, placed in the ballot boxes and locked up. Upon taking them back into his custody from the board, as was his legal right and duty, he would have been justified in breaking open the boxes and taking the packages out of them and locking them up in other receptacles, if he deemed it necessary to do so for their preservation. Suppose some one should steal the keys to the boxes from the clerk when he has placed the ballots in them for safe-keeping; would he be justified in casting them into the street, or refusing to perform his duty respecting them in any other way?

The petition suggests that as, in the further progress of the recount, and after the ballots, ballot boxes, and keys had all been returned into the custody of the clerk, it was found that the packages of ballots of one of the precincts bore evidence of having been tampered with, there is conclusive evidence of exposure and tampering with the ballots, either while they were in the custody of the sheriff or in the custody of the clerk, and that in either view of the matter they must be discarded entirely, all of the ballots of all of the precincts, unless it is proper to overcome the presumption of viciousness by extrinsic evidence. There is no evidence that any of the ballots of any of the other precincts have been tampered with. If they are, condemned, it must be because of the inference arising from the fact that the packages of the one particular precinct disclose evidence of having been tampered with. We do not think this proposition tenable. Let us suppose that the ballots have been in indisputably proper custody all the time, nevertheless it appears that one precinct or package bears evidence of having been tampered with; shall we say that this fact alone condemns all others, though such others bear no evidence of having been tampered with, and no evidence is offered tending to show that they have been violated? We know of no authority that goes so far. The books say that ballots are not to be rejected merely because there was possible opportunity to tamper with them, but that it must appear that they were probably tam-

pered with. *Ellis v. Elkin*, 180 Mo. 90, 80 S. W. 333, 31 S. W. 1037.

Two pleas in abatement, tendered by the respondents, set up the pendency of mandamus proceedings in a circuit court, instituted prior to these applications, for the purpose of compelling the board of canvassers to reject all ballots found by them, in the progress of the recount, on which each of the poll clerks had not subscribed his name as required by the statute. No return was made to the alternative writs in those cases, and the board, being satisfied that they could not make sufficient returns to them, went on and rejected all ballots of that class. It is manifest that these proceedings are not for the same purposes as the writs applied for here. They were to compel the rejection of ballots of a certain class, while these applications are for writs to compel the rejection of all the ballots cast at all the precincts in the county for reasons other than those upon which the circuit court writs are founded. "To sustain the plea of a former suit pending, it must appear that the subject-matter and the relief sought in the second suit are the same as in the first suit." 1 Cyc. 27.

For the reasons given, the writs sought in petition No. 1 are refused.

NOTE BY DENT, J. Having been a candidate in the last election and peculiarly interested in the result, I have concluded that it is improper for me to take part in the decision of any contest arising under it, if avoidable. It is true the people have removed my disqualification in part, but

"You may break, you may shatter, the vase, if you will.

The scent of the rose will cling to it still."

Litigants are entitled to submit their causes to a tribunal free from prejudice and bias and whose integrity is above suspicion. Not only this, but a judge is entitled to avoid unnecessary and embarrassing positions, in which his reputation for judicial fairness may be subject to unjust criticism. Political prejudice or bias, I am aware, is no objection to a judge, yet it has been the prolific source of injustice and wrong, and even cruelty, from time immemorial, and always will be until the people adopt some way of selecting their judicial officers independent of their party affiliations and free from party obligations. Judges of courts of final resort should enjoy the approbation of the whole people without regard to party lines, and under no circumstances should they be offensively partisan. Private citizenship is preferable to a judgeship hampered with the lack of public confidence in the ability, integrity, or legal acumen of the incumbent. As this is the last act of my judicial career, I bid my colleagues, lawyers, litigants, and the people a kindly farewell.

With charity for all and enmity toward none,
My judicial work is forever done.

(56 W. Va. 394)

STATE, to Use of CALHOUN'S ADM'R, v.
WOTRING et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

JUDICIAL SALE—BOND OF COMMISSIONER—CONSTRUCTION.

1. In a decree for a sale of land on terms of part cash, part credit, the special commissioner is required before sale to give bond conditioned according to law. The bond is conditioned that he shall "faithfully discharge his duties as such commissioner, and account for and pay over, as required by law, all money which may come to his hands by virtue of said office." The bond binds the principal and sureties for all money

*Rehearing denied January 2, 1905.

received by the commissioner, whether from the cash or deferred payments.

2. A bond given under a statute must be construed, as to the scope of its obligation, to cover the objects of the statute in requiring it, if its words will at all allow such construction, and the statute is to be regarded a part of it.

(Syllabus by the Court.)

Error to Circuit Court, Preston County; John Homer Holt, Judge.

Action by the state, for the use of Calhoun's administrator, against D. M. Wotring and others. Judgment for defendants, and plaintiff brings error. Reversed.

P. J. Crogan, for plaintiff in error. Neil J. Fortney, W. G. Worley, and R. W. Monroe, for defendants in error.

BRANNON, J. In a suit in Preston county, Wotring was appointed a special commissioner to sell lands to pay various debts, on the terms of one-third cash, and the balance in two payments, in one and two years; and the decree required him, before acting, to give a bond in the penalty of \$2,000, conditioned according to law. He gave the bond, with Dawson and Fortney as securities. The bond recites such appointment as special commissioner, and says: "Now, if said Wotring shall faithfully discharge his duties as such commissioner, and account for and pay over, as required by law, all money which may come to his hands by virtue of the said office, then the above obligation to be void." Wotring sold the land for \$3,080, receiving the cash payment, and took from the purchaser two notes for balance of purchase. Wotring was directed and authorized by the decree confirming the sale to collect the notes and pay their proceeds to the persons entitled under the former decree. He paid over the cash payment, and collected, but did not pay over the money collected for the notes; and Calhoun, who was decreed a debt in the case, brought an action on said bond, in which the facts were agreed, and the court gave judgment for the defendants, and Calhoun brought the case here. The decree which required the bond was the first decree, and the subsequent decree provided for no other or further bond. It did not limit the bond to any particular part of the sale proceeds.

The sole question is whether the bond covers the money arising from the notes given for the deferred purchase money, or only the cash payment. It is contended that this bond was intended to cover only the cash payment, and was so understood by the sureties; that Wotring had no authority by law to collect the notes, and that the sureties are not bound for it; that the court ought to have required a second bond in the second decree; and that this omission cannot operate to charge the sureties. By no means can we agree to this contention. Section 1, c. 132, Code, edition of 1887—the law at the time—demands a bond before sale. It prohibits a commissioner from receiving any money before giving the bond, and, in

words, prohibits him from making sale until a bond has been given. *Neeley v. Ruleys*, 26 W. Va. 686. Therefore we cannot say that the law contemplates two bonds in case of sale for part cash and part credit; but we can say that it requires a bond before sale, which ought to be provided for in the decree of sale, and the bond is designed to cover all and any money arising from the sale, whether from an entire cash payment, or part cash and part credit sale. It was decided that payment to a commissioner, who was required to give, but did not give, bond, was not good, and the purchaser must again pay the money, and hence the change in the law demanding a bond before sale. The design is to protect the purchaser, creditor, and debtor having any interests in the proceeds of sale—all the proceeds—and we find no warrant for limiting the protection intended by the statute to any particular part of the proceeds. The statute neither makes nor implies any such distinction. What reason to say that the statute does not intend to protect parties entitled to the money, whether it come from cash or deferred payment? The hurt of defalcation is the same. Why is not Calhoun, whose money was to come from the notes, as much authorized to look to the bond as one whose money would come from the cash payment? The statute does not provide for two bonds. The bond taken under a statute is to be construed by it, if its words will admit of it, as the statute is part of the bond. *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67; 9 Cyc. 756. So much for the object, letter, and import of the statute. Turn to the bond. Its contract and covenant make no such limitation. It is broad. It stipulates that the commissioner shall faithfully discharge his duties as required by law, and the law demands that he apply the money—any coming to him under the sale—as the decree requires. Not only this, but the letter of the bond is that he shall account for and pay over "all money which shall come to his hands." It recites that Wotring had been appointed to sell, and "collect and disburse the proceeds arising from the sale." This means all the proceeds. Notice the words "all money." No distinction is here made as to cash and credit moneys. It says all money coming "to his hands by virtue of said office." Did not this money come to his hands only as commissioner? It was by color of his office. *Lucas v. Lock*, 11 W. Va. 81, 89; *Sangster v. Com.*, 17 Grat. 131. It is a rule that the obligation of sureties will not be strained and stretched beyond the letter of the bond (*State v. Nutter*, 44 W. Va. 385, 30 S. E. 67); but we do not do this in this instance. The letter of the statute, its spirit and object, and the very letter of the bond, bind them for all this money to the extent of the penalty of the bond. We are told that as the farm brought more than the penalty, and it is not likely the court intended the bond to go beyond the cash payment, and the parties so understood, these circumstan-

ces indicate that the bond was intended to go no farther. Why talk about silent intent and understanding, in the face of the words of the bond and the design of the statute? How can a court defeat the statute by guessing at the silent understanding? Such an understanding is not shown. If the design was to limit the bond to the cash payment, why did it not so provide? The decree made no such limitation in its requirement of the bond.

We reverse the judgment, and, upon the facts agreed, give judgment for the plaintiff.

(56 W. Va. 148)

HURSEY v. HURSEY et al.*

(Supreme Court of Appeals of West Virginia.
Nov. 1, 1904.)

MORTGAGE—DEED ABSOLUTE ON FACE—EVIDENCE—INTENT OF PARTIES.

1. If, in a suit to have a deed absolute on its face declared a mortgage, it appears, from all the evidence, that at the time of the execution of the deed the grantee paid a debt for the grantor, and that the parties intended that the sum so paid should be and continue a debt due from the grantor to the grantee and secured by the deed, such payment will be so treated in equity.

2. An admission by the grantee in such case of a declaration, made by him at the time of the conveyance, of his willingness to receive back, at any time within five years, the money advanced by him, coupled with the circumstances of retention of possession and payment of a large part of the taxes by the grantor, and continuous conduct of both parties of such nature as to indicate recognition of an equity or interest on the part of the grantor in the land, constitute sufficient ground for holding the deed to be in fact a mortgage.

3. When such deed is shown to have been intended to be a mortgage, a mere agreement of sale between the grantee and grantor, made long after the date of the conveyance, and without any new consideration moving from the mortgagor to the mortgagee, does not alter the character of the original transaction.

4. The intent of the parties at the inception of the transaction determines the character of the conveyance. If by this test it is shown to have been originally a mortgage, it remains a mortgage, unless the equity of redemption has been in some way extinguished.

5. Explanation of the retention of possession by the grantor, though sufficient to destroy the probative force of that circumstance when standing alone, will not overcome it and admissions by declaration and conduct on the part of the grantee.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by Augustus M. Hursey against John H. Hursey and others. Decree for plaintiff. Defendants appeal. Affirmed.

E. G. Smith and E. A. Brannon, for appellants. Raymond Maxwell, for appellee.

POFFENBARGER, P. By this appeal the soundness of a decree of the circuit court of Harrison county, declaring a deed absolute on its face to be, and to have been originally intended by the parties to be, a mortgage,

and the debt secured thereby to have been paid off, and ordering a reconveyance of the land to the grantor, is questioned. Hence an examination of the findings of fact in the case, as well as the law upon the subject, is necessary.

The tract of land involved is small, containing only 28½ acres, and was not of great value at the date of the deed, October 31, 1887, but has since proved to be valuable oil, gas, and coal land. On said date Augustus M. Hursey, being the owner of the land and owing certain debts, some of which were liens upon it, executed to his brother, John H. Hursey, the deed in question, which contains the following recital as to the consideration: "For and in consideration of the sum of fourteen hundred dollars paid to the party of the first part in the following manner, to-wit, that is to say, said party of the second part is to pay to one Elmer B. Hursey the sum of \$208.00 being the balance of the purchase money due said Elmer B. from said party of the first part on the land hereinafter conveyed said party of the second part is to pay D. G. Watkins Ad'r of William F. Kidd the sum of five hundred and fifty-six dollars and fifty-three cents, being the balance due on a certain note, made by said party of the first part to said Kidd, which is secured by a trust on said land, said party of the second part is to pay Randolph Co. the sum of \$163.24 being the amount of a judgment against party of the first part which is a lien on said land and the said party of the second part paid the sum of \$471.18 the residue of said consideration to the party of the first part by crediting said party of the first part with the said sum of \$471.13 on certain indebtedness owed said party of the second part by the said party of the first part."

As to the Elmer B. Hursey debt, the defendant, the grantee in the deed, filed as an exhibit a release of the deed of trust by which it was secured, dated February 21, 1890, reciting that the debt had been paid by J. H. Hursey. His payment of this debt seems not to be denied. As to the debt due D. G. Watkins, administrator of Kidd, he filed a copy of a release of the deed of trust by which it was secured, dated December 24, 1887, reciting that the debt had been paid "by J. H. Hursey for said A. M. Hursey, except the two credits of interest paid August 31, 1885, and July, 1886, which were paid by the latter to said decedent." John H. Hursey testifies that he paid all of this debt and the unpaid interest thereon, but A. M. Hursey swears he furnished his brother \$210 of the money used for that purpose. The Randolph Company judgment was a judgment of a justice in favor of P. F. Randolph, dated November 30, 1886, for \$161.04, and \$2.20 costs. It remained unpaid until 1891, when the creditor, being under the impression that the lien had expired, took in lieu thereof, without releasing, however, three notes executed by J. H. Hursey, A. M. Hur-

*Rehearing denied January 2, 1905.

sey, and H. L. Hursey, for the sum of \$49.50 each. On two of these he afterwards acquired a judgment for \$76.83, and \$3.60 costs, against A. M. and H. L. Hursey only, the other debtor being then a nonresident. Later he obtained a similar judgment on the other note for \$59.14, and \$3.40 costs. Then, as J. H. Hursey held the title to the land and was out of the state, he instituted a suit in equity, with an attachment against him, and thereby secured a lien on the land, and took a decree for \$154.96, and \$57.90 costs. J. H. Hursey satisfied this decree, taking a release dated November 30, 1895. As to it, he testifies that on the 24th day of December, 1887, he delivered to his brother, A. M. Hursey, sufficient money to pay off this debt, upon his agreement to so apply it, but that he used the money for other purposes and failed to pay the debt. A. M. Hursey denies this, and says that, although his brother furnished him nothing for that purpose, he had himself reduced the debt to about \$41 by payments and credits for lumber. If so, he must have done it after September, 1891, when the notes were given, and this is negatived by the judgment and decree, all of which seem to have been by default. J. H. Hursey paid another debt of A. M. Hursey, not mentioned in the deed, which was originally about \$102, but which, with interest and costs, when paid, amounted to about \$171.80. A. M. Hursey does not claim to have paid any of this, but says the defendant should have avoided interest and costs by earlier payment.

As to the sum of \$471.13 mentioned in the deed, J. H. Hursey insists it was credited on indebtedness due to him from A. M. Hursey, as stated in the deed; but the latter says he owed him nothing, and said statement was made simply for the purpose of making the detail of items correspond with the total amount of consideration named, and, further, that J. H. Hursey had another demand against him which he supposed would be covered by the item of \$471.13. This was the Lowndes debt, for which J. H. Hursey was surety. He adds that they both thought the recital in question would be a protection in case he should become involved. The deed was acknowledged December 24, 1887, and on that date A. M. Hursey executed his note to J. H. Hursey for \$241.87, bearing interest from date, and reciting that it was given for borrowed money. This note has never been paid. The plaintiff denies having owed to him or borrowed from him any money on that date. J. H. Hursey says that at the time of the execution of the deed and note he told the plaintiff he would be glad to accept for the land within five years the amount he had paid for it. In May, 1890, the defendant borrowed money on the land of Mary G. De Quaise. He borrowed a considerable sum of money from one Farland also, securing it by deed of trust on the land, but the date of this loan is not given. He says he borrowed that

money to pay the M. B. Hursey debt and the Randolph debt, and that he paid Hursey December 24, 1887, and gave the plaintiff money to pay Randolph on the same day. He obtained a release from Watkins on that day, but not from Hursey. After this debt had become due, the land was advertised for sale, and, in order to procure money to satisfy it, the sum of \$620 was borrowed from Leeman Maxwell, and payment thereof secured by a deed of trust on the land. Of this sum A. M. Hursey received \$20 and J. H. Hursey \$95.67, and the residue satisfied the Farland debt. The plaintiff negotiated this last loan, and the defendant says he gave him, or let him retain, the \$20 for his trouble.

Both parties admit that at about the time of this last transaction, when the land was threatened with sale for the Farland debt, it was agreed that if A. M. Hursey would obtain the sum of \$600, pay that debt out of it, and pay the balance to J. H. Hursey, and pay him an additional sum of \$900 within three years, making \$1,500 in all, the land should be reconveyed to him. The Maxwell loan was made August 16, 1898. The plaintiff produces certain letters to him from the defendant relating to the loan and their agreement, the first of which is dated August 11, 1898. In it, after having said he had requested the trustee to postpone the sale of the land, he uses the following language, relied upon by the plaintiff: "If he does not put the sale off probably you had better get that man that you expect to get the money off to go on day of sale and buy land for you if sale can be put off I will give you three years if you can get the six Hundred I am needing money very badly now I am building a House and am hard up." The next is dated August 18, 1898, and says, among other things: "He [meaning the trustee] will pay off the Farland note and send Balance to me he will also get the release of the Farland note and have it recorded I have told Thompson to draw an article of an agreement which you will sign." The next, dated August 24, 1898, says: "I have wrote to Thompson and told him to pay you the \$20.00 you had not said anything to me about it & that is the reason why I did not tell him about it when I sent papers I hope things will be all right now and you will be able to pay Each year the amount you expect to pay and all will be all right. Gus I have built a house and have went in debt to build it so I hope you will have success in paying out so I can look for some money." Then follows one dated May 17, 1899, saying the writer is undecided about the leasing of the land for oil and gas on certain terms. To it he appends this: "I promised you the land for \$1500.00 Dollars to be paid within three years from last August I think was the time. But you remember it spoken of that if during that time the land should become more valuable I would be entitled to more money. That land has cost me every cent of 2500.00 Dollars not saying anything about the interest on the money for ten years." Another

dated March 1st, probably 1900 (the printed record says 1890, which is evidently a mistake), says: "I have had 2 or 3 letters from different parties there wanting to buy land or lease it is there any oil or gas excitement there. Now I though there must be on account of getting letters from 2 or 3 different parties wanting to buy or lease. Gus the time is drawing near that the Maxwell note will have to be payed and you know that I will have to pay it or let the land be sold under the hammer which means great loss to any one that has to let property be sold that way of course you know what progress you have made toward the payment of the note by this time to fully know just whether or not you will be able to do so or not. If you feel that you will not be able to do so I think you should tell me so before the note is due so I could have a chance to sell the land and not have to let it go to a forse sale I would like for you to have the land but if you cannot raise the money to pay Maxwell & then raise the money for me it had better be looked after before it is too late when it becomes known that you cannot raise the money for Maxwell the parties who would buy it would rather see the land go to a forse sale so please rite me the facts in the case as to what amount you have paid on the debt." Another letter, dated August 18, 1900, says: "Your letter at hand in regard to land I had wrote you a letter yesterday did not get your letter until this morning Gus you did not make matters clear in regard to the Maxwell debt that is the mortgage that Maxwell holds againce the land that six hundred Dollars of course was borrowed for you and I give him a deed of trust on the land you promised to pay that six hundred dollars in 3 years and you thought you could then borrow the money to pay me I told you I would take fifteen hundred dollars but you was to pay the debt to Maxwell I suppose you understand that but you did not state it clear in your letter I will be willing to do the fair thing which I think I have done all the way through. The land cost me \$1641.00 fourteen years ago I will be willing to take \$1500.00 with the understanding that if the land should turn out to be valuable On count of oil gas or from any cause I think it would be no more than rite that I should have the amount in full and at least a part of interest that the money would of brought in that time." On September 8, 1900, he writes about the making of a deed, and asks for a blank. On the 2d day of April, 1901, John H. Hursey leased the land to O. A. Bingman and G. W. F. Randolph for oil and gas, receiving from them a cash consideration of \$1,050, and then two days later obtained from them an additional cash consideration of \$1,000 for one-sixteenth of the oil and one-half of the gas reserved in the lease. On the day of the date of the lease he wrote a letter notifying his brother of its execution, and asking the address of Maxwell, the holder of the deed of trust. On the 5th day of April, 1901, he wrote his brother as fol-

lows: "Gus you can rest easy now in regard to having a home there I can now lift the morthage without selling land and if it turns out to be a good thing I surely will remember you all kindly It will take the most of the money I got for lease to pay Maxwell but I hope it will turn out that good money will come from it yet. Gus if you will send me the address of Maxwell I will write him and if he will Except the money now I will pay him and stop the interest." On July 28, 1901, he wrote another letter, saying: "Your letter at hand I will direct Thompson to make deed to hoom you may direct and that you will pay to him \$900.00 for me and turn over to him the note I give to Maxwell and he can send them to me when he sends the other papers or after the matter is settled up I will write to Randolph & Bingman and direct them to transfer the lease to you that you may receive royalty and rental thereafter in fact I don't think there will be any need of a transfer of lease for I think the making of the deed to you will be all that is nessary." The other side of this correspondence is not given. John H. Hursey says he did not preserve his brother's letters, and his brother gives no clear statement of their contents. He claims to have had another letter which he is unable to produce, and in which he says John H. Hursey told him he had written Mr. Thompson that, in case the land went to sale, he should deduct from the proceeds thereof \$1,641, and pay the residue to the plaintiff. If this occurred, it must have been about the time the land was advertised for sale for the Farland debt. These letters, his own testimony and that of his sister, Mrs. Cain, constitute all the evidence of admissions on the part of the defendant found in the record. Mrs. Cain says the defendant told her he had agreed to let the plaintiff redeem, but she fixes the date of this conversation in the year 1899, while the correspondence about the \$1,500 proposition was proceeding.

In reviewing this decree, the rule according much weight to the findings of the trial court upon issues of fact must be kept in view. The oral evidence, as well as the inferences arising from some of the established facts, presents conflict. How much weight the circuit court may have given to the admissions of the defendant, both by declaration, in his testimony, and conduct during the course of the dealings between the parties, it is difficult to say, and the application of this rule forbids any interference with the decree, except after mature consideration and an abiding conviction that it is wrong. However, although firmly established and universally recognized and enforced by appellate courts, it lays no restraint upon the power of the court to make a full investigation and careful analysis of the evidence, with a view to ascertaining whether there is such conflict, and whether the decision rests upon findings of fact supported by substantial proof.

There is no evidence of any actual loan

made at the time of the execution of the deed. For proof of the existence of any indebtedness to the grantee on the part of the grantor, nothing appears except the recital of the deed as to the \$471.13, the note for \$241.87, and the testimony of the defendant to the effect that there was such indebtedness. His testimony on that point is most unsatisfactory, for he does not pretend to indicate how this indebtedness was incurred. His conduct contradicts his testimony, for he paid the Lowndes debt, amounting originally to something over \$100, and, when paid, to \$171.30, not recited in the deed as a part of the consideration, but has never asserted or claimed, since that time, any demand against the plaintiff on account of this debt. He treats it as part of the money he claims to have paid for the land, and not as a debt due from the plaintiff. True, he was bound to pay it as surety, but it was still the debt of the plaintiff. The evidence of the plaintiff, respecting the recital and the note has been already referred to, and need not be repeated here.

If it be assumed that there was no such indebtedness, the transaction presents a rather anomalous feature. The defendant, upon the theory of the plaintiff, accepted these conveyances, assumed the payment of certain debts of the plaintiff, and agreed to hold the title to the land for him, carrying this indebtedness until such time as the grantor should be able to pay off the debts or reimburse the grantee for such debts as he might pay. At first this would seem to call for some discussion as to whether the principle announced in point 3 of the syllabus in *Troll v. Carter*, 15 W. Va. 567, applies, and prevents the assertion of a parol trust by the grantor under his own deed, absolute in form. But the operation of the statute of frauds, and the rule against varying or adding to a deed by parol evidence, is excluded by the existence of indebtedness shown in another way. The deed was not delivered until the 24th day of December, 1887, and on that day, as part of the same transaction, the grantee paid a debt of the plaintiff, one of the debts mentioned in the deed as hereinbefore shown. If the evidence shows the parties treated this sum as a debt, and intended it to be a debt due from grantor to grantee, it will be so held in equity. "It seems to be clear, and upon admitted principles of law, that on the payment of H. & A. to L. & T. of the money due from S. to L. & T., S. became the debtor of H. & A. for that amount, as it was paid at his request and for his benefit." *Stephens v. Allen*, 11 Or. 188, 3 Pac. 168. See opinion, page 192, 11 Or., page 170, 3 Pac. To the same effect is *Brumfield v. Boutall*, 24 Hun (N. Y.) 451.

"Once a mortgage, always a mortgage," is a maxim of universal application. Though its operation is subject to certain limitations, these must rest upon a new contract based upon a sufficient valid consideration. Without the introduction of some new element

working a decided and substantial change in the relationship of the parties, that of mortgagor and mortgagee, when once established, must be observed, and the principles applicable thereto enforced, in the settlement of their rights. *Jones on Mort.* § 263; *Russell v. Southard*, 12 How. 189, 18 L. Ed. 927; *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321. It takes a new agreement, based upon an adequate consideration, to do away with this relationship. There is in the mortgagor an equity of redemption, a valuable right, for the extinguishment of which a consideration is necessary. *Villa v. Rodriguez*, 12 Wall. 823, 20 L. Ed. 406. Possibly it could be donated, relinquished voluntarily, without consideration, as any other species of property may be, but the proof of such disposition of it must be positive, clear, and unequivocal. It must rest upon something more substantial than mere inference drawn from conduct or casual declarations of the parties. A subsequent agreement that a mortgage shall be regarded as an absolute conveyance will not be sustained unless shown to have been fairly made and without the exercise of undue advantage by the creditor. "Where an absolute deed is given as a security for a debt, chancery will treat it as a mortgage, though the defeasance rest in parol, especially if the grantor continues in possession. Where the deed was so executed, and the mortgagor afterwards took a lease of the premises from the mortgagee, and the mortgagee, with an intent to veil the transaction and cut off the equity of redemption, covenanted to reconvey to the mortgagor on the payment of a sum of money by a time specified, it was held that, although the lease and covenant gave the transaction the appearance of a conditional sale, still the relation of mortgagor and mortgagee was not thereby destroyed." *Wright v. Bates*, 13 Vt. 341. See, also, *Henry v. Davis*, 7 Johns. Ch. (N. Y.) 40; *Mills v. Mills*, 28 Conn. 213.

As already stated, the defendant says he told the plaintiff, the grantor in the deed, at the time it was made, that he would be glad to accept within five years the amount he had paid for the land. At that time money was obtained from some source with which to pay a considerable part of the grantor's indebtedness, namely, the \$556 debt due the estate of Kidd. The grantor says he furnished \$210 of the money with which to pay it. Assuming that he did, more than \$300 additional money was necessary. Either for this purpose or the payment of some other debts, money was obtained from Farland for which a deed of trust upon the property was executed. When this debt became due, and the creditor advertised the land for sale, the defendant seems to have relied upon the plaintiff to obtain the money from some source with which to save the land, and the plaintiff appears to have been very anxious to do so, and to have exerted himself to that end. When it seemed doubtful as to whether this

would be accomplished, the defendant wrote his brother, saying that, if the trustee did not postpone the sale, he would better get the man from whom he expected to obtain the money to buy the land in for him (the plaintiff). By this he laid grounds for the inference that he felt that his brother had a deeper interest in the matter than he, and that the former must protect and save himself, and was at liberty to do so, if possible, by having some one purchase the property for his benefit. In the event of the postponement, and success in raising the sum of \$600 by a new loan on the property, he wanted the excess over the amount necessary to discharge the debt, because he was needing money badly, and would give time for the payment of additional money which he hoped to get out of the land. Added to this is the further circumstance that the grantor was permitted to remain in possession of the property and use and occupy it as his own. No rent was ever demanded from him, and the payment of taxes seems to have been left to his care. During the whole period from 1887 to 1901 the taxes were for the most part paid by the plaintiff. On one occasion, when he was pressed by the officers for the taxes and unable to pay them, the defendant paid about \$35. He may have paid for some additional years, but the taxes seem to have been paid in the main by the plaintiff. Possession of the land by the grantor, whether rent be nominally reserved or not, and if no rent is even professedly reserved, is entitled to very great weight, if unexplained. *Vangilder v. Hoffman*, 22 W. Va. 1 (Syl., point 7). It is insisted, however, that a sufficient explanation of this circumstance has been furnished by the defendant, who testifies that he permitted this by way of courtesy to his brother and two sisters who made their home there the greater part of the time. This position is taken upon the authority of *Edwards v. Wall*, 79 Va. 321. In that case, however, possession of the grantor was about the only circumstance relied upon by the plaintiff as evidence of the character of the conveyance, save that out of part of the lands sold the purchaser paid the grantor his debt, for the payment of which the land had been threatened with sale at the time of the conveyance. There was no evidence of any admission on the part of the grantee that the conveyance had any character other than that evidenced by its face. On the contrary, the notary who took the acknowledgment testified that, before the deed was signed and acknowledged, the grantor asked that some clause be put in reserving to him some right in the property, and that the grantee remarked that he would not put any provision in the deed, and that, if it were not signed as written, he would not touch it. Moreover, no claim that the deed was intended to be a mortgage was asserted until shortly before the suit was instituted. In the case now under considera-

tion the defendant testifies to an expression made to the plaintiff at the time of the conveyance of his willingness to take his money back and release the land at any time within five years. Long before this suit was commenced, the sum which he was willing to take was fixed at \$1,500. He says this was a contract of sale, but the plaintiff says it was an abatement of \$141.87 from what the defendant had formerly fixed as the amount of the redemption money, and a continuation of the original agreement and understanding for redemption thus modified. Such a modification would not convert what was originally a mortgage into a contract of sale. To have that effect, the new agreement must be predicated upon a consideration, and it is not pretended that any was given or agreed to be paid to the plaintiff by way of extinguishment of his right to redemption. The conclusion of the trial court probably rests more upon the admission of the defendant to which reference has been made than any other circumstance. The great weight of such admission, or evidence tending to establish it, was adverted to in the case of *Sadler v. Taylor*, 49 W. Va. 104, 120, 38 S. E. 583.

He says he made that statement at the inception of the transaction, at the time of the conveyance. The intent at that moment determines the character of the conveyance. *Sadler v. Taylor*, cited; *Hogg's Eq. Prin.* 715; *Dabney v. Green*, 4 Hen. & M. 101, 4 Am. Dec. 503. Although he does not say a loan was made, or that he then said the deed was to be treated as a mortgage, or that he used the word "redeem," he did say he would receive back his money, and, of course, a reconveyance would follow. He does not say that agreement was for a repurchase. As to what he then said, his statement is indefinite, except in respect to his willingness to be reimbursed. That he clearly and fully admits, and the admission is to be construed in the light of the conditions then existing and the subsequent conduct of the parties, bearing in mind that doubtful cases are generally decided to be mortgages. *Conway v. Alexander*, 7 Cranch, 218, 237, 3 L. Ed. 321.

It has been truly stated that the defendant was not a money lender. He was a poor man himself, taking upon himself a great burden for the relief of a distressed brother and sisters. It may not be the ordinary case of a conveyance to secure an antecedent debt or a direct contemporaneous advance, and the motive for the acceptance of the conveyance may not have been that which usually impels such action. The defendant was surety for some of these debts, and this circumstance may have influenced him. But whatever his character, or the inducement to the conveyance, he obtained by it a position of advantage over the grantor respecting the title, and not in the usual and ordinary mode of purchase, and no reason is perceived why

the general principles and rules governing inquiry into the class of conveyances to which this one is said to belong should not be applied.

Another objection to the decree is that it treats the indebtedness of the plaintiff to the defendant as having been satisfied by the oil lease bonus of \$1,050 and the \$1,000 realized from the sale of one-half of the oil and gas reserved. Counsel for appellants say the indebtedness amounted to \$3,639, which exceeds the amount received by the defendant from the oil and gas by the sum of \$1,589. This contention ignores some facts favorable to the plaintiff that are perfectly apparent from the face of the record. The Farland loan paid all, or the greater part, of the large Kidd debt. If the defendant's evidence is true, it paid about \$300, and the plaintiff received the balance of that loan. That loan itself was paid out of the Maxwell loan, and the plaintiff put into his own pocket practically all of what remained of the Maxwell loan. It also includes \$713, the aggregate of the \$241.78, and the \$471.13 recital of the deed, the doubtful characters of both of which have been adverted to. As to the amount of the indebtedness, the evidence conflicts violently. The trial court has passed upon it, and no ground is perceived upon which the finding can be disturbed. There is evidence, both direct and circumstantial, to sustain it.

For the reasons above stated, the decree should be affirmed.

(56 W. Va. 257)

WEIMER, WRIGHT & WATKINS v. TALBOT et al.*

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1904.)

SURETY—SUBROGATION—ASSIGNMENT—JUDGMENT LIEN—SATISFACTION—LIMITATIONS—ACTIONS BETWEEN SURETIES—DEFENSES—EVIDENCE—MEASURE OF LIABILITY.

1. The right of a surety who has paid the debt of his principal to be subrogated to the rights and remedies of the creditor against his co-sureties may be assigned, and, under the assignment, enforced by the assignee.

2. In the absence of evidence to the contrary, decrees adjudicating liens against certain land, ordering a sale of the land, confirming the sale thereof, and ordering payment of the liens out of the proceeds by the special commissioners into whose hands the proceeds of sale have come, in sufficient amount to satisfy a certain one of the liens so fixed, and all others prior thereto, is sufficient proof of satisfaction out of the proceeds of the land of the lien in question.

3. Where a judgment has been kept alive by the issuance thereon of successive executions, as provided by section 10 of chapter 139 of the Code, and finally satisfied out of the lands of one of several co-sureties for the debt out of which the judgment originated, and the assignee of such surety, holding his right of subrogation against other sureties, brings his suit for enforcement of that right against the lands of one of the other sureties within 10 years from the return day of the last execution issued on the

judgment, and the rights of no third parties have intervened which will be prejudiced by the enforcement of the lien by way of subrogation, such suit is not barred by either the statute of limitations or laches.

4. An allegation, by way of defense to such a suit, of payment made by a third co-surety of his portion of the judgment, is not supported by oral testimony of the existence of a release of the judgment as to the land of such co-surety, without production of the release, or a copy thereof, showing payment by him, or proof of satisfaction of the lien as to such land in some way other than by payment out of the proceeds of the lands of the other surety, sold as aforesaid for the satisfaction thereof.

5. Allegations, by way of defense to such a suit, that there remains in the hands of a special receiver in a chancery cause against still another surety, brought for the enforcement of liens against his lands, a fund, which has not been disposed of, derived from rents accruing under a decree by which the lands of such surety were rented, and that the lands of such surety were sold in such suit for an amount more than sufficient to pay all of the liens thereon, and that the judgment in question was barred from participation in the proceeds thereof by the failure of the creditor to assert it in said suit, are not sustained by oral testimony, based on information only, to the existence of such fund, in the hands of such special receiver, and to the understanding of the witnesses testifying that there was a surplus of the proceeds of the lands after satisfying all the judgments asserted in said suit, none of the decrees in said suit being produced in support of the allegation, notwithstanding the nonproduction of the papers in the cause is justified by proof of their loss.

6. The measure of liability of the co-surety in such case is the whole amount of principal and interest paid for him, with interest thereon from the date of payment.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by Weimer, Wright & Watkins against James W. Talbot and others. Decree for defendants, and plaintiffs appeal. Reversed.

J. Hop Woods, for appellants. Ice & Ice and C. F. Teter, for appellees.

POFFENBARGER, P. The assignability of a right of subrogation against a co-surety, proof of payment of a judgment out of the proceeds of real estate of the assignor judicially sold to satisfy it, and maintenance of the lien of the judgment by issuance of executions thereon, are the important subjects for consideration in disposing of this cause.

On the 1st day of February, 1886, the Farmers' Bank of Philippi obtained a judgment, in the circuit court of Barbour county, against J. W. Talbot, principal debtor, and John F. Woodford, J. E. Heatherly, Henry A. Call, J. M. Woodford, Jacob W. Robinson, and Anthony T. Daniels, sureties, for the sum of \$1,781.80, with interest thereon from January 30, 1886, and \$3.75 costs. Talbot was then insolvent. Execution was immediately issued, went into the hands of the sheriff February 15, 1886, and was returned unsatisfied by order of plaintiff's attorney on February 27, 1886. One month later J. M. Woodford assigned and transferred all his personal property to trustees by a written

*Rehearing denied January 2, 1906.

contract, which may be seen by reference to the case of *Heatherly v. Bank*, 31 W. Va. 70, 72, 5 S. E. 754. On the 10th day of May, 1886, said bank instituted a suit in equity against said J. M. Woodford and numerous other defendants, some of whom are judgment creditors, for the purpose of subjecting Woodford's real estate to the satisfaction of the liens thereon. On the 10th day of July, 1886, after the commencement of said suit by the bank, Weimer, Wright & Watkins recovered a judgment against said Woodford for \$354.87 and \$12.20 costs, and on the same day Greer & Laing obtained a judgment against him for \$983.64 and \$12.20 costs. On this last judgment, \$323.62 was paid March 5, 1887. Some time in the year 1887 James E. Heatherly, one of the sureties for the Talbot debt, commenced a suit in equity to restrain the Bank of Philippi from enforcing payment of its judgment against him, and obtained a decree on the 22d day of July, 1887, adjudicating that the personal property assigned to said trustees by Woodford should be treated as a payment pro tanto of judgments, debts, and liabilities due from Woodford to said bank, and that the principal debtor and all the sureties except Heatherly should pay the said judgment of \$1,781.80, then amounting, with its interest, to \$1,981.74, and awarding execution thereon. On the 30th day of July, 1887, the execution was issued, and on the 3d day of October, 1887, returned unsatisfied in consequence of an appeal from the decree awarding it. The nature of that decree, and the disposition of the appeal from it, will appear by reference to *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754. Pending these proceedings, Greer and Laing commenced a chancery suit against Woodford to enforce satisfaction of their lien, and, after the decision of this court in *Heatherly v. Bank*, the three causes—*Farmers' Bank of Philippi v. Woodford et al.*, *Heatherly v. Bank*, and *Greer and Laing v. Woodford et al.*—were heard together, on the 19th day of July, 1889, when a decree fixing the liens upon Woodford's property, and directing a sale thereof, was entered. Sale was afterwards made and confirmed by a decree entered on the 30th day of October, 1889. From these decrees an appeal was taken, and they were reversed and the causes remanded, as shown in *Farmers' Bank v. Woodford*, 34 W. Va. 480, 12 S. E. 544. The modifications of the decrees directed by this court related to the priorities of liens and distribution of proceeds of the sale of the real estate. The sale itself was not disturbed. Upon the mandate of this court, the circuit court on the 4th day of June, 1891, made another decree, altering the order of payment, and directing a distribution of the proceeds of sale to the creditors in the order of preference thereby fixed.

Out of the proceeds of the personal property which went into the hands of Teter and Call, trustees, the circuit court, by its

first decree, applied \$524.02 on the judgment of \$1,781.80 as of the 26th day of September, 1887. This application of the trust fund was one of the errors corrected on the appeal. By the last decree, it was ascertained and determined upon the mandate of this court that the *Farmers' Bank of Philippi* had the sixth lien upon the real estate of James M. Woodford for the sum of \$1,961.95, with interest from September 26, 1887, on account of said judgment of \$1,781.80, subject to a credit of \$594.13, as of November 4, 1889, paid by John F. Woodford, instead of the eighth, as determined by the first decree. By said decree the court ascertained that the judgment of February 1, 1886, with interest, costs, and damages, amounted on the 19th day of July, 1889, as to James E. Heatherly, to \$2,357.69. Execution for that amount was awarded against him, and was issued on the 8th day of July, 1891, and returned September 7, 1891, "No property found." It was also ascertained that the judgment, as to all the other defendants was of the original amount, subject to the credit aforesaid, and execution was awarded against them accordingly, and issued on the 8th day of July, 1891, and returned on the 26th day of September, 1891, by order of the attorney for the plaintiff. Prior to its return the officer made this memorandum on it: "I levied this execution on money in the Tygart's Valley Bank sufficient to pay execution on September 5, 1891." Early in these proceedings, to wit, October 22, 1887, James M. Woodford executed to Greer & Laing and to Weimer, Wright & Watkins a written assignment of "whatever right or cause of action" he had or might have "for contribution or subrogation or otherwise" against his co-sureties, or either of them, "in the judgment for \$1,781.80, with cost," etc. These assignees brought this suit on the 28th day of March, 1900, less than nine years from the date of the issuance of the last execution on the judgment, to be substituted and subrogated to the rights of James M. Woodford against John F. Woodford for the amount paid on said judgment out of the proceeds of the sale of said James M. Woodford's real estate in excess of his equitable portion thereof, which the plaintiffs allege was one-half, less the payment of \$594.13 paid by said co-surety; the principal debtor and all the sureties except James M. Woodford and John F. Woodford having been insolvent, by reason of which nothing was collected from any of them on account of said judgment. There is some contention of payment made by Heatherly, one of the sureties, and of ability to pay by the estate of Robinson, another one of the sureties, but these questions, for convenience, will be postponed for the present.

That an equitable claim, such as the right of a surety who has paid the debt of his principal, or more than his equitable part thereof, to be subrogated to all the rights

and remedies of the principal against his co-sureties, is an equitable demand for money, which may be assigned in equity, would seem to be too plain to require any citation of authority. Although originally a matter of equitable cognizance, contribution between sureties long ago became a legal right, enforceable by courts of law. *Brandt on Sur. & Guar.* § 289. The right to recover at law seems to be limited to an aliquot part of the debt, to be determined by a division according to the whole number of co-sureties, solvent and insolvent. But in equity a surety who pays the debt of his principal is entitled to have, as contribution from his solvent co-sureties, a pro rata amount of the sum paid by him, based upon the number of solvent co-sureties, excluding the insolvent ones. *Brandt on Sur. & Guar.* § 288; *Story's Eq. Pl.* § 496; *Preston v. Preston*, 4 Grat. 88, 47 Am. Dec. 717; *Dent v. Walt's Adm'r*, 9 W. Va. 41. Whether the right in this case is legal or equitable is immaterial. As an equitable demand for money, an assignment of it is enforceable in a court of equity. However, authority for the proposition is not wanting. 27 Am. & Eng. Enc. Law, 271; *Pierce v. Garrett*, 65 Ill. App. 682; *York v. Landis*, 65 N. C. 535; *Bank v. German*, 3 Pa. 300; *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445.

It is not upon nonassignability of the right, however, that the defense is based. One contention is that payment of the judgment out of the proceeds of the sale of James M. Woodford's real estate is not proved. The decrees hereinbefore referred to are exhibited with the bill, and relied upon as proof of payment. They show that the property was sold for \$7,510. The debt in question was made by the last decree, sixth in order of payment, and these six liens amounted, in the aggregate, to only \$2,834.66. There were judgments amounting to \$4,186.72 which had preference of payment out of the fund arising from the sale of the personal property, but that fund amounted to \$4,200.52, which was probably sufficient to cover all of these judgments, with the interest thereon. Whether it was or not, the decree gave preference over the bank judgment to only one of these judgments—that of A. Block & Co. for \$325, which was one of the first six liens, and included in the total of \$2,834.66. Hence there can be no doubt as to the sufficiency of the proceeds of the sale of the real estate to pay the judgment in question. But it is urged that the decrees do not show that it was paid. This contention is based upon certain recitals in the decrees. One is in the decree of July 19, 1889, and is as follows: "But no part of the proceeds of the sale of said lands shall be applied to the satisfaction of said debt of \$1,757.79 until execution thereon has been issued and returned." This is the same judgment reduced by an erroneous application thereto of part of the proceeds of the per-

sonal property which was corrected on the appeal as above stated. Other recitals relied upon are in the decree of October 30, 1889. They are as follows: "But nothing herein contained shall be construed to release the said proceeds arising from the sale of said lands of James M. Woodford from the lien existing thereon in favor of the Farmers' Bank of Philippi for his equitable share of its demand against him and others for said sum of \$1,757.79, when the same shall be ascertained after allowing him credit of \$542.02, with interest thereon from the 26th day of March, 1886, paid by him upon the original judgment of \$1,781.80, mentioned in said decree of sale. * * * It is further ordered that, whatever sum may be paid on said debt shall be applied as a credit on the said debt eighth in order of priority aforesaid, as of the date of payment thereof, nothing herein contained shall be so construed as to prevent said special receiver from issuing other executions for the said debt or any balance thereof, and the amount so paid by said J. F. Woodford shall be a credit on said execution, but shall be no release to him of the balance thereof." Another is in the last decree, carrying out the final decree of this court, and reads as follows: "In case execution shall issue upon the said debt of \$2,359.89 against said Heatherly, subject to the credit of \$594.13 as of November 4, 1889, paid by J. F. Woodford, or in case execution shall issue against the other defendants therein for the sum of \$1,781.80, and \$3.75 costs, with interest from February 1, 1886, subject to the credit aforesaid, and the said debt shall be paid by any of the said defendants therein except by the principal, J. W. Talbot, then in that event it is further adjudged, ordered, and decreed that the proceeds of J. M. Woodford's lands, in or which may come into the hands of said commissioners, applicable to the payment of said debt of \$1,961.95, decreed to the Bank of Philippi, shall be liable to such co-surety for his equitable proportion of said debt for which he is liable, but all questions touching the amount thereof are reserved for such order of the court as may be necessary and proper to protect the rights of all the sureties in said judgment." From what has been said, it must be apparent that the recitals in the first two decrees are now without effect, for they were reversed and held for naught in so far as they fixed the order of distribution of the money. The recital in the last decree does not stay the distribution of the fund, but only reserves to the court the power to enforce contribution among the sureties. This contention, however, is set at rest and shown to have no foundation by another part of the last decree, which orders payment of the proceeds upon the debts in the order fixed by that decree. It reads as follows: "It is further adjudged, ordered, and decreed that the said commissioners, J. Hop

Woods and Chas. F. Teter, shall withdraw the fund deposited in bank by a former order herein, and, with it and the proceeds of the uncollected notes for the purchase money of the lands of the said James M. Woodford, pay the debts, so far as said funds will avail, in the order herein mentioned, after payment of costs and expenses as herein provided." The stay in the decree of July 19, 1889, if not released by the action of this court on the appeal, is undoubtedly released by the decree of June 4, 1891. It shows conclusively that the money in the hands of the special commissioners was appropriated to, and directed to be paid on, this debt; and it would be a most violent presumption to say that these commissioners, special officers of the court, had not paid over the money.

Laches and the statute of limitations are relied upon as other defenses. The answer to this is that the assignment made by Woodford to the plaintiffs carries the benefit of the judgment lien upon the property of John F. Woodford held by the Farmers' Bank of Philippi. On satisfaction of the judgment, James M. Woodford became entitled to all the rights to and securities for that debt held by said bank. By his assignment to the plaintiffs he invested them with the same rights, including the benefit of the lien of the judgment upon the lands of John F. Woodford. That lien was not allowed to lapse. As already shown, executions were issued upon it within two years; and, before the expiration of ten years from the date of the first of the executions, another one was issued on the 8th day of July, 1891, by reason of which the lien would continue for another period of ten years. Before the expiration of that time, this suit was brought to enforce the lien. Hence neither the statute of limitations nor the principle of laches applies. Code 1899, c. 139, § 10. The lien of a judgment ceases to exist when the right to sue out execution or to bring a scire facias or action thereon is barred by the statute of limitations, and not before. *Shipley v. Pew*, 23 W. Va. 487. "Where execution issues within two years as aforesaid, other executions may be issued on such judgment without notice, within ten years from the return day of the last execution issued thereon, on which there is no return by an officer, or which has been returned unsatisfied." Code 1899, c. 139, § 10. Since the lien exists as long as execution may issue on the judgment or scire facias, or action thereon may be had, neither the statute nor laches can bar it, for the lien gives a clear right to satisfaction of the judgment, and equity will enforce it. Its existence precludes the possibility of any waiver, abandonment, lack of diligence, or any other element of laches.

That the right of subrogation may be lost by lack of diligence in its assertion against third parties is not overlooked, but here the rights of no such persons have intervened. Such lack of diligence is termed laches in

Gring's Appeal, 89 Pa. 336, but it is more like an estoppel in pais than laches. Laches presupposes a right of action founded upon contract or cause of equitable relief between parties to a contract or a transaction out of which an equity arises. It is a failure to prosecute in time that cause of action, or until after such changes in condition as render the enforcement of the right inequitable. 18 Am. & Eng. Ency. 97. Estoppel in pais extends beyond the parties to the cause, and operates in favor of third parties. Herman. Est. & Res. Jud. § 7, cls. 3, 4; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. However the principle may be classed, there are no facts calling for its application.

Whether, in the absence of a lien, the enforcement of which gives equity jurisdiction as long as it exists, the right to contribution in equity, where the plaintiff seeks more than an aliquot part of the debt, determined by a division by the whole number of the sureties, because of the insolvency of some of them, is barred by the five-years statute of limitations, does not arise here. Part of such claim would be a legal demand, as to which there is concurrent jurisdiction in equity. As a whole, it would be a demand cognizable only in equity, unless the statute has wrought a change in that respect. Section 3 of chapter 101 of the Code of 1899 gives to a surety having right of action for the amount paid by him a summary remedy. It says he may, "by motion in the circuit court of the county, obtain judgment or decree against any person against whom such right of action exists for the amount so paid, with interest from the time of payment, and five per centum damages on said amount." Section 5 of said chapter says that, if the principal debtor be insolvent, the surety against whom a judgment or decree has been rendered may obtain a judgment or decree, by motion in the circuit court, against any co-surety or his personal representative for his share, in law or equity, of the amount for which the first-mentioned judgment or decree may have been rendered, and, if the same has been paid, for such share of the amount so paid, with interest thereon from the time of such payment. The object of these two sections seems to be not to do away with any distinction there may be between law and equity jurisdiction, but only to provide more simple and speedy remedies for the surety in both forums. Under the third section, he may have either a judgment or a decree by motion. Under the fifth section, he may have, by motion, either a judgment or decree, if a judgment or decree has been rendered against him on the contract for which he was surety. Construction of these provisions is not proper here, however. Nothing in the case calls for it.

The answer relies upon payment by Heatherly of his portion of the judgment, and an attempt is made to sustain this affirmative allegation by the evidence of a witness who

says that the release deed book in the clerk's office of the county court shows that Heatherly's share has been paid. Neither the release itself, nor a copy thereof, is produced, and the witness does not undertake to say by whom the payment was made. His testimony is only secondary evidence, and therefore could not be considered, had proper objection to it been made; and, if it were competent, it fails to show that Heatherly paid any portion of the judgment. It only shows a release of the judgment, without indicating who paid it. Payment out of the proceeds of Woodford's real estate would justify the execution of the release, and may account for its existence. This evidence is wholly insufficient to sustain the allegation of payment by Heatherly.

Another defense is that there is in the hands of C. F. Teter, special receiver in the chancery cause of *P. O. Robinson v. J. W. Robinson*, one of the sureties for the bank debt, a sum of money amounting to \$1,000 or \$1,500, belonging to the estate of said Robinson, and derived from rents of his real estate under a decree in said chancery cause of *Robinson v. Robinson*. The object of that suit seems to have been to enforce the lien of a judgment against Robinson's land, and the real estate was evidently placed in the hands of a special receiver and rented for a time before it was sold. The claim is that these rents were never applied to the payment of any judgments, and still remain in the hands of a special receiver. The only evidence of this is the testimony of John F. Woodford and L. D. Robinson, a son of the said J. W. Robinson, who died before the institution of this suit. The record of the chancery suit of *Robinson v. Robinson*, which would show what became of these funds and the proceeds of his lands, is not produced. It is said to have been lost. But the order book would undoubtedly show something concerning the disposition of his estate. None of the decrees in that case are produced in the effort to substantiate this contention, and this testimony is open to the objection interposed to the evidence offered concerning the alleged Heatherly payment. It proves nothing. John F. Woodford testifies that it is his understanding that Robinson's real estate sold for more than enough to satisfy all the liens upon it, and that, but for the failure of the Farmers' Bank to present in that suit its judgment against Robinson, that surety would have paid out of the proceeds of his real estate his portion of the debt. This, again, is only secondary evidence, offered without any foundation for it having been laid, and it falls far short of proving the affirmative matter of defense alleged. The witness does not state what the judgments against Robinson amounted to, the amount realized from the sale of his real estate, the costs of the suit, or any of the facts upon which the issue made depends. He does not even say of his own knowledge that there was a sur-

plus, but only that it is his understanding. Whether, if proved, the matter relied upon would be a good defense, it is unnecessary to inquire.

The defendant also relied upon the alleged levy of the execution of July 8, 1891, upon money in the Tygart's Valley Bank, to which reference has been made. The officer who made the memorandum on the execution testifies that there was in fact no levy made. He saw no money, had none in his hands, nor any dominion over it, but made the memorandum upon the assurance of the cashier that the money would be forthcoming at any time he might want it. Moreover, he amended this return, if such it may be considered, before delivering up the execution. The memorandum was made on September 5, 1891. On September 26, 1891, the attorney for the plaintiff indorsed upon the execution an order directing it to be returned unexecuted. On the execution, the officer wrote, "Returned unexecuted by order of Att'y for plaintiff." Reading all these indorsements together, it is manifest that the return was made on or after September 26, 1891, and it negatives effectually the inference of any satisfaction of it, or liability for the amount of it by the officer, arising from the memorandum made on September 5, 1891.

It follows from these conclusions that the circuit court erred in dismissing plaintiffs' bill. They are clearly entitled to enforce the lien of the judgment against the real estate of John F. Woodford for one-half of the judgment of February 1, 1886, with interest thereon from said date, and \$3.75 costs, less the sum of \$594.13 paid by said John F. Woodford November 4, 1889.

By the decree satisfied out of the proceeds of the lands, the principal sum in the judgment, and the interest thereon to September 26, 1887, were aggregated; the amount ascertained to be \$1,961.95, and interest allowed on the aggregate from said date; and the proceeds of the land sold were held liable to contribution in favor of any of Woodford's co-sureties who might satisfy the decree, on the basis of said aggregate sum, subject to the credit aforesaid. Under section 18, c. 131, of the Code, a decree for the principal, with interest added to the date of the decree, June 4, 1891, could have been made, allowing interest on the aggregate from that date. Hence the law authorized a decree for interest upon interest after decree, in that way and to that extent, in favor of the creditor against all the sureties; and, upon his satisfying the decree with such interest, the same right passed to J. M. Woodford against his co-sureties, together with the right to interest on the whole amount paid by him for his co-sureties from the date of payment. Though it is the lien of the original judgment his assignees are now enforcing, a decree based upon the same lien has rightfully augmented the principal

sum by the addition thereto of accumulated interest as aforesaid. This sum was further increased by the interest thereon until the date of payment, subject to deduction of the amount paid by John F. Woodford, as of the date of that payment, and one-half of the judgment, with interest thereon as aforesaid until paid, and costs, and interest on the aggregate from the date of payment, subject, however, as to said one-half, to a deduction, as of November 4, 1889, of the sum of \$594.18, paid by John F. Woodford, is the measure of liability of said John F. Woodford by way of contribution. "The amount of the payment made, with legal interest, is the measure of recovery." *Faires v. Cockerell*, 88 Tex. 423, 31 S. W. 190, 639, 28 L. R. A. 523; 27 Am. & Eng. Ency. Law, 207. Out of that sum, if sufficient, the plaintiffs are entitled to have satisfaction of their judgments, and, if insufficient to pay them in full, it is to be applied on them pro rata. But the amount for which decrees are to be entered can be more conveniently ascertained, under these principles, in the circuit court, than here.

For the reasons above stated, the decree complained of will be reversed, and the cause remanded, with directions to enter a decree for the plaintiffs in accordance with the principles and directions herein stated, and for such further proceedings as the rules and principles governing courts of equity may require.

(56 W. Va. 356)

ARMENTROUT v. S. H. SMITH & BRO.
et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

RES JUDICATA—ACTION ON JOINT NOTE—JUDGMENT—MERGER.

1. A. instituted his action against S. & Bro. only upon two joint promissory notes made by S. & Bro. and H. Judgment was recovered by him in the action against S. & Bro. for the full amount due upon the notes, which judgment remained in full force and effect. At a subsequent term, A. caused the action to be reinstated upon the docket, remanded to rules, summons to be issued thereout and served on H., who appeared at the next term and pleaded the judgment against S. & Bro. as a bar to the suit against him. The court sustained the plea and dismissed the suit at the costs of the plaintiff.

Held, no error.

(Syllabus by the Court.)

Error to Circuit Court, Grant County; R. W. Dailey, Judge.

Action by Aaron Armentrout against S. H. Smith & Bro. and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Reynolds & Foreman, for plaintiff in error.
A. J. Welton and H. B. Gilkeson, for defendants in error.

MILLER, J. S. H. Smith & Bro. and John G. Harman executed to Aaron Armentrout

their two joint promissory notes—one for \$290 and the other for \$200. On the 27th day of January, 1897, Armentrout sued out of the clerk's office of the circuit court of Grant county a summons, commencing his action against S. H. Smith and R. C. Smith, as partners, composing said firm, requiring them to answer him of a plea of trespass on the case in assumpsit. At the February rules, next thereafter, he filed his declaration in the action, in which he counted on said notes against Smith & Bro., and also against Harman, but Harman was not included in or served with the summons, nor was he otherwise brought before the court. In this condition of the case, judgment was taken by default against Smith & Bro., only, for \$338.20, the amount due to the plaintiff upon the notes sued on. Afterwards a motion of the plaintiff to have the judgment set aside was overruled by the court, but "without prejudice to the right of said Armentrout to bring suit on said notes against the said S. H. and R. C. Smith and John G. Harman." Later a new action was instituted against the Smiths and Harman upon the notes, totally disregarding the former action and judgment therein. Harman pleaded the former judgment in bar of the second action against him. His plea was sustained, the action dismissed at the costs of the plaintiff, and the judgment of dismissal affirmed by this court. *Armentrout v. Smith et al.*, 52 W. Va. 96, 43 S. E. 98.

After the affirmance of the last-mentioned judgment, the circuit court, on motion of the plaintiff, reinstated the original action on the docket, awarded summons thereout against Harman, and remanded the case to the rules to be matured thereat. Summons was issued and served on Harman, who at the March term, 1904, appeared and moved the court to dismiss the action, but admitted that, if plaintiff was entitled to judgment against him therein, such judgment should be for \$366.28, with interest thereon from that date. The court sustained his motion, dismissed the action, and rendered judgment against the plaintiff for costs. That judgment is now before us for review on writ of error. Harman was not a party to the original action at its commencement, or when judgment was rendered therein as aforesaid against Smith & Bro., his co-makers of the notes. The process to commence a suit shall be a writ, commanding the officer to whom it is directed, to summon the defendant to answer the bill or action. Code 1890, c. 124, § 5; *Gelser Mfg. Co. v. Chewing*, 52 W. Va. 523, 44 S. E. 193. The last-mentioned judgment became and is now final and binding upon the plaintiff, Armentrout, and defendants S. H. and R. C. Smith. That suit was ended by the judgment therein. "It is res judicata. The original cause of action is gone." 1 Herman, Est. & Res. Jud. § 124. No other or further judgment could or can be rendered against Smith & Bro.

*Rehearing denied January 3, 1905.

upon the notes. The reinstatement of the first action on the docket and issuance of summons thereout against Harman, if it had any legal effect, was a new action against him alone for the recovery of the money due upon the notes, which before that time had been adjudicated between Armentrout, payee, and Smith & Bro., co-promisors therein with Harman. Such action cannot be maintained. 1 Herman, Res. Jud. § 564, says: "So, in an action brought against two or more of the makers of a joint and several note or bond, without including all, it discharges the remainder of them; the obligation being lost in the judgment that binds only those parties against whom it is rendered. A judgment on a bond or contract extinguishes that bond or contract, because there cannot be liabilities on both instruments, and, as a judgment and a bond both import an absolute liability, the legal obligation of the inferior obligation must be considered as at once blotted out. So a judgment against a joint debtor on a joint cause of action merges the liability of all." 2 Black on Judg. § 770, cites the Supreme Court of Wisconsin as follows: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors, and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so, because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or canceled as to one, and be existing and operative as to another, joint debtor." With reference to the number of the defendants, and who must be joined, 2 Tuck. Com. 212, says: "There is, however, this objection, in the case of a joint contract, to the nonjoinder of one or more of the several parties liable: that, if judgment be obtained against one in a separate action against him on such contract, the plaintiff cannot afterwards proceed against the parties omitted, and consequently loses their security." Freeman on Judg. § 231; Am. & Eng. Ency. Law, 342, 344. Code 1899, c. 125, § 52, provides that "where, in an action or suit against two or more defendants, the process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against them all." This statute applies only to joint defendants against whom process has been issued, but not served as to one or more of them. It permits the plaintiff to obtain judgment in the pending action against those served, and to have execution and judgment lien as to them, although the others also sued and jointly liable may not be before the court. In *Snyder v. Snyder*, 9 W. Va. 415, it is

held that "a further exception to the rule that in a joint action there must be a joint judgment is found in the fifty-second section of chapter 125 of the Code." The opinion, on page 420, states that "under this statute there may be had as many several judgments on a joint obligation as there are parties to the obligation, dependent wholly upon the service of process." In the former opinion in this case (52 W. Va. 96, 98, 43 S. E. 98) the court says: "The statute, being in derogation of the common law, must be construed strictly, and its meaning cannot be so extended as to authorize separate actions on a joint contract against each of the obligors. To hold this would be to entirely destroy the distinction between joint and several contracts, and to make all contracts several. The motion to set aside the judgment in the first action, which was overruled, has nothing to do with the question in controversy, as, under the statute, that judgment, though not set aside, would not be a bar in the same suit to new process, and a separate judgment against a defendant not served, for the statute expressly authorizes this course. Because, however, the statute authorizes a new summons and a separate judgment in the same suit, it cannot be held to authorize a new suit on the same cause of action, without regard to the first." The court then holds that "section 52, c. 125, Code 1899, so far changes the common law as to permit a plaintiff to take several judgments against several joint obligors, as they are served with process in the same suit. It does not authorize more than one suit against all or any of the obligors, whether served with process in the first suit or not. As to the bringing of more than one suit on the same joint cause of action, the common-law rule remains unchanged." *Armentrout v. Smith et al.*, 52 W. Va. 96, 43 S. E. 98. No action having been commenced or prosecuted by the plaintiff against Harman on the notes, or either of them, in controversy, until after the said judgment was rendered thereon against Smith & Bro., which has not been reversed or in any way impaired, the alleged cause of action as to Harman was and is merged in and extinguished by that judgment.

For the reasons stated, the judgment complained of is affirmed.

(56 W. Va. 494)

UHL v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 13, 1904.)

WATER COURSES—OVERFLOW—RAILROADS—DEFECTIVE CULVERTS—VERDICT—FAILURE TO OBJECT.

1. Overflow waters of a natural stream in times of ordinary flood or freshet, flowing over or standing upon the adjacent lowlands do not cease to be part of the stream, unless and until separated therefrom so as to prevent their return to its channel.

2. Failure of a railroad company to make culverts in an embankment constructed by it for its roadbed, on lands subject to such overflow, of sufficient size to permit the water behind the embankment to rise and fall as fast as the stream does, is negligent and unskillful construction, making the company liable in damages for resulting injury.

3. When no objection, by motion to set aside or otherwise, has been made, in the trial court, to a verdict rendered, subject to the action of the court upon a demurrer to the evidence, it cannot be disturbed in the appellate court on the ground of excessiveness or paucity of damages.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Action by Winnie Uhl against the Ohio River Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Vandervort and Van Winkle & Ambler, for plaintiff in error. V. B. Archer and Wm. Beard, for defendant in error.

POFFENBARGER, P. This case calls upon the court to say whether injury to real estate resulting from interference with the overflowing waters of a navigable river, at a point outside of its banks, by means of an embankment, gives a right of action for damages. There is practically no controversy as to the facts, and in all material respects the question is one of law. The defense is predicated mainly upon three propositions: First, that such waters are deemed to be surface waters; second, that, even if, by the common law, such waters, in England, constitute part of the river, the rivers of this country, by reason of their size and character as great navigable bodies, would, on the general principles of that law, be excepted from the rule, and classed with the waters of the sea; third, that the overflow was the result of an extraordinary rise in the river, the consequences of which the defendant was not bound to anticipate or provide for in the construction of its embankment.

Winnie Uhl was the owner of a lot situated in the town of Williamstown, on the Ohio river, with a frontage of 37 feet on a street running practically parallel with the river, and lying between the lot and the river. From the street the lot falls away into a depression, in the lowest part of which there is a small channel, in which, during part or all of the time, there is a stream of water, fed by springs, which carries, in addition to the water from the springs, the surface water from the basin. Passing on below the limits of plaintiff's property this depression reaches the river at some point not far distant. The defendant located its railroad on the street in front of plaintiff's property, and, passing on down the river, crossed the depression a short distance below it. In the construction of its road the defendant threw up an embankment in the street in front of plaintiff's property, the top

of which is three feet above the level of the lot, and maintained it at about the same height to a point beyond the depression. At the crossing of the drain, the elevation is 10 to 15 feet, and at that point a small opening is made in the fill, called a "culvert." The culvert is three feet square on one side and eighteen inches by two feet on the other. It is sufficient to carry the waters accumulating in the drain from the springs and from the surface, but insufficient to let in the waters from the river, when rising, fast enough to make the rise in the basin keep pace with that of the waters of the river, and to allow the waters in the basin to subside, when the river is falling, as fast as the river goes down. In the flood of 1898 this resulted in the injury complained of. The river rose rapidly, and attained a very high stage. When the river reached the top of the railroad company's embankment, the water in the basin had not attained that height by about seven feet, according to the testimony of witnesses, and the waters from the river flowed over the embankment, and fell upon the plaintiff's premises, tearing up and washing away the soil, undermining the foundation of buildings, flooding a cellar, loosening from its anchorage a frame building called a "cooper shop," containing tools, materials, and barrels, and causing the same to float, and finally to be carried away. When the river subsided, the outflow of the waters in the basin was so impeded by the embankment, with its insufficient culvert, that water remained upon the lot much longer than it would have done but for the interference of the embankment.

In order that the discussion of the main proposition may be unembarrassed by any consideration of the rules of pleading, the action of the court in overruling the demurrer to the declaration will be passed for the present.

The space taken up in the briefs with the discussion of the distinction between the principles of the common law and the Roman civil law governing the rights of parties in respect to surface waters and of the decisions in those states which have adopted the principles of the civil law on that subject serves the purpose of a caution to the court to observe that distinction in attempting to analyze the cases as reported, and deduce from them rules and principles applicable to the questions here presented.

In *Neal v. Railroad Co.*, 47 W. Va. 316, 34 S. E. 914; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859, and other cases, this court declares the common-law rule on the subject of surface waters to be the law of this state. By that law the owner of property may consume the surface water of his premises, or obstruct or divert the flow of it, without incurring any liability to his neighbor, whether above or below him, although he may be injured by the act; pro-

vided that the interference does not amount to a collecting of the surface water on his own land into a body and discharging it as such upon his neighbor's premises. See *Gillison v. Charleston*, 16 W. Va. 283, 37 Am. Rep. 763; *Knight v. Brown*, 25 W. Va. 808; *Railroad Co. v. Carter*, 91 Va. 587, 22 S. E. 517; *Gould on Waters*, § 271; *Field v. Inhabitants*, 36 N. J. Eq. 118. Neither the decided cases nor the text-books point out any material distinction between the two systems of law respecting the rights of riparian owners as regards natural water courses. Hence, if the waters of a river which spread over the adjacent lowlands in times of freshets and floods are not surface waters within the meaning of the common law, as to which only that law departs from the principles of the civil law, but remain part of the stream, there is no basis in reason or law for any conflict in the decisions respecting the rights of riparian owners as to property affected by such water. As the Roman civil law makes no distinction between the waters of natural streams and surface waters, it is reasonable to assume that the courts of those states which have adopted it would be uninfluenced in classifying waters, and determining what are and what are not surface waters, by any insensible bias or prejudice, such as might induce courts of the other states to include in surface waters what does not properly belong to that class. But, as the distinction is usually comparatively unimportant in those courts, it may be assumed that they have not bestowed upon the subject as much care and labor as have the courts that observe the other rule. Making due allowance for all this, we are disposed to avail ourselves of such light on the question as those decisions may afford.

In Ohio the civil law is followed. *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. The Supreme Court of that state, in *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429, declines to consider overflowing waters of a river as surface water. In the opinion, at page 282, 44 Ohio St., and page 431, 7 N. E., *Minshall, J.*, says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows,

and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water."

Georgia is classed as a state in which the rule of the civil law is adhered to, though the court has made no express declaration to that effect; and in *O'Connell v. Railway Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246, *Lumpkin, J.*, in an able opinion, expressly repudiates the theory that such waters are surface waters within the meaning of either the civil or the common law, and the decision of the case rests upon that ground. In the opinion, at page 253, 87 Ga., and page 491, 13 S. E., 13 L. R. A. 394, 27 Am. St. Rep. 246, it is said: "The surplus waters do not cease to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water eventually to be discharged through the channel proper."

In Missouri the common law was at one time rejected in so far as it relates to surface waters, and afterwards adopted. In *McCormick v. Railroad Co.*, 57 Mo. 433, and *Shane v. Railroad Co.*, 71 Mo. 237, 36 Am. Rep. 480, it was held that an owner of land could not stop the natural flow of surface water, or divert its course so as to throw it upon the land of his neighbor. In the latter case the court held that "overflowing water from a river in time of flood is surface water within the meaning of this rule." The decision was by a divided court, and the opinion somewhat inconsistent, as declared in the case next to be noticed. The principle of these two cases was discarded in *Abbott v. Railroad Co.*, 83 Mo. 271, 53 Am. Rep. 581. This was a case of obstruction to a natural water course by the erection of a bridge, but the second count in the petition charged an interference with the surface waters "which fell and ran down from higher ground," and the case did not concern the overflow of the river.

The Minnesota court, up to 1888, did not seem to have taken any position with reference to the two systems of law, and in *Byrne v. Railroad Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668, it is expressly held that: "The water which in times of ordinary high water overflows the banks of a stream, and is accustomed to flow down over the adjacent lowlands in a defined stream, is subject to the law relating to water courses, rather than to that of surface water." This implies a leaning toward the common-law rule, otherwise it would be unnecessary to note any distinction between the two kinds of water. In Oregon the court, without considering the doctrine of dominant and servient heritage of the civil law respecting surface water, held that: "A stream does not cease to be a water course

and become mere surface water because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

In Iowa the court seems to lean toward the rule of the civil law, and in *Sullens v. Railroad Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501, it is held that where, by building an embankment across a wide creek bottom, a railroad company caused the surface water of the bottom to flow into the channel, and then to leave it far above the culvert, and flow over plaintiff's land, and then be turned back into the channel again above the culvert, the water was no longer to be considered surface water. This seems to have been nothing more than an interference with a natural water course. The embankment and culvert caused the creek to leave its course and spread over the land, and then go back into its course. Hence the decision has very little bearing on this question. In *Moore v. Railway Co.*, 75 Iowa, 263, 39 N. W. 390, the court decides that water which, in the time of a freshet, leaves the channel of a stream, and spreads over the bottom land, and is forced back into the channel again by a railroad embankment built across its course, is not to be regarded as surface water in considering the sufficiency of the culvert constructed in the embankment. This seems to be another case of mere obstruction to a natural water course.

Coming now to the decisions of courts which apply the principles of the common law in determining the rights respecting surface water, we find that in Indiana it has been held in more than one case that the waters of a river spreading over depressions in the land in the time of a flood are held to be surface water. *Turnpike Co. v. Green*, 99 Ind. 205; *Railroad Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139.

In New York, the surplus water of a stream when flooded is undoubtedly regarded as a part of the stream. Thus, in *Wallace v. Drew*, 59 Barb. 413, it is held that: "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods; otherwise he will be liable for the injury. But this rule does not apply to floods altogether extraordinary and unusual." This proposition was adopted from *Angell on Water Courses*, § 834, and that work adopts it from *Rex v. Trafford*, 1 B. & Ad. 874, a case to be noticed later on.

Though not exactly in point, *Burwell v. Hobson*, 12 Grat. 322, 65 Am. Dec. 247, is said to bear upon the question, and tends strongly

to uphold the view that flood waters are to be considered a part of the stream. The syllabus reads as follows: "H., owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another (W.) the land on the north side; and in their report they made no allusion to the dike. The son receiving the land on the south side of the creek afterwards sold it to B., and then W., owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H. and overflow the low grounds on the south side. B. then filed a bill to enjoin the building of the dike on the north side. Held: (1) B. is entitled to have his dike as it was when H. died, and to have his lands protected thereby; and W. has no right to build a dike on his side of the creek, which would destroy the dike of B. and overflow his low grounds. (2) Equity will interfere to prevent the building of the dike, and will compel W. to abate so much of his dike already built as would injure the dike and low grounds of B." This case follows the principle laid down in *Angell on Water Courses*, just referred to, and is based upon the English decisions. It is urged that the embankment made by the ancestor was not for the purpose of controlling the flow of the water when the stream was within its banks, but only to protect certain land when it overflowed its banks. By this dike he had thrown the water to one side of the stream, and left the land on that side to his son, subject to the burden of the surplus water. While owner of the entire tract, the ancestor had altered the course of the stream on his own premises, as he had a clear legal right to do (*Gould, Wat.* § 213), but after the division of the estate neither of the several owners could so interfere with the stream as to injure the other. When, by the counter dike, the superabundant waters of the flood stage were confined within the channel, kept off the land, and caused to overflow land on the opposite side, the court declared the act to be an actionable obstruction of the stream, and not a mere rightful repulsion of surface water.

The claim of analogy between the case of *Burwell v. Hobson* and the case now in hand seems to be sustained by the views of Judge Moncure in applying to that case the principle declared in *Rex v. Trafford*, 20 Eng. C. L. 498, in which the overflowing waters of a stream formed the subject-matter of the controversy. Embankments, called "fenders," had been erected by the owners of lands bordering on a stream to prevent it from overflowing their lands in times of freshets and

floods. These embankments were increased in height from time to time and finally resulted in throwing such a large body of water into the channel of a river into which the brook emptied that it endangered certain canal banks and aqueduct and obstructed navigation in the canal. Neither the aqueduct nor the canal banks was in any degree the cause of the overflow. It had occurred before the erection of the canal, and in times beyond the memory of man. Arches had been made in the aqueduct at points distant from the river to permit this overflowing water to pass through it. Upon the special verdict showing all the facts, the court of King's Bench held: "That the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood water had been accustomed to run; that there was no difference in this respect between flood water and an ordinary stream." In the opinion Lord Tenterden, C. J., said: "The consequence of a judgment requiring the fenders to be reduced may be the production of much mischief in times of flood, not only to the lands of the defendants, but also to a considerable tract of country, unless some other method can be found of carrying off the flood water. But this consequence cannot be properly attributed to the erection of the canal as any blame either in its projectors or present proprietors. On the contrary, it distinctly appears that at the formation of the canal a sufficient provision was made for carrying off the flood water in the course which it had previously taken by the erection of the three arches; and these arches would continue to be sufficient, notwithstanding any increase of water by the improved drainage of the country above, if the ancient course and outlet of the flood water had not been obstructed by the erection of the fenders. Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." In *Burwell v. Hobson*, Judge Moncre says the King's Bench judgment in *Rex v. Traford* was reversed in the Exchequer Chamber, "but that court agreed in the principle laid down by the court of King's Bench, though it did not discover upon the special verdict a finding of sufficient facts to warrant its application to the case."

Lawrence v. Railroad Co., 71 Eng. C. L. 643, deals expressly with the subject of flood waters as affected by a railroad embankment. The facts were such as to make it

identical in principle with the case now in hand. They are stated by Patteson, J., as follows: "The plaintiff, * * * brings this action for an injury to his land by its being flooded, as he alleges, by the fault of defendants in constructing their railway across the lands of other persons without leaving sufficient openings for the passage of flood water, whereby they were obstructed and penned up and forced upon the lands of the plaintiff." In the opinion he says: "The railway passes across the lowlands adjoining the river Dun, over which the flood waters of that river used to spread themselves. Those lowlands were separated from the plaintiff's land by a bank constructed under certain drainage acts, and which protected the plaintiff's lands from floods. By the construction of the defendants' railway without sufficient openings those flood waters could not spread themselves as formerly, and were penned up, and flowed over the bank on the plaintiff's land. *Prima facie*, this would give the plaintiff a cause of action; and the question is whether the company are protected by their act." The court held: "That, although the company were not required by their act to make flood openings to their embankment, and would not be compellable by *mandamus* to make them, yet, as they might, by proper caution, have prevented the injury sustained by the plaintiff, an action on the case was maintainable against them for such injury." This means that the act of constructing the embankment was not wrongful, because the act of Parliament had authorized it, just as we hold now that the construction of a work of internal improvement authorized by law cannot be enjoined or controlled by the court, but that the company constructing such works is answerable to the landowner for such damages as may result to him, and particularly for damages resulting from negligent or unskillful construction of the work. *Arbenz v. Wheeling, etc., Co.*, 33 W. Va. 1. 10 S. E. 14, 5 L. R. A. 371; *Mason v. Bridge Co.*, 17 W. Va. 396; *Spencer v. Railroad Co.*, 23 W. Va. 406. By saying that *prima facie* this would give the plaintiff a cause of action, the judge meant that, if the construction of the railroad had not been a public work, authorized by law, it would have been wrongful, and the embankment might have been abated as a nuisance.

These English decisions must be accepted as being declaratory of the common law. They were adopted and approved as correctly announcing the law by the Virginia court prior to the division of the state. The interpretation put upon them by that court must be accorded great weight here, because the Virginia decisions rendered prior to the division of the state are as binding upon this court as its own decisions. The two cases above referred to deal with the flood water of streams, and apply the same principles to it that are applied by the common law to

natural water courses themselves. They utterly preclude the assumption that such waters are surface waters, and class them with the waters of natural streams.

In some of the American cases in which ordinary flood waters are held to be waters of the stream, stress seems to be laid upon the fact that the flood waters maintain a current, and do not stand upon the ground as backwater, motionless as a pool. *Lawrence v. Railway Co.* seems clearly not to recognize any such distinction, for in the course of the opinion it is said the flood waters of the river used to spread themselves over the lowlands, just as they do in this country, and that, by the construction of the railway embankment, they were prevented from spreading themselves as they had formerly done, and flowed over the bank onto plaintiff's lands. This imports that by the railroad embankments the waters were confined to smaller limits, and thereby raised to a higher level, so that they overflowed the bank, which had formerly been of sufficient height to protect plaintiff's land. At any rate, they are not referred to as waters flowing over the land outside of the banks of the river and maintaining a current.

The Indiana decisions are clearly at variance with the application of the principles of the common law made by the English cases. They recognize nothing as overflowing river water unless it flows practically all the time. Such waters as are alluded to in *Lawrence v. Railway Co.* and *Rex v. Trafford* as flood waters flowing beyond the limits of the stream are classed as surface waters, although they maintain a current over the land. Thus, in *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114, the court, in its opinion, at pages 172 and 173, 64 Ind., 31 Am. Rep. 114, says: "In the complaint before us there is no averment of any water course, except, indeed, by way of parenthesis, that the place, during floods, is a part of the Ohio river; but the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a water course, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee therefore are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents, and vicissitudes of natural causes." The reason for this departure is found in the nature and situation of the lands of that state, for in the same case—which is referred to in subsequent cases as a leading case in that state—the court says: "The doctrine contended for by the appellant, applied to the vast alluvial regions—so generally level, subject to occasional inundations—bordering upon the Ohio river, and

lying along other rivers and large streams within this state, would very much embarrass agricultural and general improvement by preventing proprietors of lands from securing their fences by planting trees or other permanent methods, and in some instances, perhaps, render large portions of our richest soil useless. While the owners of lands may not obstruct water courses to the injury of others, they must be permitted to fence and cultivate their fields and improve their lands in the way which best subserves their interests, without being responsible for the accidents of floods or the shiftings of surface water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents, which must be borne alike by all." This sounds very much like a declaration of state policy, designed to facilitate the cultivation of vast areas of low and swampy lands, subject to frequent overflow, in the interest of the general welfare of the people of those sections of that country and of the whole state; but the situation may fully justify it as a necessary modification.

Though the flow or current of a water course is one of its pronounced characteristics, it is at variance with common knowledge and reason to say that only such water of a stream as is perceptibly moving may be considered a part of it. When one stream, uniting with another, obstructs its flow by reason of its running bank full, while the other is low, and causes such other stream to be filled with back water, can it be said that, so long as the backwater stands, it is only surface water? Are all the motionless pools within the banks of a river, produced by the windings of its channel and current, to be called surface water? Nobody has ever ventured such an unreasonable suggestion. If it be conceded that the running waters of an overflowing river on the lowlands outside of its banks do not cease to be part of the river—as clearly they do not—what reason can be assigned for a distinction outside of the banks which cannot exist within them? The standing waters are supported and maintained by the great body of water forming the river. From bank to bank, surface to bed, within the banks and beyond them, as far as the water stands or flows, all the atoms or parts are, for their positions, interdependent and inseparably united save when absolutely severed. If, from the lowest point in the bed a large quantity should be removed, a subsidence of the entire surface would result, each particle finding a lower level by the law of gravitation. That part of the water which flows is simply seeking what the standing water has already found, its level. By nature, it is all one body, until severed in some way, and the law suggests no reason or principle upon which what clearly is not severed can be deemed to have been cut off.

No doubt such water often becomes so separated from the river as to justify its classification as surface water. On the lowlands along our rivers there are depressions having no outlets to the river or elsewhere, and in which, when filled, the water must stand until it passes away by evaporation through the air and percolation through the soil. These are filled by overflow in times of flood, and upon the recession of the river are left full of water. This overflow water is thereby effectually severed from the waters of the river, and no doubt becomes, under the decisions, surface water.

The suggestion that the rules governing the rights of riparian owners in respect to our great rivers should be different from those applicable to the small English streams is a novel one, not expressed by any of the decided cases. Shall they be likened unto the high seas merely because our public policy has classed them as navigable waters beyond the limits of tide water, while the English streams are not, and because we deny to riparian owners any exclusive right to the bed or shores, inconsistent with the public right of navigation, as a matter of public necessity and convenience in the interest of commerce and the public welfare? If we did so, we would do it for a reason other than that assigned as justification for embanking against the waters of the sea, namely, that their breaking in upon the land is due to unknown causes, and cannot be anticipated. They suddenly come where they have never before been known to occur, and may never be repeated, unlike the floods of inland streams, recurring year after year in obedience to well-known natural laws and causes. Everybody is bound to take notice of them, and as to them no man can be heard to set up his ignorance. The public nature of our natural streams argues the exact contrary of the proposition suggested. Neither by embankment nor other structure can a riparian owner obstruct or alter them to the injury of the public. The sea may be fenced out to the utmost extent of man's ability, and there will still remain ample room for the world's commerce; but a very small obstruction may seriously impair the usefulness of a great river.

The tremendous extent and weight of the overflow of our great rivers makes it all the more necessary to adhere to common-law principles. A diversion of the course of these irresistible bodies of water results in great injury and possible disaster. It is only because of their comparative alightness in quantity and incapacity to do injury that the law allows the owner of land to do as he pleases with the surface waters on them, or that would come upon them. When he collects and forms them into a body, and thus makes them injurious and hurtful, the law prohibits him from turning them upon his neighbor. The clearing away of the forests,

by reason of which the streams rise higher and more quickly than when the fallen leaves, moss, and muck held back the waters in the forests, and the draining of the swamps and low lands, only emphasize this view. Of all these changes persons dealing with the waters of the river must be deemed to have notice, too.

For the foregoing reasons we conclude that the overflow water of a river at times of ordinary flood, whether standing motionless on the adjacent land or sweeping over it, do not cease to be part of the river, unless so separated from it as to prevent its return. From this it follows that by preventing the gradual rise of the water over plaintiff's lot by damming it and raising its level so as to cast it down in the form of a cataract or waterfall upon her grounds, and thus causing injury which would not otherwise have occurred, is such an interference with the stream as, by the common law, gives a right of action; and the same legal result arises from the prevention of the outflow of the water from the basin, in consequence of which it remained upon the land longer than otherwise it would have remained there, unless the flood was extraordinary, an act of God. A larger culvert would have rendered the embankment uninjurious to plaintiff's property in these respects, and the failure to make it of sufficient size to carry the water is negligent construction. Though the defendant could lawfully build the embankment, in doing so it was bound to use the engineering knowledge and skill ordinarily applied in the erection of such works. It must be carefully and skillfully done. *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29. Whether a flood is extraordinary is generally, though not always, it seems, a question of fact for the jury. *Railway Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Brown v. Railway Co. (Pa.)* 38 Atl. 401. If, therefore, the evidence is such as would warrant a finding that the flood in question was not extraordinary, the demurrer to the evidence cannot be sustained on the theory that it was extraordinary as the demurree is entitled to the benefit of all inferences of fact that may be fairly deduced from the evidence. *Garrett v. Ramsey*, 26 W. Va. 345; *Gunn v. Railroad Co.*, 42 W. Va. 676, 28 S. E. 546, 36 L. R. A. 575; *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. According to the evidence the river is subject to frequent rises of varying height and rapidity. That of 1884 was higher than that of 1898. The water had been on a level with the street 10 or 12 times in a period of 50 years. One witness says that of 1898 was an unusual flood, but a jury would not be bound to accept his opinion. The facts attending the rise in question were not shown to have been without precedent as in all cases in which great floods have been classed as acts of God, such as the Johnstown Flood (*Long v.*

Railroad Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; Wald v. Railroad Co. [Ill.] 44 N. E. 888, 85 L. R. A. 356, 53 Am. St. Rep. 332; the flood of 1832 in the Congaree river, the greatest freshet ever known in that country (Lipford v. Railroad Co., 7 Rich. Law [S. C.] 409), or that which submerged Chattanooga in 1867, and broke up all roads leading into it, and as to which the proof showed "beyond question that such a flood had never occurred" at that place "within the memory of man; the old inhabitants who had witnessed other remarkable overflows since 1826, never having seen such a one" (Railroad Co. v. David, 6 Helsk. [Tenn.] 261, 19 Am. Rep. 594). The evidence shows variableness and irregularity in the rises to which the river is subject, and one much higher than that of 1898 had occurred just about the time the road was built. Unlike the ocean tides, freshets and floods in streams are governed by no fixed rules as to volume or the time in the which it gathers, and the facts disclosed by the evidence are not such as would call upon a jury to pronounce the flood extraordinary in character.

Practically all that is urged upon the demurrer to the declaration, not disposed of by the general principles already discussed, is that the declaration does not aver that the defendant constructed the embankment, nor the height attained by the water, and the rapidity with which it rose. The amended declaration does aver the building of the embankment by the defendant, and no principle of pleading requiring so much of detail as is suggested by the other objection is referred to. A declaration need not set out evidential facts.

The jury fixed the damages at \$362, of which \$337 is for the cooper shop and contents washed away and \$25 for injury to the surface of the lot. No objection to this finding was made in the trial court by motion to set the verdict aside or otherwise, but the plaintiff in error now insists that the judgment should be reversed because the embankment did not cause the loss of the cooper shop with its contents, the water having been so deep it would have floated away anyhow, and because some of the tools and materials in it were the property of plaintiff's husband, he having purchased them. This is an exception to the action of the jury in assessing the damages, which cannot be made in the appellate court. Only the rulings of the trial court may be reviewed here. Upon the demurrer we can only say whether the evidence sustains plaintiff's right to the damages, for that is all the lower court considered. It was not requested to rule upon the correctness of the finding of the jury as to the quantum of damages. Its action is a prerequisite to the exercise of any jurisdiction by this court. Riddle v. Core, 21 W. Va. 530; State v. Phares, 24 W. Va. 657; Brown v. Brown, 29 W. Va. 777, 2 S. E. 808; Proudfoot v. Clevenger, 33 W. Va. 267, 10 S. E.

394; Humphrey's Adm'r v. West's Adm'rs, 3 Rand. 516; Barrett v. Coal Co. (W. Va.) 47 S. E. 154.

Seeing no error in the judgment, we must affirm it.

(56 W. Va. 592)

RICHARDS v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

RAILROADS — NEGLIGENT MAINTENANCE — ACTION FOR NUISANCE.

1. One who purchases a lot near an existing railroad, and sustains damages from its negligent construction and maintenance, is not barred of recovery of damage by reason of the fact that the railroad had already been constructed before his purchase.

2. Action by one coming to a nuisance for damage from it.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Action by A. S. Richards against the Ohio River Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Vandervort and Van Winkle & Ambler, for plaintiff in error. V. B. Archer and Wm. Beard, for defendant in error.

BRANNON, J. A. S. Richards brought an action against the Ohio River Railroad Company to recover damages to a house and lot in Williamstown from flood water of the Ohio river, charging that the negligence of the company consisted in making an embankment for its road in a street in front of his house, and failing to make a culvert under its road of sufficient capacity to allow the flood water to rise equally on both sides of the embankment, causing the water to dam up against the embankment and flow over and down from it with heavy fall upon the lot, and barring the outlet of the water accumulated in a depression between the embankment and the hill in the subsidence of the flood equally with the subsidence of the water of the river, causing the water to stand longer on the lot than it would were the culvert larger. There was a judgment on demurrer to evidence for the plaintiff. The case is similar to the case of Uhl v. Ohio River Railroad Company (decided this term) 49 S. E. 378. I do not think it necessary, for the law governing the case, to write an opinion, as the law is amply laid down in the opinion by Judge Poffenbarger in that case.

There is a feature of this case different from the Uhl Case. In this case Richards purchased his property after the railroad had been constructed. This is merely mentioned, but not relied upon as a defense. No authority is cited upon it. It is not supposed the duty of the company to put in a proper passage for water was passed from Richards'

grantor to him; but the duty continued, from year to year, as between the company and any one owning the lot, it being no less the duty of the company to protect Richards, though he bought after the construction of the railroad, than it had been to one owning the lot before and after such construction. As the construction and maintenance of the railroad was pursuant to law, we cannot say that its presence was per se a nuisance, but its negligent construction and maintenance was a private nuisance in nature as to Richards—the same, in effect, as to him, as if unauthorized, because of negligence. The authority did not authorize negligence. It is a private nuisance in such case. Jaggard on Torts, 788; Taylor v. Railroad, 33 W. Va. 39, 10 S. E. 29. He had right to assume that the duty would be performed, and was not in any way bound to refrain from buying a residence there because the railroad was already there. If one comes to a nuisance, that does not debar him in legal proceedings for harm from it or to restrain it. 21 Am. & Eng. Ency. L. 691; 2 Jaggard on Torts, § 236, p. 774; 1 Wood on Nuisances, §§ 76, 802. The same principle applies in this case.

Judgment affirmed.

(56 W. Va. 464)

STOCKTON et al. v. CRAIG et al.

(Supreme Court of Appeals of West Virginia.
Dec. 18, 1904.)

TAXATION—LANDBOOKS—POWER OF ASSESSOR AND CLERK OF COUNTY—TAX DEED—PAYMENT OF VOID TAXES—CLOUD ON TITLE.

1. Section 10, c. 54, p. 83, Acts 1875, as amended and re-enacted by section 10, c. 73, p. 104, Acts 1879, as amended and re-enacted by section 10, c. 12, p. 115, Acts 1881, and now in force as section 10, c. 29, Code 1899, authorize the assessor or the clerk of the county court to restore to the landbooks, at the instance of the owner, any lands omitted therefrom by reason of a sale to the state for delinquent taxes, if such sale is for any cause illegal and invalid, within five years from the time such lands are omitted from such books; and the failure of the owner to have such lands so restored to the proper books within such time subjects them to forfeiture under section 6, art. 13, Const., and section 39, c. 31, Code 1899.

2. A suit to cancel alleged fraudulent and void decrees and deeds as a cloud upon title to land cannot be maintained by those having no present interest in or title to such land, either legal or equitable.

3. The payment of taxes by adverse claimants of land under fraudulent and void tax decrees and tax deeds does not inure to the benefit of the delinquent owner, so as to prevent the forfeiture of his title for nonentry on the landbooks.

(Syllabus by the Court.)

Appeal from Circuit Court, Nicholas County; W. G. Bennett, Judge.

Bill by Charles Stockton and others against James S. Craig and others. Decree for defendants, and plaintiffs appeal. Affirmed.

E. B. Dyer and Price, Smith & Spilman, for appellants. Alderson & Horan and Brown, Jackson & Knight, for appellees.

DENT, J. Charles Stockton and others, claiming to be the heirs at law and legal representatives of Aaron Stockton, John B. Clopton, Wm. E. Clopton, Zachariah Lewis, and Sarah Ann E. Foster, appeal from a decree of the circuit court of Nicholas county dismissing a bill of review filed by them for errors of law in a certain suit in chancery in said court finally determined, wherein they were plaintiffs, and James S. Craig and others were defendants. The two errors relied on are, first, that the court decided the original suit contrary to law; second, that the court refused to continue the case to permit the plaintiffs to take depositions. If the circuit court was right as to the first proposition, the second becomes wholly unimportant. The undisputed facts are as follows:

"By three several patents, all bearing date on the 30th day of August, 1845, the commonwealth of Virginia granted to Aaron Stockton, John B. Clopton, Wm. E. Clopton, Zachariah Lewis, and Sarah Ann E. Foster three several tracts of land, containing 1,183¼ acres, each, situate in Nicholas county. The said three tracts of land were entered on the landbooks of said county in the names of said patentees in the year 1846, and remained so charged for each and all the years from that date until the year 1881, except for the year 1853, for which year they were omitted from said books, but in the year 1854 were again re-entered and charged to said parties on said books, with the memorandum, 'Re-entered by Auditor's receipt produced,' and all the taxes for said years, to wit, from 1846 to 1861, were paid by said patentees. There are no landbooks for the county of Nicholas, either in the county clerk's office of said county, or in the auditor's office, for the years 1861, 1862, 1863, and 1864. For the year 1865 said three tracts of land were charged on said landbooks in the names of said patentees, and remained so charged for the years 1866, 1867, and 1868. For the years 1869, 1870, 1871, 1872, the said three tracts were omitted from said landbooks. In the year 1873 these said three tracts of land were all again entered on the said books in the names of the patentees, and charged with the back taxes for nine years, and said three tracts of land remained so charged upon the said landbooks in said names for the years 1874, 1875, 1876, 1877, and one of said tracts for the years of 1878 and 1879. For the year 1874 said three tracts of land were returned delinquent, and were certified by the auditor to the sheriff of Nicholas for sale in 1875, but were redeemed from said sheriff before the sale by the payment of the taxes for the year 1873, and the back taxes for the nine years prior thereto, and the taxes for the year 1874.

"John M. Hutchinson, commissioner of

school lands in said Nicholas county, filed his petition in the circuit court of said county on the 9th day of August, 1875, in which he set out the granting of these three tracts of land, of 1,183¼ acres each, by the commonwealth of Virginia, as aforesaid, and averred in said petition that said tracts of land were transferred to the said grantees, and regularly charged with the taxes chargeable thereon, first on the landbooks of Nicholas county for the year 1846, and regularly for succeeding years, down to and including the year 1866, but that the assessors' landbook for the year 1867 does not show any charge or assessments of taxes on the first of the said tracts of land, and that said tract was dropped from said books, and has not been charged with the taxes thereon for any year or years since the said year 1866, and that the others of the said tracts of land were charged on said books up to and including the year 1868, and that the said two tracts of land were dropped from the landbooks of the said county for the year 1869, and are not charged with any taxes thereon for any year since that time. The said petition further falsely stated, as is apparent on the face of the record, and beyond all contradiction, that said three tracts of land were sold and purchased on behalf of the state of West Virginia in the years 1850, 1856, and 1860, and were never redeemed from said sales. The certificates of the auditor and of the clerk of the county court, exhibited with the bill and the answers, show beyond controversy that said allegations of the petition were false and altogether without foundation, and that there never was any sale of said three tracts of land, or any of them, to the state of Virginia. The petition further falsely alleged 'that for five successive years after the year 1869, to wit, for the years 1870, 1871, 1872, 1873, 1874, the owners of the three tracts of land have not been charged with any state or other tax thereon, nor has any state tax been charged on either of said tracts, for any one or more of said years on any part of said land on the landbooks of Nicholas county aforesaid; that the said three tracts of land are forfeited to the state of Virginia, and are now forfeited to the state of West Virginia, and are therefore liable to be sold for the benefit of the school fund.' As before stated, these three tracts of land had all been re-entered on said landbooks in the year 1873, and charged with the back taxes, and were again charged on said books for the year 1874; and this fact must have been, and was, well known to the defendant James S. Craig, who has been the recorder of said county. It is further shown by the record that this petition of John M. Hutchinson is in the handwriting of the defendant James S. Craig, and it is charged in the bill that said Craig fraudulently entered into a combination or conspiracy with the said Hutchinson for the purpose of having the lands sold, in order

that he, the said Craig, might become the purchaser thereof, and thus defraud the true owners, and that he and the said Hutchinson knowingly and falsely misstated the facts in regard to the assessment aforesaid in order that by imposition upon the court a decree of sale might be obtained.

"On the same day on which this petition was filed, to wit, on the 9th day of August, 1875, an order was entered by the said circuit court directing said Hutchinson, school commissioner, to make sale of said three tracts of land, with direction to have same surveyed before such sale. It further appears from the record that said Hutchinson at once advertised said lands to be sold on the 12th day of October, 1875, at which sale the defendant, James S. Craig, became the purchaser of lot No. 6, of 200 acres, lot No. 7, of 267 acres, lot No. 8, of 186 acres, lot No. 10, of 111 acres, lot No. 11, of 650 acres, lot No. 15, of 400 acres, lot No. 16, of 500 acres, at the aggregate price of \$156.50; and that Joseph Rader, assignee of M. L. Rader, became the purchaser of lot No. 1, of 261 acres, lot No. 2, of 130 acres, lot No. 3, of 146 acres, at the aggregate price of \$124.50; and that Joseph Rader and A. F. Rader became the purchasers of lot No. 4, of 218 acres, lot No. 5, of 130 acres, at the aggregate price of \$127.50; and that A. F. Rader became the purchaser of lot No. 12, of 180 acres, lot No. 13, of 225 acres, and lot No. 14, of 137½ acres, at the aggregate price of \$35.28. By a decree entered on the 7th day of August, 1876, the report of said sales and said sales were confirmed, and said commissioner directed to execute deeds to the purchasers for the lots purchased by them, respectively, upon the payment of the whole of the purchase money. By deed dated the 13th day of March, 1877, said John M. Hutchinson, commissioner of school lands, conveyed to the defendants James S. Craig and John S. Conner (it being stated in said deed that Craig had assigned to said Conner half of the lands purchased by him) the lots of land out of these three tracts, of 1,183¼ acres each, purchased by said Craig as aforesaid, with the statement in said deed that said three tracts of land had become forfeited and delinquent to the state. By deed dated the 5th day of January, 1891, James S. Craig, describing himself as former commissioner of school lands, conveyed to the defendant M. L. Rader the whole of lots Nos. 1, 2, and 3, and the undivided one-half of lots Nos. 4 and 5; the deed stating that Joseph Rader had directed the conveyance to be made for the lots purchased by him to the said M. L. Rader. This deed expressly excepts and reserves from the operation thereof 'one-half undivided of said Lots No. 4 of said 218 acres and No. 5 of said 130 acres,' which reserved and excepted two lots were purchased by A. F. Rader, and duly confirmed to him by the decree of confirmation last aforesaid. That the foregoing are the

only deeds ever made, and it does not appear in the record that any deed was ever made to the said A. F. Rader for the undivided half of said lots Nos. 4 and 5, nor any deed to the said A. F. Rader for lots Nos. 12, 13, and 14.

"It further appears from the record that said lots Nos. 1, 2, 3, 4, and 5 were never entered upon the landbooks in the name of the said Raders, or any of them, or any person claiming under them, until after the making of said deed of January 5, 1891, nor were any taxes paid by them upon any of said lands until the year 1891. In other words, although said lands were claimed to have been purchased in 1875, and the sales confirmed in 1876, none of said lots were charged to said purchasers, or any taxes paid thereon, from 1875 to 1891, a period of 16 years. It further appears from the record that said lots Nos. 12, 13, and 14, claimed to have been purchased by A. F. Rader in 1875, were never entered upon the landbooks or charged with taxes in his name, or any taxes paid on the same or any one of them. And there is nothing in said record to show that said A. F. Rader ever did comply with the terms of the sale by the payment of the deferred payments for said last-mentioned lots. It further appears from the record that the order of sale of August 9, 1875, directed the notice of sale to be published in the Greenbrier Independent, a newspaper published in the town of Lewisburg, and also to be posted at the courthouse door of Nicholas county and at least four of the most public places in said county, for 30 days next preceding the sale, and that the commissioner was directed to have proper surveying done, and that the plat and description of each tract surveyed be returned with his report. It does not appear in the record that the notice was ever posted at the courthouse door or anywhere else in Nicholas county, but it was published in the Greenbrier Independent. A copy of the notice so published is found in the record, stating that the sale would be had 'at public auction in front of the courthouse door in Nicholas county, West Virginia, on Tuesday, the 12th day of October, 1875.' In that notice no intimation was given that said lands would be sold in lots or parcels, but a statement was made that three tracts, of 1,183 $\frac{1}{4}$ acres each, would be sold. The order entered on the 7th day of August, 1876, confirming the sales of the lots to Craig and the Raders, states that these lands were sold 'in front of the courthouse door of said county on the 11th and 12th days of October, 1875,' notwithstanding said three tracts were advertised to be sold on the 12th day of October, 1875; and the deeds made to defendants Craig and M. L. Rader both state that such sales were made on the 11th and 12th days of October, 1875. It thus appears that the sales actually took place one day in advance of the date stated in the public notice. It is further shown by

the record that these three tracts of land were returned in the name of the said patentees for the years 1875 and 1876, and were certified by the auditor for sale in 1877, and were sold for said taxes on October 10, 1877, and were purchased by the sheriff of said county for the state of West Virginia, and were subsequently certified by the auditor to the clerk of the circuit court of Nicholas county, as required by law, to be sold for the benefit of the school fund, and that for the year 1877 said tracts of land were returned delinquent, and were sold for such delinquency by said sheriff on October 28, 1879, and purchased by the defendant J. S. Craig, but no deed was ever obtained by said Craig under said sale, and therefore he obtained no right thereunder. It is further shown by the record that the report of the sale in 1877 for the taxes of 1875 and 1876 aforesaid was not returned by the sheriff within the time required by law."

The statement of facts so far is taken from the brief of counsel for appellants. The following additional facts appear from the record: That after the purchase of said lands at the sheriff's sale on October 28, 1879, for the taxes due thereon for the years 1877 and 1878, C. I. Lewis, representing the plaintiff's title and interest, offered to redeem the lands from Craig, to which Craig consented, and tendered him a receipt therefor as follows: "Received May 18th, 1880, of C. I. Lewis twenty-eight dollars and 85 cents taxes and interest to this time at the rate of 12 per cent. on three tracts of land of 1,183 $\frac{1}{4}$ acres each sold by the sheriff of Nicholas county on the 28th day of October, 1879, one tract for the taxes of 1877 and 1878 and the other two tracts for the taxes of 1877 and the three tracts purchased by me for the aggregate sum of \$26.97. But this acceptance of said sum by me is not to prejudice the rights or title of any party or parties obtained under a sale made by John M. Hutchinson, Commissioner of School Lands under a decree for the sale of said three tracts of land made by the Circuit Court of the County of Nicholas about the year 1874." This Lewis refused to accept, and deposited the sum necessary for redemption with the clerk of the county court. He left it there for a short time, and then withdrew it, thus abandoning all thoughts of redemption. A portion of the lands was continued on the taxbooks for the year 1879, and in the year 1881 they were again sold for taxes. From this time on down to the present time the lands have not been assessed to the original patentees—a period of more than 15 years to the beginning of this suit, and almost 25 years to the present date. During all this time the portion claimed by J. S. Craig and J. S. Conner has been assessed in their names, and they have paid the taxes thereon from and including the year 1878 down to and including the present time. That said lands have not since been returned

delinquent, but the appellees claim that they had actual, open, notorious, continuous, and exclusive possession thereon under their purchase from the commissioner of school lands, ratified and confirmed by the circuit court on the 7th day of August, 1876.

The first question that demands consideration is as to whether the plaintiffs have shown any right to maintain this suit. It is admitted that the state purchased the lands in the year 1877 for the taxes delinquent thereon for the years 1875 and 1876; that notwithstanding such purchase the lands remained on the landbooks until the year 1879, when they were again sold for taxes, and purchased by Craig, who never obtained a deed therefor. They were then dropped from the landbooks, and no attempt has ever been made by plaintiffs, or those under whom they claim, to restore them thereto. Thus plaintiffs' title has long since been forfeited to the state, both by Constitution and statute, for nonentry on the landbooks for a period of upwards of 15 years, unless they have shown a good, legal excuse for not making such entry. They do not claim that they ever made any effort to redeem the lands or have such entry made, but rest their case solely on the claim that because the state purchased these lands in the year 1877 for the taxes of the years 1875 and 1876, and such sale was void because the sheriff failed to make his report in the time required, such void sale excused them from making any attempt to restore their lands to the landbooks, and that the afterward continuance thereof on the landbooks up until the year 1879 was also illegal and void by reason of such void sale. In short, that such sale was void to invest their title in the state, but valid to suspend their title in the air, and furnish them a just, equitable excuse for their total lack of diligence and regard for the just duty they owed the state for more than 20 years, beginning with their delinquency for the year 1875. Plaintiffs, to sustain this contention, rely on the decision of the Circuit Court of Appeals of the United States in *Sayers v. Burkhardt*, 85 Fed. 246, 29 C. C. A. 187, which holds that, "where lands have been purchased by the state at tax sale, they cannot be forfeited for nonentry on the landbooks for taxation under the statute of West Virginia which provides that lands so sold shall not thereafter be entered for taxation unless redeemed." Supported by the decision of this court in the case of *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, in which it is held that "where land has been sold for taxes, and purchased for the state, and the clerk of the county court illegally places such land on the landbooks for succeeding years in the former owner's name, and such land is again delinquent, and sold, by direction of the auditor, for the taxes of such succeeding years, such sale is illegal and void, and the purchaser acquires no title by reason thereof." These

decisions are both in harmony with each other and the statute which they construe, but do not in any sense sustain plaintiffs' contention that, if the sale to the state is void, the lands cannot be restored to the landbooks on request of the original owner, in discharge of the requirements of the Constitution and the statute. When the state once acquires the title of the landowner, either by purchase or forfeiture, its title becomes absolute, and it cannot be divested thereof in any other manner than is authorized by law. *State v. Swann*, 46 W. Va. 128, 33 S. E. 89; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; *McClure v. Maitland*, 24 W. Va. 561. No title remains in the landowner, and therefore the replacement of the lands on the landbooks before redemption or sale would be illegal and void. If the sale to the state, however, is for any reason illegal and void, no title passes, but the title remains in the landowner, who is presumed to know the law, and it is his duty to take steps immediately to restore the land to the proper books; and, if he fails to do so for five consecutive years, such title as remains in him is forfeited to the state. *Simpson v. Edmiston*, 23 W. Va. 675. The clerk, the assessor, and the landowner are all presumed to know the law, and presumed to know when a sale is illegal and void, and their ignorance of law furnishes no excuse for disobedience thereof.

It is maintained that the clerk is a mere ministerial officer, and that it is his duty, under his oath, to obey the plain mandate of the statute, without investigating the validity or invalidity of the sale. To the contrary, the law presumes that the clerk knows the law, and, knowing it, knows when a sale is valid, or invalid, and must act accordingly to comply with his oath of office; and the plea of ignorance will furnish him no excuse, and will not make any illegal act done by him legal. The clerk's ignorance cannot make that legal which is illegal, or make that illegal which is legal. The oath he takes is "that he will support the Constitution of the United States and the Constitution of this state, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment." Though his skill and judgment may sometimes be in error, yet they cannot make law, after the manner of the errors of courts of last resort, although they may excuse him from intentional wrong. While both the assessor and the clerk are administrative officers, and belong to the administrative branch of the state government, yet, in restoring lands to the landbooks, improperly omitted therefrom, they act judicially.

Section 10, c. 54, p. 83, Acts 1875, provides that "when the assessor shall ascertain that there is any land in his district which has not been entered in his landbook, or after being so entered, has from any cause, been omitted for one or more years,

he shall make an entry thereof, and of the name of the owner * * * and shall charge the same with all the taxes which should have been charged or collected thereon since the twentieth day of June, 1863, with lawful interest thereon." By section 10, c. 73, p. 107, Acts 1879, this section was amended and re-enacted by adding thereto, after the word "omitted," "for a period of less than five years," in lieu of "for one or more years," thus subjecting it to the constitutional limit of forfeiture, and also omitted therefrom, "since the twentieth day of June, 1863." By chapter 12, p. 111, Acts 1881, the clerk of the county court is directed to make out the landbooks, and authorized to correct any mistakes he may discover therein. Section 10 (page 115) is continued in this act substantially as formerly, with the following clause added thereto, "And if the clerk of the county court make any such discovery [that is, that any lands have been omitted therefrom for a period of less than five years] he shall enter the same in the landbooks and inform the proper assessor thereof, who shall assess the same as aforesaid and certify his assessment to the clerk; and the clerk shall thereupon charge said real estate with taxes as aforesaid." This section, materially unchanged, has been continued to the present time. Section 10, c. 29, Code 1899. Thus both the clerk and the assessor, in ascertaining what lands have been improperly omitted from the landbooks for any cause, are clothed with judicial powers, often nominated quasi judicial; and, when a landowner seeks to have his land restored to the landbooks because illegally omitted for any cause, the duty is imposed on them of investigating the grounds of illegality, and if found to be true, and forfeiture has not yet accrued, of restoring such lands, with all unpaid taxes, with legal interest thereon chargeable against the same, to the landbooks. Thus the state is made whole, and the landowner redeems his land from delinquency and sale, and prevents forfeiture thereof.

In Welty's treatise on the Law of Assessment, § 25, p. 87, the law is stated as follows: "In the exercise of the functions and in the discharge of the duties of his office, an assessor acts both judicially and ministerially; that is, some of his acts are judicial, and some ministerial. When it becomes necessary to determine a question of law or fact, the act is judicial." The acts of assessors in determining what property is liable to taxation are judicial in their character. *Throop on Public Officers*, 571; *Wheeling Bridge Co. v. Paull*, Judge, 39 W. Va. 142, 19 S. E. 551; *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615; *Charleston Bridge Co. v. County Court*, 41 W. Va. 658, 24 S. E. 1002.

It is therefore plain that either the assessor or the clerk had authority to restore these lands to the landbooks on application

of the owners at any time before they became forfeited by reason of nonentry, provided the former purchase by the state was illegal or void for any cause; and, having the power, it was incumbent on them as a duty to do so when thereto requested. Whatever title remained in the owners became forfeited to the state after they had been off the landbooks for five consecutive years. Hence, whether the sale to the state was valid or invalid, the landowners lost their title, and it became absolutely vested in the state. Having no title or no suable interest in the subject-matter of the suit, they cannot maintain the same. *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; *King v. Panther Lumber Co.*, 171 U. S. 437, 18 Sup. Ct. 573, 43 L. Ed. 227. Without title either legal or equitable, plaintiffs cannot attack the defendants' title papers as being fraudulent and void and creating a cloud on their lost title, since the fraud alleged had nothing to do with the loss of their title. The cancellation of defendants' papers would not restore their lost title. The rule is stated in 17 Am. Plead. & Prac. 300, as follows: "A bill to quiet title or remove a cloud cannot be maintained by any one who is not interested in the title. The plaintiff must have some title, either legal or equitable, for it is a general rule that he must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. Want of title in the plaintiff renders it unnecessary to examine that of the defendant."

It is insisted that as the purchase by the defendants, under which they hold, was by a decree of the circuit court at the instance of the commissioner of school lands, plaintiffs are entitled to the benefit of all taxes paid by such purchasers to prevent forfeiture of their land, under the decision of *Lynch v. Andrews*, 25 W. Va. 751, and *Sturm v. Fleming*, 28 W. Va. 54. These cases hold that there was such privity between the purchaser at a judicial sale and the person whose land was sold that if such sale, and the deed made in pursuance thereof, should thereafter be set aside, the payment of taxes by the purchaser would prevent the forfeiture of the title to the state during the period covered by such annulled sale and deed. This arises from the fact that the titles are the same, and temporarily vested in the purchaser, and, as he pays the state taxes during the interim, the title cannot possibly be forfeited, but that the purchaser would have the right to reimbursement of the taxes from the owner of the land, whose title is restored or freed from cloud. In the present case there was no such judicial sale as would create or continue a privity between the original owners and the purchasers. Such owners were not parties to the proceedings, nor were they entitled to be. *McClure v. Maitland*, 24 W. Va. 561. Their title was not sold, but it

was only such title as the state had at that time. If any privity existed, it was between the state and the purchasers. If the state had no title, then the decree of confirmation and deeds in pursuance thereof furnished mere color for the beginning of a new title, bringing this case clearly within the rule of *Simpson v. Edmiston*, 23 W. Va. 675; *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650.

Having reached the conclusion that the plaintiffs have lost their title, whether the purchase by the state in 1877 is valid or invalid, it becomes wholly unnecessary to inquire into the validity of such purchase, for the afterwards forfeiture for nonentry renders the state's title, though otherwise defective, absolute and indefeasible.

It is said by Mr. Justice Harlan in the case of *King v. Mullins*, 171 U. S., on page 435, 18 Sup. Ct. 937, 43 L. Ed. 214, that this "is a case of sheer neglect upon the part of the landowner to perform the duty required of him by the Constitution and statutes of the state." Plaintiffs' counsel avers in his brief that "the evidence in the case at bar shows that the commissioner of school lands refused to proceed against these lands, and thereby deprived the former owners of their right of redemption, or the right to contest the validity of the sale," and relies on this fact to give a court of equity jurisdiction, and cites *King v. Mullins* as upholding his conclusion. Counsel certainly had some other case in his mind when preparing his brief, for it is alleged in plaintiffs' bill that the commissioner of school lands was about to bring proceedings to sell their lands as forfeited to the state, and they pray "that the said F. B. Smith, commissioner of school lands as aforesaid, be inhibited, restrained, and enjoined from proceeding against said lands as forfeited and subject to be sold by him for the benefit of the school fund under and by virtue of said pretended forfeiture and sale aforesaid." So that plaintiffs not only claim that the sale was void and prevented forfeiture, but satisfied the delinquency of the land, and relieved them from the necessity of redeeming the same and paying any taxes thereon for the past 20 years. How long they expect this to last, does not appear. Certainly they can hardly claim that the failure of the sheriff to return his report of sales within 10 days would render the land wholly immune from taxation. Not only have plaintiffs failed to make any attempt to redeem their land, but they pray an injunction to prevent such opportunity being afforded them. A more inequitable plea could not possibly be presented. Courts of equity help those who are willing, anxious, and ready to do equity, and do not permit themselves to be used as instruments to deprive the state of its just taxes on lands held only under its grants. No title is good without a grant, directly or indirectly, or mediately or im-

mediately, from the state, and they who expect to keep their titles from returning to their original source must pay the taxes lawfully assessed and assessable against the same. Before the plaintiffs can prevail in equity, they must redeem their title from the state in the manner pointed out by law. Until they do so, they cannot maintain this suit. *Davis v. Living*, 50 W. Va. 431, 40 S. E. 385; *State v. Sponangle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; *Totten v. Nighbert*, 41 W. Va. 95, 24 S. E. 627; *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; *King v. Panther Lumber Co.*, 171 U. S. 437, 18 Sup. Ct. 573, 43 L. Ed. 227.

The plaintiffs' bill was properly dismissed. The decree is affirmed.

BRANNON, J. I concur in the decision made in this case, because I think that time denies relief to the plaintiffs. So many years have passed since the purchase by Craig, and the means of information to the owners of the land that it was not in fact delinquent open to them. They could have learned the facts by the slightest diligence and care. In fact, they did know of them long ago—as far back as 1879. The bill is predicated upon fraud. Equity does not allow a man to lie supine through a generation. I think, therefore, laches bars the bill, and also the statute of limitation. But I am not as yet ready to hold that when land is sold to the state for delinquent taxes, even where the sale is void for irregularity, its nonentry on the taxbooks after such sale will work its forfeiture. Section 23, c. 29, Code 1899, provides that "real estate purchased for the state at a sale for taxes shall not be thereafter entered on the land books, but the auditor shall keep a register thereof." Here is a positive prohibition against the entry of such land on the taxbooks, and I cannot see how the owners can be remiss to the extent of the forfeiture of their land. They can redeem and reassess. We cannot say that, if not re-entered for taxes, the owners cheat the state out of her taxes, as the land is hers, and she can sell it and take all its proceeds, if she chooses to deny them the excess over her taxes and interest and damages; and, under the statutes as they are, on redemption or sale she gets back all her taxes, with 12 per cent. interest. She can lose nothing. The land is hers, and not taxable. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *State v. Belcher*, 53 W. Va. 359, 44 S. E. 216; *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627. In *Sayers v. Burkhardt*, 85 Fed. 246, 29 O. C. A. 137, it was held that, "where lands have been purchased by the state at a tax sale, they cannot be forfeited for nonentry on the landbooks for taxation, under the statute of West Virginia, which provides that lands so sold shall not thereafter be entered for taxation unless redeemed." But it is said in this case that, where the tax deed is void for irregularity,

it is the duty of the clerk or assessor, on request of the owner, to restore the land to the taxbooks, and that that owner must cause him to do so by request or mandamus. I cannot see clearly, as yet, that in the face of a statute prohibiting the assessment of such land a clerk or assessor can assume the function of passing upon the validity of the tax sale—generally a most intricate and delicate question of law—and thus exercise judicial functions. The sale is colorable—its validity colorable—and I cannot see how it can be overthrown by the clerk or assessor.

(56 W. Va. 419)

LIPSCOMB'S ADM'R v. CONDON et al.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

ATTACHMENT—SHARES OF STOCK—PERSONAL ESTATE—GARNISHMENT—CERTIFICATE OF STOCK—SALE—TRANSFER ON BOOKS—TITLE ACQUIRED—CLAIM OF THIRD PARTY—JURY TRIAL—WAIVER.

1. By the common law, shares of stock in a corporation, being in the nature of choses in action, intangible property incapable of manual seizure, are not subject to execution or attachment. They are by statute.

2. Section 9 of chapter 106 of the Code of 1899, giving the plaintiff in an attachment proceeding a lien on the personal property of the debtor from the time of the levying of the attachment, or serving a copy thereof on the garnishee, on all the personal property, choses in action, and other securities of the defendant in the hands of the garnishee, and on any real estate of the debtor levied on by virtue thereof, from the suing out of the same, includes shares of corporation stock in the terms "personal property, choses in action and other securities."

3. Such shares are personal estate, and a species of incorporeal property.

4. In a proceeding by the creditor of a shareholder to subject his shares to the payment of his debt, the corporation in which the shares are held should be made the garnishee.

5. A certificate of stock is not the stock itself, but is evidence of its existence and ownership.

6. Though, when issued, such certificate is a muniment of title, it is not essential to the existence of the property represented by it.

7. A certificate is not necessary to a sale of shares. The beneficial interest in them is assignable by parol, the ownership passing immediately on consummation of the sale, by force of the contract, as in the case of ordinary choses in action, and not by operation of law.

8. A sale of shares for which no certificate has been issued may be evidenced by an informal written instrument, executed and delivered by the transferor to the transferee, without a power of attorney entitling the latter to have the same transferred on the books of the company.

9. In this state a shareholder may, upon his demand, obtain a certificate of his shares, but unless demanded by him it need not be issued, and he may freely transfer the shares without it if they are fully paid up, or security for the balance due on them, satisfactory to the board of directors, be given.

10. Section 21 of chapter 53 of the Code of 1899, requiring corporations to keep transfer books and the shares to be assigned therein, is intended for the protection and convenience of the corporation and its shareholders.

11. The books and papers of a private corporation under the laws of this state are not public, but private, records and documents.

12. An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferor.

13. In the absence of fraud and statutory regulations, a creditor proceeding by execution or attachment only obtains such rights in the property seized as his debtor had at the time of the seizure.

14. The rights of a creditor respecting shares of corporation stock for which certificates have not been issued, alleged to be the property of his debtor, are the same as in the case of an ordinary chose in action.

15. When, under the provisions of section 23 of chapter 106 of the Code of 1899, a petition is filed in a suit in equity founded upon an attachment, setting up title by purchase, and the plaintiff in the cause relies upon fraud in the alleged purchase to defeat the claim of title so set up, the trial of the issue must be upon the petition without any other pleading, and by jury, unless trial by jury is waived.

16. In such case it is reversible error to hear and determine the issue upon the petition, and answer thereto, and depositions of witnesses, according to the rules and principles governing courts of equity.

17. Waiver of the right of trial by jury must be by consent entered of record. It cannot be merely inferred from the fact that the court tried the case without objection.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by Lipscomb's administrator against Levi Z. Condon and Albert N. Horner. Decree for plaintiff, and defendants appeal. Reversed.

W. B. Maxwell and Dailey & Bowers, for appellants. F. M. Reynolds and J. P. Scott, for appellee.

POFFENBARGER, P. This is a suit in equity against a nonresident defendant to subject to the payment of a debt, amounting to \$5,000 and interest, by process of attachment and garnishment, certain shares of stock in a corporation, which, the bill alleges, are the property of the defendant. The case presents a number of questions which seem never to have been passed upon by this court.

In the absence of any statute upon the subject, shares of stock in a corporation are not subject to execution. Cook, Cor. § 480; Clark, Cor. 1147. By that law intangible property incapable of manual seizure and delivery cannot be taken on execution. Attachment, being a purely statutory remedy, reaches only such property as is made subject to it by the statute. Hence, if the statutes governing the remedy by attachment do not make shares liable under it, it is clear that they cannot be subjected to the payment of debts by such proceeding. Drake, Attach. § 244; Haley v. Reid, 16 Ga. 437; Foster v. Potter, 37 Mo. 525; Howe v. Starkweather, 17 Mass. 240.

By section 20 of chapter 53 of the Code

¶ 1. See Attachment, vol. 5, Cent. Dig. § 142.

of 1899 it is declared that such shares shall be deemed personal estate. Section 9 of chapter 106 gives the plaintiff in an attachment proceeding a lien from the time of the levying of his attachment or serving a copy thereof, as provided in that chapter, "upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of, or due from any garnishee, on whom it is so served." By these provisions the Legislature has expressly made choses in action liable to garnishment, and shares of corporate stock are almost universally held by the courts to be property of that nature. *Thomp. Com. Cor.* §§ 1070, 2587, 4571; *Cook, Cor.* § 12; *Clark, Cor.* § 377. If there were no adjudications upon the subject, there would be no reason to hesitate in saying that shares of stock are subject to attachment under these statutes. Although this court has not construed them, similar statutes have been passed upon in many of the states. In *Railroad Co. v. Payne*, 29 *Grat.* 502, shares in a railroad company were held liable under a statute which made the attachment a lien upon all the "estate" of the debtor. In delivering the opinion of the court, *Moncure, P.*, said such shares were plainly within the letter, as well as the spirit, of the law. In *Bank v. Byram*, 131 *Ill.* 92, 22 *N. E.* 842, it was held that the words "rights and effects" of the debtor in the general attachment law were broad enough to cover shares of stock. In *Curtis v. Steever*, 36 *N. J. Law*, 304, the words "rights and credits" in the general attachment law were sufficient. It is now well settled by the authorities that, in the absence of any statutory provision to the contrary, shares of stock, although incorporeal in their nature, are personal property. *Clark, Cor.* 1142, 1143. As our statute makes them personal property, and subjects apparently all forms of property to the process of attachment by giving a lien on the real estate, personal property, and choses in action and other securities of the debtor, it would be very difficult to find a plausible technical ground upon which to except them, and utterly impossible to say, in view of the vast amount of money and property represented by corporation stock and the extent of its use for purposes of credit, that the Legislature did not intend that it should be subject to the attachment laws.

Nor can there be any doubt that, in the matter of procedure, the corporation itself may be made the garnishee. Whatever interest the shareholder has is in the custody and control of the corporation. A share of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and, upon dissolution, in all of its assets remaining after the payment of its debts. *Clark, Cor.* 1141. The certificate of stock representing the share of the owner

may be in the hands of some person other than the debtor or the corporation, but the certificate is not the share itself. For most purposes it is not regarded as property, but only as evidence of the existence and ownership of the shares named and described in it. 10 *Cyc.* 588. Where the proceeding to subject stock by attachment is under the general attachment laws, the corporation is made the garnishee. *Railroad Co. v. Paine*, 29 *Grat.* 502. Special statutes usually make the corporation the garnishee. *Drake, Attach.* § 259.

In this case the stock, against which the proceeding is, stands on the books of the company in the name of the debtor, but is claimed by a third party under an alleged purchase thereof from the debtor, made long before the order of attachment was served upon the company—in fact, years before this suit was brought. Is the lien of the attachment superior to the title of the purchaser? The assignment of the shares was not made by delivery of share certificates, but by a mere written assignment of the shareholder to the purchaser, specifying the number of shares. It does not appear that any certificate had ever been issued, nor that any demand for the transfer of the stock from the seller to the buyer on the books of the company had ever been made. The circuit court found and held that for the purposes of this suit the stock was the property of the debtor, and decreed it to be sold; but whether it did so upon the ground that the sale was fraudulent, or that an unregistered transfer of the stock is not good as against an attaching creditor, does not appear.

"The decided weight of authority holds that he who purchases, for a valuable consideration, a certificate of stock, is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferror to appear to be the owner of the stock upon which the attachment or execution is levied." *Cook, Cor.* § 487. This author says it is so held in New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Delaware, Nebraska, Tennessee, Kentucky, Louisiana, Mississippi, Texas, and Washington, independently of any statute on the subject. In a large number of states the purchaser, in such case, is protected by statute. In still other states a purchaser does not acquire any right to the stock as against an attaching creditor of the debtor, unless it is transferred to him on the books of the company before levied upon. The difference in the decisions is attributable, for the most part, to the peculiar terms of the statutes of the several states bearing upon the question, and to differences in construction of like and similar statutes by the courts of different

states. Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is generally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books. Even in those jurisdictions in which the statute declares that the stock shall be transferable only on the books of the corporation, it is held that an unregistered transfer or assignment gives the purchaser a perfect equitable title as between him and the assignor, and any person claiming under the latter.

The reasoning of the court in *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571, on this subject seems to be in perfect consonance with the rules and principles upon which contracts and rights of property stand. The court said, in part: "It seems too clear for argument that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and, if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is to hand over to the buyer his certificate, with a sufficient assignment, by deed or otherwise, to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a bona fide purchaser. It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by the owner, and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission. In the case of an unrecorded deed the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation, sold, but not transferred on the books. The statutes

which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases. As between the parties the title passes by contract, and not by the record in both cases alike."

It is to be observed that the New Hampshire court holds that the statute making the stock transferable only on the books of the company is in the nature of a registration law for the benefit of purchasers and creditors, in consequence of which an unregistered purchase is not good against a subsequent attachment; but it does hold that, as between the parties, the equitable title passes, notwithstanding the statute. Many of the courts hold that under such a statute the legal title passes as between the parties, while only an equitable title passes as against the corporation and bona fide purchasers. *Clark, Cor.* 1785. "In those states in which an unregistered transfer conveys the legal title to the shares, and not merely an equitable title, an unregistered transfer will necessarily convey a good title as against subsequent attaching or execution creditor of the transferor, whether the latter has notice of the transfer before his levy or not, unless the circumstances are such as to estop the transferee to set up his title, or the transfer is fraudulent as against the creditors of the transferor. In those jurisdictions in which it is held that the legal title remains in the transferor, the courts have not agreed as to the effect of an unregistered transfer as against an attaching or execution creditor of the transferor." *Clark, Cor.* 1794. "If a transfer on the books of a corporation is not required by the charter or by-laws, nor by any general law, it is not necessary to give a transferee a perfect title. In such a case a transfer by delivery of the certificate of stock duly assigned, although not registered on the books of the corporation, will prevail in all jurisdictions over a subsequent attachment by a creditor of the transferor, whether he had notice of the transfer or not. And the same is true where registration of transfers is required by statute, not for all purposes, nor for the protection of creditors, but merely for the protection of the corporation and its creditors. 'It requires a clear provision of the charter itself, or of some statute,' said the Massachusetts court, 'to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same, to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor.'" *Clark, Cor.* 1798; citing *Boston Music Hall Ass'n v. Cory*, 129 Mass. 485. In the earlier Massachusetts cases, the contrary of this doctrine had been

held, and, since the decision of the case just referred to, the Legislature of that state has passed a statute conforming to the principles announced therein.

In *Continental Bank v. Elliott National Bank* (C. C.) 7 Fed. 369, holding that an unrecorded transfer of national bank stock will take precedence of a subsequent attachment in behalf of a creditor without notice, Lowell, J., delivering the opinion, discusses the question most lucidly and exhaustively, reviewing many of the authorities, both American and English. In speaking of the statutes concerning transfers of the shares upon the books of the company he says: "No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholder. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant." Again, he says, at page 371: "It is a general rule that creditors, whether they proceed by an attachment on mesne process, seizure on execution, creditors' bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. Willis, J., in giving judgment in the Queen's Bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ilfracombe Ry. Co.*, L. R., 3 C. P. 235, 251. It has been the law of the Lord Mayor's Court in London, from the time of Richard I, that an equitable assignment of a chose in action should prevail against an attachment. *Westoby v. Day*, 2 E. & B. 605. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise." It is proper to say here that it is the rule in this state. *Neill & Ellingham v. Produce Co.*, 41 W. Va. 87, 58, 23 S. C. 702; *Wall v. Railroad Co.*, 52 W. Va. 485, 492, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948; *B. & O. R. R. Co. v. McCullough*, 12 Grat. 595.

Except in those cases in which a statute is held to have inhibited any transfer except on the books of the company, the delivery of the certificate with an assignment to the transferee passes either a legal or an equitable title to the shares; but, in this case no certificates appear to have been issued, and there was no delivery of any certificate between the parties. The only evidence of the assignment is a written instrument not

under seal, purporting to make over, transfer, and assign, for a valuable consideration, the shares therein described. Is this sufficient to pass any title? The shares exist independently of any certificate. They are a species of incorporeal property. "A share certificate is merely the paper representative of an incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property; hence the proprietary right may exist without a certificate." 10 Cyc. 538. "This legal relation, and proprietary interest on which it is based, are quite independent of the certificate of ownership, which is a mere evidence of title. The complete fact of title may very well exist without it." Mr. Justice Matthews, in *National Bank v. Watson-town Bank*, 105 U. S. 217, 222, 26 L. Ed. 1039. "Millions of dollars of capital stock are held without any certificate, or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. *Crumlish v. Railroad Co.*, 40 W. Va. 627, 22 S. E. 90. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deductible from the acts and conduct of the party." Mr. Justice Bradley, in *Pacific National Bank v. Eaton*, 141 U. S. 227, 234, 11 Sup. Ct. 984, 35 L. Ed. 702. Other cases to the same effect are *First National Bank v. Gifford*, 47 Iowa, 575; *Brigham v. Mead*, 10 Allen, 245; *Curtis v. Crossley*, 59 N. J. Eq. 358, 361, 45 Atl. 905; *Agricultural Bank v. Burr*, 24 Me. 256; *Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 50, 56, 17 S. W. 1043.

A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence and of title to the share in the holder, it is obvious it may be assigned without a certificate, and in the mode adopted by the defendant here and his transferee; but for this there is authority. "Subscription rights in a proposed corporation need not be evidenced by written instrument in any particular form, but may be established by parol. A subscription right in a proposed corporation is assignable by parol, and ownership passes immediately on consummation of the sale, and by force thereof, and not by operation of law." *Manchester St. Ry. Co. v. Williams* (N. H.) 52 Atl. 461. A certificate of stock is important for many purposes, but not for the purpose of a transfer as between parties. *Id.* 464; *Brigham v. Mead*, 10 Allen, 245; *Field v. Pierce*, 102 Mass. 253, 261; *Cattle Co. v. Burns, Walker & Co.*, 82 Tex. 56, 17 S. W. 1043; *Baker v. Wasson*, 53 Tex. 150; *Agricultural Bank v. Burr*, 24 Me. 256, 267; *Curtis v. Crossley*, 59 N. J. Eq. 351, 361, 45 Atl. 905.

As, by the assignment or transfer from the

debtor to his transferee, evidenced by the informal written instrument executed and delivered by the former to the latter, title to the stock, legal or equitable, passed, what is the status of that title as against the attaching creditor, assuming that it is only the equitable title? In addition to the authorities already noted as maintaining its superiority to the attachment lien, the following is quoted from that latest and invaluable work, *Cyclopedia of Law and Procedure*, vol. 4, p. 632: "The right of a creditor to property attached must be determined by the state of the title at the time the attachment was made, and, in the absence of fraud and statutory regulations, he only obtains the rights which the debtor had in the property at the time, for the creditor is not in the position of a bona fide purchaser." The rule applies where the debtor holds title to property subject to a valid outstanding charge or lien, whether the lien arises by agreement of parties, by operation of law, or a prior garnishment. *Id.* 633. The only exception to the rule, independent of statute, is that of the participation of the adverse claimant in the fraudulent purpose of the debtor, in which connection it is to be noted that, in the case of a sale of personal property, retention of possession by the seller is strong evidence of fraud, when the sale obstructs the rights of a creditor. *Id.* 635. It makes the sale *prima facie* fraudulent. *Davis v. Turner*, 4 Grat. 422; *Forkner v. Stuart*, 6 Grat. 198; *Dance v. Seaman*, 11 Grat. 778; *B. & O. R. R. Co. v. Glenn*, 28 Md. 287, 384, 92 Am. Dec. 688. What effect this rule of evidence is to have is an inquiry which more properly arises on the question of the validity of the sale, to be disposed of in a subsequent portion of this opinion.

As a rule, those courts which hold an unregistered transfer not good, as against the creditors of the transferor, do not put it upon the ground that the presence of the shares on the books of the corporation in the name of the transferor, after the sale, is tantamount to the retention of the possession of tangible personal property after sale, and is therefore evidence of fraud. The Supreme Court of New Hampshire, in *Pinkerton v. Railroad Co.*, 42 N. H. 424, and in *Scripture v. Soapstone Co.*, 50 N. H. 571, puts it partially upon that ground. In the former case the court said that the Legislature had made plain its intention that the entry upon the stock record should be the appropriate indication of ownership, as it had made provision in regard to returns of stock by the clerks or treasurers for the purposes of taxation, private liability, and attachment, and, in the case of manufacturing corporations, had ordained by express provision that a transfer of stock should avail nothing against an attachment until entered upon the corporation records. Whether, in the absence of such statute, the court would have arrived at the same conclusion, nobody can tell, but

there is no reason to assume that it would. In 1887 the Legislature of that state made an unregistered transfer good against an attachment. *Laws 1887*, p. 417, c. 16. In Connecticut the original idea was that no title, either legal or equitable, could pass by a transfer unless recorded on the books of the corporation. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Turnpike Co.*, 3 Conn. 544; *Northrop v. Curtis*, 5 Conn. 246; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552. This position, however, was abandoned in *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, propounding the quere whether, by an unregistered transfer, an equitable title passed, and holding that, if so, it was not good against an attaching creditor unless the transferee did all he could to have the transfer made before the attachment was levied. The statutes of Connecticut seem not to have been so rigid in their requirements in respect to the registration of stock as those of New Hampshire. The court, in the case last cited, after referring to the rule that possession of tangible property is an indication of ownership, says: "So, in respect to the assignment of ordinary choses in action, there must be notice of an assignment to the debtor; the assignment conveying but an equitable interest in the thing, and notice to a trustee being in equity the ordinary and only practicable mode in which an assignee can protect his interest. And in the case of the purchase of stock in a corporation there must be such a transfer of it as the Legislature in the charter or by statute prescribes. And notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of." As to choses in action, this is good law when applied to the case of a subsequent purchaser for value and without notice. But is it good law as to a creditor whose rights rise no higher than those of his debtor? That it is not considered sound, even in Connecticut, is evidenced by later decisions of that court. In *Mowry v. Hawkins*, 57 Conn. 453, 18 Atl. 784, the court said: "In the absence of fraud, stock may stand in the name of one which belongs to another, without being liable to attachment for the debts of the nominal owner. This must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title." This proposition was referred to in *Skiff v. Stoddard*, 63 Conn. 198, 28 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, as established Connecticut law. In *New York Commercial Co. v. Francis*, 83 Fed. 769, 28 C. C. A. 199, the proposition is applied as sound Connecticut law; the court saying in its opinion: "It is one which we are satisfied is in accordance with the general rule and with the principles of justice, unless the equitable owner is prevented by an estoppel

from showing the truth, or there has been some illegality or violation of a statutory requirement." In Alabama an unregistered transfer is not good against an attachment, because the statute expressly declares that the holder of stocks in corporations must have the same transferred on the books of the company within 15 days, else the same shall be void as to bona fide creditors and subsequent purchasers without notice. In Arkansas the statute gives precedence to the attachment unless a certificate of transfer is filed with the county clerk. In California, Colorado, and New Mexico the statute declares that no transfer of stock shall be valid for any purpose whatever until entered on the corporate books. In Indiana the attachment prevails because the statute declares that stock shall be transferable on the corporate books, and not otherwise. In Iowa the statute says transfers shall not be valid except as between the parties until a registry is had on the corporate books. See Cook, Cor. § 49, note 5. In Vermont the statutes were much like those of New Hampshire when *Cheever v. Meyer*, 52 Vt. 86, was decided, and the decision was rested wholly upon statutory grounds, treating the statutes as registration laws for the protection of creditors and subsequent purchasers without notice. The early cases in Massachusetts, giving precedence to the attachment, rested upon the same ground. In *Fisher v. Bank*, 5 Gray, 373, holding that shares in a bank whose charter provides that they shall "be transferable only at the banking house and on its books" cannot be transferred in any other way, so as to give the transferee a good title against a creditor of the vendor who attaches them without notice of the transfer, the decision was based wholly upon the statute. As before stated, this rule has been overturned in that state by a statute. Before the passage of the statute, the court, in *Dickinson v. National Bank*, 129 Mass. 279, 37 Am. Rep. 351, in construing the United States statute concerning national banks, which did not say the stock was transferable only on the books of the bank, although the by-laws of the corporation did say so, held that an unregistered transfer must prevail over an attachment in favor of a creditor of the transferor.

The proposition asserted in *Colt v. Ives*, 81 Conn. 35, 81 Am. Dec. 161, the soundness of which has been hereinbefore questioned, is the doctrine asserted in *Dearle v. Hall*, 3 Russell, 1, and confirmed in *Foster v. Cockrell*, 3 Cl. & Fin. 466, to the effect that, of two innocent purchasers of a merely equitable interest, he shall be preferred who first gives notice to the trustee or holder of the legal title. The Connecticut court seems to have treated a creditor as standing on the same footing as a purchaser for value without notice. The fallacy and unsoundness of it is clearly shown in the opinion in *Continental Bank v. Elliot National Bank* (C. O.)

7 Fed. 369, 375. *Lowell, J.*, said: "(1) Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares which they can convey, and whether their actual conveyance is legal or equitable is of no consequence. (2) The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. This statute was once held by the Queen's Bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor (*Watts v. Porter*, 3 E. & B. 743); but this has been overruled on the ground that the Legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose, and therefore the 'right' refers to the equitable as well as legal right. *Dunster v. Lord Glengall*, 3 Ir. Ch. 47; *Scott v. Lord Hastings*, 4 K. & J. 633; *Beavan v. Earl of Oxford*, 6 D., M. & G. 524; *Eyre v. McDonald*, 9 H. L. 619; *Robinson v. Nesbitt*, L. R., 3 C. P. 264; *Pickering v. Ilfracombe Railway Co.*, L. R., 3 C. P. 235; *Gill v. Continental Gas Co.*, L. R., 7 Ex. 619. A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a nonnegotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. *Drake, Attachments*, c. 24; *Cornick v. Rickards*, 3 Lea, 1. The Supreme Court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that state to choses in action. As shares are not choses in action, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point."

We have a statute on this subject, and it does not extend the principle so as to protect creditors. Assignees of choses in action are required to "allow all just discounts, not only against themselves, but against the assignors, before the defendant had notice of the assignment." Code 1899, c. 99, § 14. Discounts are not the debts of the assignor or assignee.

Another statute gives the right to any person to set up against an attachment any interest in, or lien upon, the property attached which he may have, without regard to notice. Code 1899, c. 106, § 23; *First National Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753.

This inquiry as to the grounds upon which some of the courts give precedence to an attachment over an unregistered transfer results in the conclusion that they put it upon the statutes either authorizing or requiring transfer to be made on the books of the corporation, some of them adopting the view

that, as there can be no visible change of the possession of a share, the Legislature intended the record to take the place of visible possession, by way of analogy to the common-law rule relating to tangible property, and others adopting the view that the statutory provision is in the nature of a registration law for the protection of the public. It has been shown that, where the former theory was adopted, it has either been abandoned or displaced by statutes. Moreover, there never was any basis for the assumption of legislative intent to require recorded evidence of ownership of shares, when the statute did not make the record a public one. It might as well be assumed that some record ought to show who owns other choses in action, evidenced by notes, bonds, and other obligations. The latter has been almost universally condemned as imputing to the Legislature an intent not warranted by the language of the statute or the nature of its subject-matter. Of it, Thompson, Com. Cor. § 2411, says: "But this view, which makes the stock and transfer books public records, open to the inspection of the public, is plainly untenable unless the statute law (as it does in some states) obliges the corporation to expose such records to the inspection of the public. Otherwise, they are strictly private records, sustaining no analogy to the records of transfers of title required to be made and kept in public recording offices; and even these last records import no notice except in those cases where the statute law expressly so provides."

Our statute, viewed in the light of the foregoing authorities and principles, affords no ground for a conclusion that an attachment in favor of a creditor of a transferee will prevail over the title, be it legal or equitable, of a transferee, when the transfer is not entered upon the transfer book of the corporation. It does not say the stock shall be transferable only on the books of the corporation. It is silent as to what shall constitute a transfer. The provisions relating to transfer are found in sections 21, 22, and 35-38, of chapter 53, of the Code of 1899. The last-mentioned section has no important bearing upon this question, and the others read as follows:

"21. A transfer book shall be kept by the corporation in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws.

"22. No share shall be transferred without the consent of the board of directors, until the same is fully paid up, or security given to the satisfaction of the board for the residue remaining unpaid. And where bond and security have been given to the corporation for any sum remaining unpaid upon stock, no transfer shall affect the validity of such bond and security."

"35. The board of directors shall cause to be issued, if demanded, to any person ap-

pearing on the books of the corporation to be the owner of any shares of its stock, a certificate therefor, under the corporate seal to be signed by the president and such other officer, if any, as the board may direct; which certificate shall show the amount paid on each share.

"36. A stockholder to whom such certificate has been issued shall not be allowed to transfer the shares therein mentioned, or any part thereof, without delivering up the said certificate to the corporation to be canceled, unless the same be lost or destroyed, or sufficient cause be shown to the satisfaction of the board of directors why it cannot be produced.

"37. If any person, for valuable consideration, sell, pledge or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge or other disposal of the said shares, not only as between the parties themselves, but also as against the creditors of and subsequent purchaser from the former owner, but subject nevertheless to the provisions contained in the nineteenth section of this chapter."

It is to be observed that no certificates of stock are required to be issued unless demanded by some person appearing on the books of the corporation to be the owner of the shares. While a certificate, when issued, is generally deemed by the courts to be a muniment of title, our Legislature, not deeming it essential to the existence of the shares, nor expedient on the ground of public policy, has failed to require corporations to issue them, unless demanded. The demand may be made by any person appearing on the books of the corporation to be the owner of the shares. He is an owner before he acquires a certificate. The certificate is clearly only evidence of title, which exists without it and independently of it. He may exercise his own pleasure about taking a certificate. If he does accept one, however, then he is placed under restrictions as to the mode of transfer, imposed by section 36, and his transferee is given special protection by section 37. These two sections will be further discussed later on. They clearly do not inhibit a transfer without a certificate, for they only relate to stockholders who have taken certificates, and a stockholder is not bound to take a certificate in order to complete his title. They clearly do not cover the whole subject of transfer. Section 22 imposes no conditions upon the exercise of the right to transfer, except that, if a share is not fully paid up, no transfer of it shall be made without the consent of the board of directors, unless security for the residue remaining unpaid, satisfactory to the board, be given. If the board of directors consent,

it may be transferred, although not paid up nor any security given. If it is paid up, consent of the board of directors is not necessary, and the owner of it may sell it at his pleasure.

Section 21 requires the corporation to keep a transfer book "in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws." This, no doubt, means that the names of the shareholders, together with the number of shares owned by them, respectively, shall be recorded in the book kept for that purpose, but it does not mean that the entry in that book shall be necessary to pass the title. It does not say so, and nothing but a strained construction of it could make it mean that. Nowhere in our corporation laws does it appear that any of the records required to be kept are in any sense public records. Section 43 of chapter 53 requires a list of the stockholders, showing the number of shares and votes to which each is entitled, to be hung up in the most public room at the principal office or place of business of the corporation, for one month before every annual meeting of the stockholders. Section 47 of the same chapter declares that the funds, books, correspondence, and papers of the corporation shall be at all times subject to the inspection of the board of directors or committee thereof, appointed for the purpose, or of any committee appointed for the purpose by a general meeting of the stockholders. No provision appears to give to the individual stockholder, much less a creditor of his, a creditor of the corporation, or a wholly disinterested person, the right of inspection at all times or at any time. The board of directors is required by section 46 of chapter 53 to make a report to the stockholders at the annual meeting, showing the condition of the corporation, and then declares that "the board shall furnish to each stockholder requiring it, a true copy of such report, together with a list of the stockholders and their places of residence." By section 47 of chapter 53, every stockholder has a limited right of inspection. It is only for 30 days before the annual meeting of stockholders, and extends, not to the "property and funds, books, correspondence and papers of the corporation," but only to "the minutes of the resolutions and proceedings" of the board of directors.

Not a word appears in any of the provisions just discussed from which it can reasonably be inferred that they were intended by the Legislature to vest in the general public, as creditors or otherwise, any rights by which the transfer of shares is in any way impeded or restricted. But when sections 35, 36, and 37 of chapter 53 apply, it may be different. Whether Condon ever took any certificates for the shares in question does not appear. As he could hold the shares and transfer them without certificates, the court cannot assume that he held them otherwise.

However, as the construction of these sections may be deemed to have some bearing upon the question now under consideration, certain purposes which they seem to have been intended to serve will be mentioned. Judge Holt, speaking for this court in *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646, after quoting sections 19 and 37 of chapter 53, said: "The manifest purpose of the statute is to permit the corporation to go by its books in ascertaining who is the owner of stock, and not require it to go out on the street and hunt them up. * * * Evidently, one of the objects of our statute cited above was to free banks and other corporations from the danger of such loose and unreliable evidence of notice of ownership of stock, by authorizing them, in their multitudinous details of affairs, to go by their books in determining the ownership of stock, in paying dividends, so long as they are acting in good faith and with reasonable care."

Sections 36 and 37 do not apply unless a certificate has been issued. That certificate is evidence against the corporation of the existence of the share and its ownership. As long as it is out of the possession of the corporation, it is a continuing affirmation by the corporation of the title and interest of the person to whom it was issued. 10 Cyc. 590. A transfer made on the books of the corporation of the shares represented by the outstanding certificate might operate as a fraud upon the rights of an innocent purchaser of the stock. They are assignable, and are sometimes said to be quasi negotiable instruments, though they are not really negotiable in the true sense of the term. 10 Cyc. 590. Nor are they generally held to be securities in the legal sense of the term (10 Cyc. 590): but they are largely so used, and our statute (section 37) makes them evidence of complete title as between the parties to the sale and of a valid pledge when they are so used. To allow a transfer on the books of the company, inconsistent with the rights evidenced by the outstanding certificate, would produce confusion and open the door to fraud. To this extent the Legislature may have intended to protect the public against fraudulent transfers on the books when certificates are outstanding; but the corporation and all its stockholders, whether holding certificates for their shares or not, have a deep interest in the subject. "The corporation has a dangerous duty to perform when stock has been attached or sold under levy of execution, and a registry is requested by the purchaser at such sale or by a purchaser of the outstanding certificate of stock. Cook, Oor. § 489.

Whether intended for the protection of the public as well as the corporation, or not, it seems clear that section 36 inhibits only a transfer upon the books of the corporation without a surrender of the certificate, and does not further restrict the power of the owner of the shares over them. It compels the officers to keep the record of shares con-

sistent with the outstanding certificates of shares, so that neither the corporation, holders of stock, nor purchasers of shares can be prejudiced or endangered by any evidence of title made by the corporation itself.

The holder of a certificate being thus protected from any injurious action at the office of the company, his transferee of that certificate, whether purchaser or pledgee, is also protected both from the acts of the corporation by said section 36, and also from the acts of the transferor and all persons claiming under him, whether as purchasers or creditors, by the provisions of section 37, declaring that if any person sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge, or other disposal of said shares, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former. Is there a word in the three sections by which any intent to confer any new rights upon the creditor of a stockholder is manifested? Because section 37 says the delivery of the certificate, together with a power of attorney, shall effect a complete sale or pledge as between the parties, and as to subsequent purchasers from, and creditors of, the transferor, does it follow that, without such delivery, the transferee, under a purchase for value and without fraud, would not have a title superior to the claim of a creditor of the transferor under a subsequent attachment or execution, or of a subsequent purchaser who has not himself acquired the certificate? Suppose the certificate is lost or destroyed, or not within reach when the owner of the shares represented by it wishes to pledge or sell them, and the purchaser or pledgee is willing to part with his money on the faith of a simple instrument of writing, purporting to assign the shares; can this not be done, subject to the rights of any third party who may obtain the certificate? Not a word in the statute asserts the contrary. Is it to be implied? Restrictions upon the right to make contracts are not often so established. The statute only declares what shall be the effect of making a transfer in a particular manner, leaving the parties to be governed by the general principles of law and equity, if they make it in any other way. If the transfer be made in the manner indicated, the transferee need show nothing but the certificate and power of attorney to establish a perfect title as against everybody but the corporation. Without the certificate and power of attorney he would be required to show when, under what circumstances, and for what sum of money or other valuable consideration, he became the owner. It is obvious that unless section 36, or some other

provision of the statute, is to be regarded as a registration law for the protection of the public, who have no access to the books of the company, these sections are intended only to protect the corporation and those who claim under the certificates of stock. That neither section 36 nor any other section of chapter 53 is a public registration statute is made plain by what has been said in former parts of this opinion. That being true, the mode of sale mentioned in section 37 relates only to the matter of registering the transfer on the books of the corporation, for its protection and that of holders of the certificate. These observations on sections 35; 36, and 37 of chapter 53 are only made for the purpose of showing that nothing in them conflicts with the conclusion reached respecting the status of an unregistered transfer, under our statutes, when no certificate is involved, and are not to be taken as constituting a binding judicial construction of the provisions of said sections. Shares of corporation stock can only exist by virtue of a statute. Our statute, as shown, makes them property, and vests the subscribers with title before any certificate is issued, and does not require one to be issued. Owning the share without a certificate, he may sell it without one, or with one, at his election. The sale in this case was of stock for which no certificate had been issued. The *jus disponendi* is an incident of ownership. 10 Cyc. 577. And it may be exercised in any way not prohibited by the law. As our statute does not prescribe any mode of sale when no certificate has been issued, the owner may dispose of his share in such manner as would suffice to pass his title to any other chose in action or intangible property. The delivery of a written instrument assigning the property is clearly a symbolic delivery, if any delivery is necessary in such case.

An account for merchandise, for labor, for materials, for rent, or for any other chose in action, not evidenced by writing or acknowledgment of the debtor, may be assigned by a writing such as was signed and delivered in this case, purporting to assign the shares in question. Why is it not sufficient in this case? There can be no substantial, nor even a plausible, technical reason, as has been shown by authorities as well as by the provisions of the statute, making possible the existence of this kind of property.

In *Fisher v. Essex Bank*, 5 Gray, 373, holding that the statutory mode of transfer was exclusive, the statute having said shares were transferable only on the books of the bank and at the banking house, the court said: "Before any method was established by positive law, how, by what mode, or by what precise and definite act, such property should be considered as ceasing to be the property of the seller and becoming the property of the purchaser, courts of justice might well resort to the common-law modes of

transferring similar incorporeal interests, and hold that a delivery of the only muniment of title held by the owner, with the execution and delivery of an assignment of his interest, by indorsement on the certificate or otherwise, should by analogy be held to be a valid transfer, and, when notified to the bank, should be considered as having taken effect at the date of such delivery."

As before demonstrated, the notice is only required as against subsequent purchasers.

Having no doubt about the sufficiency of the transfer to vest title in the transferee, nor as to the superiority of that title, equitable though it may be, over the attachment lien, if acquired for value and without fraud, nothing remains to be determined but the question whether the purchase was for value and in good faith.

At a sale under a decree made by the Circuit Court of the United States for the District of West Virginia, in May, 1890, Levi Z. Condon became the purchaser of 66,000 acres, or more, of wild lands, situated in Randolph and other counties, which sale was confirmed July 1, 1890. On the 20th day of December, 1894, it appearing to the court that Condon had theretofore paid into the registry of the court the balance of purchase money, and had by deeds dated March 25, 1892, and April 1, 1892, conveyed to the Condon Lane Boom & Lumber Company, a corporation, the said lands, it was ordered that the same be conveyed to said company, and it was accordingly done. At about the time of Condon's conveyance to the Condon Lane Boom & Lumber Company, or shortly before that time, he owned a mill on Dry Fork river, at Bretz, some miles below the timber lands, and was trying to devise some way of getting the timber down to that point, and desired to sell the hemlock bark on the lands, and with the proceeds construct, or aid in constructing, a railroad up said river to these lands. H. Stowell says Condon employed him in June, 1902, to find a purchaser for the bark, agreeing to pay him \$5,000 for his services upon the consummation of the sale, and that afterwards, in February, 1894, a sale of the bark to the United States Leather Company, at the price of \$65,000, was effected as a result of his services in exploring the land, estimating the value of the bark, and furnishing information to the purchaser. The sale was made in February, 1894, and Stowell assigned his claim for the \$5,000 to P. Lipscomb, who in December, 1898, proceeded against Condon in equity as a nonresident, serving the order of attachment on the Condon Lane Boom & Lumber Company as garnishee, and that company answered, admitting that according to its books Condon was the apparent owner of 1,300 shares of common stock and 1,250 shares of its preferred stock. Later, Albert N. Horner filed his petition, claiming to have purchased and paid for all of said stock long

before the service of the order of attachment, and to have owned it at the time of said service, and still to be the owner of it. Jeff Lipscomb, administrator of P. Lipscomb, in whose name the suit was revived, said P. Lipscomb having died after instituting the suit, filed an answer denying that there had been any valid purchase of the stock by Horner, and charging that no valuable consideration passed from him for the stock; that the same was placed in the hands of Horner by Condon "for the sole and express purpose of hindering, delaying, and defrauding the said plaintiff" out of the collection of said debt, as well as other creditors. He was informed and believed that no assignment or transfer of the stock had been made until after the sending out of the attachment, and that then Condon and Horner conceived and executed a plan to defeat the collection of the debt, by transferring the stock after the service of the writ, and dating the transfer back, "in order to give the said pretended transfer a semblance of having been done for a valuable consideration," all of which said transaction was intended to hinder, delay, and defraud the creditors of the said Condon, and especially "this plaintiff."

As no replication to this answer was filed, and no depositions were taken on the subject-matter thereof after it was filed, it is insisted, upon the authority of *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670, *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804, and *Findlay v. Smith*, 6 Munf. 142, 8 Am. Dec. 733, that the allegations of fraud on the part of Horner, contained in the answer to his petition, must be taken as true. Counsel for appellant Horner deny the correctness of this position, saying that no answer was required. For this they rely upon the language of section 23 of chapter 106 of the Code, under which the petition is filed. This section, after authorizing the filing of the petition, says: "The court, without any other pleading, shall impanel a jury to inquire into such claim."

Though originally there might have been difference of opinion as to the application of this statute to suits in equity with attachment, the question seems to have been settled in favor of it. In *Chapman v. Railroad Co.*, 26 W. Va. 324, the court seems to have approved the ruling in *Anderson v. Johnson*, 32 Grat. 558. That was a suit in equity founded upon an attachment, and the court held as follows: "Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury impaneled for the purpose, as provided by the statute (Code 1873, c. 148, § 25); and it is error for the court to pass upon the claims without the intervention of a jury." *Chapman v. Railroad Co.* was also a suit in equity with an attachment, and Judge Johnson, in

discussing it in view of said section of the statute, said: "If the petition shows a prima facie right in the petitioner to the property in the petition, a title better than that of the defendant, then the court should impanel a jury to inquire into the claim."

Although the inquiry now is not as to the right to a trial by jury, but as to what pleadings are necessary in a case of this kind, the two decisions just referred to and others apply the statute in question to all attachment suits, whether in equity or at law. There can be no doubt of its applicability in actions at law, and these cases foreclose any question as to the intent of the Legislature to apply it to suits in equity.

That it is competent for the Legislature to require jury trials in equity proceedings cannot be doubted. In many instances it has authorized and required courts of equity to direct issues out of chancery to the law side of the court for the determination of questions of fact proper for ascertainment by a jury. The statute governing attachment proceedings requires a trial by jury of the issue made on a plea in abatement, denying the existence of the ground upon which the attachment is sued out. Whether the proceedings are entered in the chancery order book or the law order book of the same court is more a matter of form than substance, though it is sometimes error not to enter it in the latter. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. In section 23, providing for intervention by third parties, the Legislature may have intended a direction of an issue and trial by jury in all cases, whether the title set up was legal or equitable in its nature. But if it were an open question it might well be doubted whether the Legislature did so intend, and whether it was intended, when the proceeding is in equity, to alter the rules of pleading, and limit the pleadings to the petition alone.

The statutory provision in question appears for the first time in the Code of 1849. The object of the amendment is stated by the revisers in their report (page 761) as follows: "This section, as altered from the present law, will close the question whether a suit in equity is not necessary when a party claims under a subsequent attachment." Up to that time the statute had made no provision for any third party who desired to dispute the validity of the plaintiff's attachment, or who desired to assert a lien on the attached property under any other attachment or otherwise. The provision was as follows: "Whenever the goods and chattels, taken by virtue of any attachment, shall be claimed by any person, other than such debtor, the court shall immediately, (unless good cause be shown by either party for a continuance,) direct a jury to be impanelled to enquire into the right of property." Code 1819, c. 123, § 16. That chapter relates to both foreign attachments in equity and at-

tachments at law; but the distinction between the two kinds of proceedings seems to be very clearly marked, and said section 16 seems to be applicable to the latter only.

The doubt and uncertainty alluded to by the revisers is exemplified in *Erskine v. Staley*, 12 Leigh, 406, and *Moore v. Holt*, 10 Grat. 284. Both of these cases arose before the amendment of the attachment statute adverted to, and their nature is indicated by point 1 of the syllabus in *Moore v. Holt*, which reads as follows: "Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands, and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee, and, before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the same." In that case the court very clearly points out the difference between foreign attachment in equity as it existed in Virginia at that time, and the statutory attachment in equity and at law which now obtains in Virginia and this state. In foreign attachment, the process, with an indorsement on it in the nature of an attachment, created a lien, although no affidavit at all had been filed; but to authorize the officer to take the effects out of the hands of the garnishee, or require him to give security to have the same forthcoming, an affidavit was necessary. For the amount and nature of the claim, reference was had to the bill. The bill and process with the indorsement give a lien. Hence the title was drawn into the main suit. The bill asked for subjection of the property to satisfaction of the debt, and brought it within the jurisdiction of the court. In an action at law the property came into the case by reason of the levy of the attachment only. All this suggests the quære whether the legislative object was not merely to enable a lienholder, by execution or otherwise, and the person claiming an equitable title to the attached property in a proceeding at law, to assert his claim in a court of law—a thing which he could not do, or to do which his right before the amendment was doubtful—and not to work any change whatever in the rules governing the pleadings, when the suit in which the attachment is sued out is in equity. It is to be observed that Judge Moncure's discussion of the subject in *Anderson v. Johnson* is limited to a single paragraph of about a half dozen lines, and makes no reference whatever to the history of the subject or reason of the amendment. Nor does Judge Johnson enter upon any examination of it. Moreover, I see no good reason why it may not here be held that the parties, by going into equity, have waived the right to a trial at law, since fraud, the real core

of the controversy, is always a matter of equity cognizance. Though not free from doubt as to the proper construction of the section, I yield to the views of the other members of the court, who are satisfied with the interpretation which the Virginia court has given the statute, and which this court has approved, as already stated.

Under a misapprehension of the law, superinduced by the action of the parties, the court treated the petition of Horner as a cross-bill, and heard the matters in difference between him and the attaching creditor upon it and the answer thereto, and upon the depositions taken and filed by the parties. In bringing the case on to be heard, the decree contains the usual recitals, except that it refers to the agreement between the parties, upon which also it was heard. This is an agreement entered into between Horner and the plaintiff, authorizing the filing of Horner's petition with the clerk of the court in vacation, and the answer of the plaintiff to the petition within 40 days from the date of the agreement, and providing that thereafter the parties might go on "and take their proof upon said petition just as if the same had been filed in court, and mature the same for hearing; but either party shall have a right to object to any pleading or proof just as if the same were filed in court." In an effort to be more explicit the parties repeated the agreement in the following terms: "All legal objections which either party may have to any pleading or evidence are reserved for the consideration of the court, and the hearing of said petition shall be had just as though the same and the bond of the plaintiff and the answer of the plaintiff had been tendered in open court for the action of the court; and it is further agreed that the parties may take such legal and proper proof upon legal notice as they have a right to take."

Assuming either that the statute did not contemplate a trial at law of the matters in difference between the petitioner and the plaintiff, or that, if it did, they might elect to try according to the rules of equity procedure, depositions were taken and filed, and the court disposed of the case as one in equity. Considered as a trial at law by the court in lieu of a jury, how does the case stand? No witnesses were produced and examined to prove the contention of either party. No ground is shown for the use of depositions instead of oral testimony of witnesses. Had objection been made, the depositions could not properly have been used, and there was no evidence before the court. However, counsel for appellant now insists that the action of the court shall be treated as a trial at law, and the depositions to prove his petition as having been properly admitted. The court, erroneously treating the proceeding as governed by the rules of equity practice, regarded the allegations of fraud in the answer as true, and entered a decree

for the plaintiff. This operated a complete surprise upon the petitioner. To permit him now to turn the proceeding into one at law, and give him the benefit of his depositions, would work an equally great surprise upon the plaintiff. Hence it is plain that, under a misconception of the nature of the proceeding, there has been a mistrial, operating injustice to both parties. The plaintiff has had no opportunity to interpose objections to the introduction of petitioner's evidence irregularly taken and introduced. The petitioner has been unwittingly drawn into a trap which denies him the benefit of his evidence on merely technical grounds. The principle announced in *Echols v. Tracewell*, 52 W. Va. 614, 44 S. E. 164, and in *Armstrong v. Grafton*, 23 W. Va. 50, is well adapted to situations of this kind, and its application will enable the parties to have a fair trial under proper rulings by the court. On the theory of a misconception of the case by both counsel and the court, in consequence of which there had been no fair trial, the appellate court reversed the decrees in those two cases, and remanded them. Viewed from this point of observation, the vice of the proceeding is the adoption of a wrong mode of trial, and the application to the trial of improper rules of procedure.

That the case was heard on the agreement does not relieve from the effect of this irregularity. The parties reserved the right to make all proper objections to the pleadings and evidence, and, under the rules governing the mode of trial adopted, no objections would have been entertained. Hence it was useless to make any. We cannot assume that the appellee would have relied upon the want of a replication, or failed to object to the introduction of depositions, without grounds therefor having been shown, had he been informed that the trial was at law instead of in equity. He agreed that proof might be taken under the apprehension that the proceeding was governed by the rules of equity pleading and practice. This is manifest from the terms of the agreement. Therefore he cannot be said to have consented to the use of the depositions on a trial at law, and in fact, as well as in law, the record shows there never was any such trial.

The position of counsel for appellant is open to another serious objection. The record does not show any express waiver of a jury by the appellee. The decision is in his favor. Appellant would reverse the decree, and then have the court render, against the appellee, a new decree, such as, in the opinion of counsel for appellant, the court below should have entered. While an adjudication in favor of the appellee, without the waiver of a jury, might stand, because he cannot be prejudiced thereby, one against him might be fatally erroneous for want of such waiver. In decreeing against him this

court is bound to notice and protect his rights. That a jury may be waived is beyond doubt, but the Legislature has seen fit to prescribe the manner in which such waiver shall be shown, namely, by consent of the parties or their counsel entered of record. Section 29 of chapter 116 of the Code of 1899. This statute was put in the Code of 1849 upon the recommendation of the revisers, at a time when the constitutional guaranty of jury trial was in a form different from that in which it now appears; but the alteration in its language makes it no less sacred, and our lawmakers have not exercised their discretion to dispense with the statutory requirement as to the manner in which such waiver shall be evidenced. Through all the mutations of our organic and other laws, they have suffered the statute to remain wholly unaltered, and its provisions have been uniformly observed down to the present time, so far as the reported decisions of this court disclose. For more than half a century the statute has stood, working no inconvenience, and yet effectually guarding this most important and sacred right of the citizen against inadvertent and inconsiderate waiver. In view of all this, it would be clearly contrary to legislative intent, and a violent innovation upon our settled practice, to permit any form of waiver different from that prescribed by the statute. None of our decisions seem to countenance any authority in the court to try civil and misdemeanor cases except when the record shows a waiver by consent. *King v. Burdette*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296. In some jurisdictions there is a presumption of waiver when the record is silent on the subject (17 Am. & Eng. Ency. Law, 1103, 1100); but, where the mode of waiver is prescribed by statute, that mode is generally held to be exclusive (17 Am. & Eng. Ency. Law 1090).

In a trial upon the petition it will be competent for a jury, or the court trying in lieu of a jury, to inquire into the bona fides of Horner's purchase. Fraud, if proven, will vitiate the sale, and it is within the legislative power to dispense with a plea or other specification setting it up by way of defense on the question of title. "It is as competent for a jury to investigate fraud as a chancellor. The evidence to sustain actual fraud must be the same, in substance and effect, in one forum that it is in another." *Baltimore, etc., R. R. Co. v. Lafferty*, 2 W. Va. 104; *Baltimore, etc., R. R. Co. v. Lafferty*, 14 Grat. 478; *Jones v. Wood*, 16 Pa. 25; *Wilson v. R. R. Co.*, 11 Gill & J. 58.

For the reasons aforesaid, the decree must be reversed, and the cause remanded for trial upon the petition of the appellant Horner, in accordance with the principles herein stated, and for further proceedings according to the rules and principles of equity.

(56 W. Va. 320)

HOLSBERRY et al. v. HARRIS et al.*(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)**GIFT OF LAND—EVIDENCE—POSSESSION BY SON—IMPROVEMENTS—LACHES.**

1. The possession by a son of land belonging to his father, even when accompanied by valuable improvements, will not be treated as sufficient evidence of a gift because the relation between the parties prevents the inference which would otherwise arise from the fact, and removes all necessity of accounting for the possession by the supposition of an existing contract.

2. Such possession of a son under an alleged gift must be definite and exclusive, and not concurrent with the father.

3. As between father and son, the mere physical fact of possession is not of itself conclusive, nor even material.

4. The evidence in case of a parol gift from father to child should be direct, positive, express, and unambiguous, and its terms clearly defined. Loose declarations of the father, without explanation, are not sufficient evidence of a gift.

5. Improvements to amount of \$500 or \$600 made on premises occupied by a son by the sufferance of his father for a period of 30 years—the principal part of such improvements made after full notice to the occupant by the father that he would not give him the land upon which the improvements were so made—will not entitle the son to compensation for such improvements.

6. A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Action by Henry Holsberry and others against Priscilla C. Harris and others. Judgment for plaintiffs, and defendant Priscilla Harris appeals. Reversed.

Melville Peck and W. T. George, for appellant. J. Hop Woods, for appellees.

McWHORTER, J. Martin Holsberry was a farmer living at Kalamazoo, in Barbour county, and owned a farm situated at the junction of the Meadowsville and Philippi roads, containing about 230 acres, made up of two tracts—one of 135 acres, conveyed to him by his father, John Holsberry, and another tract, of about 108 acres, conveyed to him by John Poling; the former deed from John Holsberry being dated in 1859, and the one from Poling in 1854. The 230 acres composing the said two tracts were known as "Martin Holsberry's Home Farm." Some time in 1877 or 1878 Martin Holsberry gave to his son Henry Holsberry, and conveyed to him, 32 acres from the tract of 135 acres so conveyed to Martin by his father. This piece, which was conveyed as 32 acres, turned out, on being surveyed, to be 50 acres. In 1870 Henry Holsberry was married, and in 1871 went onto another portion of said 230 acres, occupying a small log house, of one room, which he continued to occupy until 1892, with the exception of about two

*Rehearing denied January 2, 1905.

years, when he lived in another house on a tract conveyed to him about 1875 or 1876 by I. V. Johnson. In 1892 he repaired and added to the house, enlarging it, which improvement he completed in 1893. He also built two small granaries, a little stable, a small storehouse, and dug a well on the property. In 1895 Henry Holsberry sold his two tracts of land, and left the property where he had lived, and removed to Elk City, where he purchased a farm, upon which he continues to live. On the 16th day of October, 1902, Martin Holsberry conveyed to his daughter Priscilla Catherine Harris, wife of Ira Harris, the said home farm, of 230 acres, more or less, for and during her lifetime, and remainder to her children by her husband, Ira Harris. On the 30th of October, 1902, Martin Holsberry departed this life. At the January rules, 1903, Henry Holsberry filed his bill in equity against Priscilla Harris, her four infant children, and Margaret B. Stalnaker, alleging the gift to him by his father, Martin Holsberry, of 30 acres of land lying immediately within the angle of the said two roads, of which his said father had placed him in possession, and promised and assured plaintiff that the same should be and become his, and advised and directed plaintiff to erect upon the same the buildings and fixtures mentioned in the bill, with the assurance and promise to plaintiff that plaintiff's use and occupancy thereof thereunder should operate and vest title in plaintiff as fully and completely as if same was vested in him by conveyance; that, relying upon said promise and assurance, plaintiff took possession thereof, with the full knowledge, consent, and direction of his father, and first built thereon in the year 1882 a storeroom costing \$200, wherein plaintiff carried on the mercantile business from the year 1882 until the year 1894, and wherein said Ira Harris, the husband of the defendant Priscilla Harris, now carries on the same business as the tenant by sufferance of plaintiff; that afterwards plaintiff built a dwelling house 36 feet long by 18 feet wide, with a two-story ell and kitchen, costing about \$1,500, which was completed in the year 1893; that about the same time, or soon after, he erected on said land two granaries costing \$38, a stable costing \$100, and built a stone wall and made an earthen fill costing \$25, had finished a well costing \$25, and set out fruit trees and made other improvements thereon, and occupied the same as a home for himself and family until the year 1895, when he left the said land and moved to his present home in Elk district, and, at the instance and special request of his father, left the property to be rented by him for plaintiff, and to account to plaintiff for the rents and profits thereof, reserving the right, at the will of plaintiff, to his father, to use one room of said dwelling house as a granary or storeroom for himself; that the decedent had never paid plaintiff anything on said ex-

penditures, or ever made him any advancements, except to the extent of about \$600 in the way of money and personal property, and the conveyance to him of the said tract of land, which plaintiff afterwards sold for \$500, its full value; that when his father on the 16th of October, 1902, made the conveyance to Priscilla Harris, he was then living with her, and was then 79 years of age, and describing the farm so conveyed "as the home farm of decedent, whereon he resided, containing 230 acres, more or less"; that said farm then contained 230 acres, exclusive of the 30 acres given to plaintiff, and which was formerly a parcel thereof, and that he did not intend by said conveyance to, and did not in fact, embrace the said 30 acres so given to plaintiff; and prayed that so much of the deed of October 16, 1902, as might be supposed to embrace said 30 acres, bounded and described by a plat filed with the bill, be set aside as a cloud upon the right and title of the plaintiff thereto, and a commissioner be appointed to convey same to plaintiff, or, in default thereof for any reason, plaintiff might have a decree, to be charged as a lien thereon, for the full amount and value of his buildings and improvements, with interest to date, and his costs. The infant defendants, by their guardian ad litem, filed their answer, and the defendant Priscilla Harris filed her answer, denying the material allegations of the bill. Plaintiff filed his amended bill, joining with him as plaintiffs David Ruckman and Cora Stalnaker Ruckman, against the same party defendants as mentioned in the original bill, making the original bill a part thereof, alleging that David Ruckman and Cora Ruckman are husband and wife, respectively; that Cora was the tenant by sufferance, by the month, at a dollar per month, in possession of said parcel of said 30 acres of land, including the buildings of said plaintiff, Henry Holsberry, by parol lease, and claiming under him, and subject to disseisin at his will, said Cora making no claim against him to the contrary; that, after the institution of this suit, Priscilla Harris had brought an action against said Cora before a justice, in unlawful detainer, for the possession of said property; and praying for an injunction against her prosecution of said action, which injunction was granted. To which amended bill the defendant Priscilla Harris filed her demurrer and answer, denying that the Ruckmans, or either of them, were tenants of the plaintiff, and that, if they (the Ruckmans) admitted such tenancy, it was fraudulent, and was done for the purpose of trying to defraud respondent and the other defendants out of said land; denying that said Cora Ruckman had any defense to respondent's action of unlawful detainer; denying that Henry Holsberry ever had any title to any of the property mentioned in the bill or amended bill, either legal or equitable, or that Cora Ruckman or her husband, David

Ruckman, were ever in possession of more than a portion of said dwelling house and one stall in the stable, which they once had, but did not have at the institution of the action of unlawful detainer; that Martin Holsberry never promised to give and never did give the property mentioned in the bills of plaintiff to the said plaintiff; and alleging that the rents of said premises were never collected by plaintiff, nor were they ever collected for him by any one; that plaintiff used said premises while he lived there; and averred that the rents of the same were worth much more than the costs of the improvements that he made; that plaintiff never paid any taxes on said land, but that the taxes were always paid by Martin Holsberry upon this land, as a part of his home farm; and that, after plaintiff moved from said premises, Martin Holsberry rented and collected the rents therefor up to the time he conveyed the same to respondent and the other defendants for himself, and not for Henry Holsberry. Depositions of many witnesses both for plaintiff and defendant were taken and filed in the cause, and on the 5th day of June, 1903, the same was brought on for hearing, when the court decreed that the defendants Priscilla O. Harris and Margaret B. Stalnaker, sole heirs with the plaintiff of the decedent, Martin Holsberry, do convey and release to the plaintiff their several interests, as said heirs of Martin Holsberry, in and to that certain parcel of land in said bill and amended bill mentioned, supposed to contain about 30 acres, particularly mentioned and described by the plat filed with said bill, and, upon their failure to make such deed, appointing a special commissioner to make the same in their behalf, and perpetually enjoined and restrained Priscilla Harris from prosecuting her said action of unlawful detainer against said Cora Ruckman for said 30 acres, and decreed costs to plaintiff against Priscilla C. Harris, from which decree Priscilla Harris appealed to this court.

This is a suit to enforce the specific performance of a parol gift, and depends entirely on oral testimony. There is not a writing of any kind, and, as to the nature of the possession given plaintiff by his father, Martin Holsberry, there is no testimony except that of the plaintiff, which was incompetent, under section 23 of chapter 130, Code 1899. Verbal admissions made by his father, Martin Holsberry, are sought to be proved to establish the fact that Martin had given him the property, and that he intended him to have it. Andrew V. Stalnaker testifies that, when he moved plaintiff Ruckman into the house, Martin referred to it as Henry's house, and that by general report in the community it was called Henry Holsberry's property. Virginia Holsberry, plaintiff's wife, testified that Martin Holsberry told her husband he should have the land; "said for him to build a storehouse,

and that he would make him a right for the land around there." Idera Talbott, daughter of plaintiff Holsberry, testified that she heard Martin say "he intended to make a right to my father for all these buildings, and the ground around them; that he never intended to see him lose anything he put on there"—and states that when Henry Holsberry was moving from Kalamazoo to Elk City, Martin Holsberry "asked papa what he should do with the buildings—if he should rent them. Papa said, 'Rent them,' and he said, 'All right; I will rent them and give you the rent.'" Margaret B. Stalnaker says her father, Martin Holsberry, always referred to the property as Henry's property. M. F. Stalnaker states that, in a conversation with Martin Holsberry, "he told me in the year of 1895, the last of February or the first of March, while standing between his house and the post office, that he intended to give Henry Holsberry, taking in the long meadow, enough to include his buildings, and running to John Holsberry's line, and then he intended for Henry to take his property and put it on his own land, and Henry could run his, and he would run his own," which he says would embrace the land in dispute in this suit. A. W. Stalnaker says Martin Holsberry told him that "he intended to give Henry on that side of the road, including his buildings," and heard him "call it 'Henry's house' and 'Henry's store.'" Another witness, Garrett Nestor, said he heard Martin say he intended the property for Henry. Stelle Holsberry, another daughter of plaintiff, says her grandfather Martin Holsberry "said he had told papa to go ahead and build; that he intended the buildings and land around them for him. He was plowing in the meadow in front of our door. I was taking him a drink of water." The most improbable story, however, is told by David Ruckman, one of the plaintiffs in the amended bill, when he says in his testimony, "I have heard Mrs. Harris' children call it 'Uncle Henry's property.'" Quite likely, when it appears from the deposition of the plaintiff himself that Mrs. Harris' four children range in age from the eldest, eight years, down to two years! Several disinterested witnesses testify that they heard conversations between Martin Holsberry and plaintiff which were entirely the opposite of that claimed by plaintiff. Witness A. C. Keller says that he heard Martin Holsberry, in the storehouse at Kalamazoo, tell his son Henry Holsberry "not to build the house on the land where he did. If he did, he built it at his own risk. He told him to go and build the house upon his own land." He further testified: "Henry says to him that he wanted to tear an old chimney down that was there. He says 'No, Henry, I am not going to have the chimney torn down,' and that that was about the way the conversation started"—and explained that this was the chimney to the back of the house in

which Henry lived, and that the chimney stands there yet. Solomon S. Skidmore testified that he was working for Henry Holsberry, who requested him to go and ask his "pap" if he had ever made him a deed for any land there. "He said 'No,' he never allowed to; he had given him all he expected to give him. He said he did not want any house put up there, and, if he wanted to build, to go and build on his own land. He said he did not want any fine house there, and he said that he was sharp enough, when he set his orchard out, to set it on his own land, that he had given him." When asked if Martin Holsberry recounted to him there or mentioned to him what he had already given to his son, he said he had given him 50 acres of land on the upper end, which now is called the "David Poling Land," and helped him to pay for what was called the "Sam Poling Place." About \$1,100 it had cost them. He said he had put about \$500 in the store for Henry, and said at that time that he did not want any fine house put up there to pay taxes on; that he went back and told Henry what his father had said to him, and stated that that was before he built the house. Witness P. M. Godwin relates a conversation he had with plaintiff. Says he asked plaintiff, "Doesn't this land belong to you, where you are?" He says, 'I have no deed for it, but I think pap will make me a deed some time,' and says he thinks this was before the house was repaired. Felix Skidmore gave a conversation he heard between Martin Holsberry and Henry Holsberry, and says: "I was at Uncle Mart's, working for him, and Henry come there in the house at night or late in the evening, and he had hauled a load of lumber that day—Henry had—and Uncle Mart asked him what he was going to do with it, and he said that he was going to build that house, or repair it, in which he lived; and Uncle Mart told him that he had better build on his own. Henry said, 'Why?' and he said, 'Build on your own;' and he said, 'I have given you all that I expect to give you. Go and build on the land which I gave you.'" He says, "Henry told him that he thought he ought to have it; when Martin told him that he could not have it; that he had given him all that he allowed to give him." H. J. Poling testified that he was at the store at Kalamazoo, and Henry came there, and called his father out in the yard, and asked him if he could not put some of his wheat in that house. Martin said, "Yes; you can put some grain in one room in the loft. We have grain in the rooms below, and we have them occupied." Ira Harris states that when Henry Holsberry left the house, in 1895, he asked "his father, Martin Holsberry, to leave a part of his stuff in a part of that house. He said that he had quite a lot of work to do over on his farm that he had bought, and, if he hadn't any objections, that he would

like to leave some of his stuff in one room of the house until he could get time to come after it. Martin Holsberry told him that it would be all right to leave it there till he got his work straightened up so that he could come after it." He stated that Henry Holsberry delivered the key of that house to his father when he left, and that Martin Holsberry had the keys until his death; that one of the keys he did not have all the time; J. W. Baylor had it a while, and since that time David Ruckman had had it part of the time; that Priscilla Harris has had the keys since Martin Holsberry's death, except the one David Ruckman had; that Henry Holsberry never called for or demanded the keys after the death of his father. He further stated that Henry took from the house seven windows. He took all the paper and canvas down, with the exception of one room. That room was papered without any canvas, and he could not get that down. He also took the finishing off of the portico. He says that Henry Holsberry's house had burned down, and he came up after the remainder of the doors and windows, and, in order to keep them in the house, witness paid him for them \$28.24.

I have given substantially the testimony, as far as the declarations of Martin Holsberry are concerned, touching his intentions as to giving Henry the property. The most important witnesses on behalf of plaintiff are his wife and daughters and his coplaintiff, Ruckman, who was interested in preventing the further prosecution of the unlawful detainer case which he had enjoined under the amended bill. There is no allegation in the bill that Martin Holsberry ever agreed or promised to make plaintiff a deed for the property, yet plaintiff attempts to prove by his wife and daughters that he said he would make Henry "a right to it." Plaintiff fails to prove sole and exclusive possession of the property, as witnesses prove that they worked at harvesting and other work on the lands claimed by plaintiff, in the employment of Martin Holsberry. Indeed the whole tenor of the evidence is to the effect that Martin Holsberry's possession was never interrupted by Henry, except, perhaps, as to the house alone, which was occupied by Henry and his family, and that seemed to be by the mere sufferance of his father; and the circumstances plainly show that when he left it he had no thought of claiming any further the right to retain possession. And when his house was burned at Elk City, he desired to have the windows and doors from the house he had left, to assist in rebuilding. His removal of the paper from the walls, which was put up on canvas, and otherwise dismantling the house, is strong evidence of his abandonment of it. If he was claiming it in good faith as his own, why did he delay to bring his suit for so many years, in the face of the fact that his father frequently informed him

that he did not propose to let him have the property, but waited until his father's death before bringing it?

The appellee contends that, the evidence being conflicting, the case is brought within the rule of the case of *Doonan v. Glynn*, 28 W. Va. 715: "Where the decree sought to be reversed is based upon depositions which are so conflicting and of such a doubtful and unsatisfactory character that different minds and different judges might reasonably disagree as to the facts proven by them, the appellate court will decline to reverse the decree, though the testimony may be such that it might have pronounced a different decree if it had acted upon the case in the first instance." I do not understand that a case of this character can be brought within that rule. In *Lorentz v. Lorentz*, 14 W. Va. 761 (Syl., point 2), it is held: "Such contracts, before they can be enforced in a court of equity, must be established by competent and satisfactory proof, which must be clear, definite, and certain." In this case the declarations of the old man Lorentz that he intended this for Catherine and her children were more clearly proven than those of Martin Holsberry; and it was even proved by one witness that Lorentz had acknowledged a deed therefor before him, but it was not proved what became of it. In this case it was alleged that the elder Lorentz had agreed and promised to convey the land to his son's wife and children. Many declarations of Lorentz were proved, that he intended to give the land to his son's wife and children; that he intended it for them; that he had made a deed to them, etc.; but it was held insufficient to prove the contract. Plaintiff here does not allege in his bill that his father ever promised to convey the land to him, but that he "promised and assured plaintiff that the same should be and become his," and "advised and directed plaintiff to erect upon the same the buildings and fixtures hereinafter mentioned, with the assurance and promise to plaintiff that plaintiff's use and occupancy thereof thereunder should operate and vest title in plaintiff as fully and completely as if the same were vested in him by formal conveyance." There is no evidence except that of the plaintiff himself to support this allegation of the bill. When Martin Holsberry made a gift of the 32 acres, which proved to be 50 acres, he conveyed the same to him by proper deed. It is strange, indeed, if he ever intended to give him this land, that he would allow him to occupy it 30 years, and in the meantime make to him a conveyance of another tract adjoining it, and not include both parcels in the same deed. Plaintiff was living on this 30 acres long prior to the time of the conveyance to him by his father of the 50 acres. This is one circumstance tending strongly to show that Martin did not intend to convey to Henry the 30 acres. Another is the location of the 30 acres—being right in the heart of his farm; and, according to the

evidence of several of the witnesses, such a division would be very injurious to the farm, and not such as would be likely to be made by any person owning the same. As stated by witness David Poling: "It would be the ruination of the farm. * * * It would cut the farm right in two, and throw the building right at one edge. * * * It would take all of the water off of that end of the farm. * * * I would consider that it would nearly ruin that end of the farm." And William J. Poling, in his testimony, speaking of such division, says: "I would not think it would be a division that any person owning the farm would be likely to make. I think it would be a damage to the rest of it on account of the water."

In *Harrison v. Harrison*, 36 W. Va. 556, 15 S. E. 87 (Syl., point 3), it is held: "Where a son goes into possession of his father's land, and makes inexpensive improvements, it is not to be inferred therefrom, in the absence of other evidence, that the father gave the son the land. Neither are loose declarations of the father, without explanation, sufficient evidence of a gift. A contract between a parent and child, from the nature of the relation, requires to be proved by a kind of evidence much stronger than that which might suffice between strangers. The evidence, in case of a parol gift from father to child, should be direct, positive, express, and unambiguous, and its terms clearly defined." In treating of specific performance of oral contracts, *Pom. on Con.* (2d Ed.) § 121, says: "The possession must be definite and exclusive. It must unequivocally show what land is possessed, and that it is possessed by the purchaser exclusively, and not concurrently with the vendor. It must, in short, indicate the commencement of a new interest or estate." *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297. There was no such definite, exclusive possession in the case at bar. Many of the witnesses who worked for Martin Holsberry testify that he farmed the so-called disputed land the same as the rest of the farm while Henry lived in the house—notably, three of the Polings and Felix Skidmore. "As between father and son, the mere physical fact of possession is not of itself conclusive, nor even material. * * * For example, the possession by a son of land belonging to his father, even when accompanied by valuable improvements, will not be treated as a part performance, because the relation between the parties prevents the inference which would otherwise arise from the fact, and removes all necessity of accounting for the possession by the supposition of an existing contract." *Pom. on Con.* § 116, and authorities there cited. As to the improvements placed upon the land by the plaintiff, the evidence as well as the circumstances show that they were placed there for the convenience of plaintiff while he should remain. The lumber was all taken from the home farm of

Martin Holsberry, and the principal improvement—the repairing or remodeling of the dwelling house—was put there after Martin Holsberry had distinctly told him to build upon his own land; that he did not want a fine house put up there to pay taxes on; and, further, that he had given him all he intended to give him. It is further clear that plaintiff set up claim for improvements grossly in excess of what they cost. In his bill he alleges the cost of the house alone to be about \$1,500, and in his testimony in chief at \$1,888 for all the improvements. Then in rebuttal he testifies: "I have made an estimate. The amount is \$2,138.98." And on cross-examination, in giving items in minute detail, he made the whole, when summed up, amount to less than \$500, which he said made a difference from his estimate of \$1,638.98. On redirect examination or rebuttal his attention was called to the cost of boarding hands, which he said was not included, and that he had estimated that that item alone amounted to \$250. It would seem that this item was about in keeping with his estimate of the whole at over \$2,100. The workmen who put up the house and assisted in making the improvements put the cost at about what Henry Holsberry's itemized estimate on cross-examination made it. It cannot be inferred from the fact that Henry Holsberry was living upon the land, and making small improvements for his own convenience, that the father had given him the land. The evidence in case of a parol gift from father to child should be direct, positive, express, and unambiguous, and its terms clearly defined. Loose declarations of the father, without explanation, are not sufficient evidence of a gift. *Harrison v. Harrison*, supra. Improvements to the amount of \$500 or \$600 on real estate of the father occupied 30 years by the son by the sufferance of the father, and the principal part of such improvements made after full notice that the father would not give him the land upon which the improvements were made, will not entitle the son to compensation for such improvements.

It is contended that laches will bar plaintiff's claim for specific performance. Henry Holsberry abandoned or left the premises in 1895. The refusal of his father to give him the land had been prior to his repairing or remodeling the house, which was the greater part of the improvements made by him. His father lived until the 30th of October, 1902, more than seven years after Henry left the place. His cause of action, if any he had, existed long prior to his father's death. Plaintiff brought his suit within a very few weeks after the death of his father. Why was it not brought in his lifetime? The fair presumption is that he was not sure of his ability to overcome the defense that the father would interpose. So he would wait until his father's lips were sealed in death, and while this, under the statute, seals his

own lips also, as touching any personal transaction or communication between himself and his father, yet, being a competent witness in some things involved in the cause, he hoped to be able to get down upon paper in his deposition in the cause, although under objections and exceptions, his version of the matter. In *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507 (Syl., point 4), it is held: "The defense of laches may be made by demurrer when the facts manifesting it appear in the bill." In *Phillips v. Coal Co.*, 53 W. Va. 548, 44 S. E. 774 (Syl., point 1), 97 Am. St. Rep. 1040: "A bill is bad on demurrer when it appears therefrom that there have been unreasonable delay and laches on the part of the complainant in asserting the rights which are sought to be enforced." Plaintiff in his bill alleges that he was placed in actual possession and control of the 30 acres in 1882 under the promise of the father that he would give him the land, and yet it was 20 years afterwards before he undertook to enforce his rights, and 8 years of that time the same was in the exclusive control of his father. Point 2 of syllabus, *Phillips v. Coal Co.*, supra, holds: "A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them." *Spedel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Trader v. Jarvis*, 23 W. Va. 101; *Pusey v. Gardner*, 21 W. Va. 470 (Syl., point 7); *Kelly v. McQuinn*, 42 W. Va. 774, 26 S. E. 517 (Syl., points 2, 3); *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514.

For the reasons herein given, the decree complained of is reversed, annulled, and set aside, and the plaintiff's bill dismissed.

(56 W. Va. 372)

WILSON v. BRADEN et al.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

SEAL—SUFFICIENCY—COPY—ACKNOWLEDGMENT
—ANCIENT DEED—ADVERSE POSSESSION—
BURDEN OF PROOF—WILD LANDS.

1. Where a copy of a deed is offered in evidence having a certificate of acknowledgment certified by the officer as under his official seal, and the clerk, in copying, appends to such officer's official signature the word "Seal," such word will be presumptively held to represent such officer's official seal, and such copy is properly admitted in evidence over such objection.

2. The fact that a justice taking an acknowledgment signs the certificate as justice and alderman will not vitiate such certificate, but his official designation as alderman will be regarded as surplusage.

3. Recitals of heirship and widowhood in deeds upwards of 30 years old, under which possession has been continuously held, are presumptive evidence of the truth of the same, and admissible against strangers to the title claiming adversely.

4. An adverse claimant of title under the statute of limitations must show actual, notorious, visible, open, continuous, and exclusive possession for the statutory period, and his possession, to be continuous, must be such as will permit the superior claimant to sue him as a trespasser at any time during the period. Unless he

makes out a prima facie case of such unbroken, continuous possession on demurrer to evidence, the judgment should be against him.

5. There can be no adverse possession of wild lands as against a superior title, unless such possession is actual, exclusive, visible, and notorious. A mere claim to possession, accompanied by the occasional cutting of timber, the prevention of trespasses, the payment of taxes, and the assertion of title, is not sufficient, but it must be such occupation, use, or holding of the property, or change in its character, as will make such claimant, during such statutory period, continuously subject to be treated as a trespasser by the holder of the superior title constructively or actually in possession of such land. Such claim of possession does not amount to an ouster of the superior claimant.

(Syllabus by the Court.)

Error from Circuit Court, Ritchie County; M. H. Willis, Judge.

Action by Henry S. Wilson against George W. Braden and others. Judgment for plaintiff, and defendants bring error. Reversed.

W. N. Miller, for plaintiffs in error. V. B. Archer, Wm. Beard, S. Robinson, and H. B. Woods, for defendant in error.

DENT, J. Henry S. Wilson, plaintiff, obtained a writ of error from a judgment of the circuit court of Ritchie county in a suit in ejectment in favor of George Braden and Hester Deem, awarding them title to two certain tracts of land claimed by the plaintiff. The case was here before (48 W. Va. 196, 36 S. E. 367), and a judgment for the same defendants was reversed, and a new trial awarded. A new trial being had, the plaintiff having proved his title and possession thereunder, and the defendants having set up possession under color of title for more than 10 years, the plaintiff demurred to the evidence, in which the defendants joined. On a conditional verdict the court found for the defendants, and gave judgment accordingly. It is now well established that on a demurrer to the evidence the court will consider the whole evidence as though on a verdict in favor of the demurrees, and will not reverse the judgment unless the evidence is insufficient to sustain the same. *Bowman v. Dewing & Sons*, 50 W. Va. 446, 40 S. E. 576; *Lewis v. C. & O. R. R. Co.*, 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

The first question that arises on demurrer is as to whether the plaintiff has made his title clear, either by a complete chain from the commonwealth of Virginia or by possession under color of title for the statutory period. If he has not done one or both of these, his demurrer was properly overruled. The plaintiff traces his title back to the commonwealth of Virginia through a patent issued by the Governor to William Tilton, assignee of Michael Ryan, dated August 4, 1785.

The first objection to plaintiff's title is that the copy of the deed from Charles E. Applegate and wife to Henry S. Wilson has the word "Seal" after notary's signature to the

acknowledgment, instead of some words to indicate it to have been his official seal. The notary certifies the certificate to be under his "official seal." The clerk, in copying, presumably considered the word "seal" sufficient to show that the official seal was affixed. In the case of *Miller v. Holt*, 47 W. Va. 10, 34 S. E. 956, this very objection was considered and overruled, and rightly so, for the word "seal" must have been annexed to the notary's signature to represent his official seal, and not his private seal. The same objection is made to several of the title deeds, but it is untenable, and was properly overruled.

The objection is made to the certificate of acknowledgment to the deed of Ann Kemble, widow of Robert Kemble, because the same is signed by two officers in their double capacity of alderman and justice. Code 1819, c. 99, § 7, authorized the acknowledgment to be made before and certified by two justices of the peace. The word "alderman" can properly be regarded as surplusage, the words "justice of the peace" being in accordance with the law.

The next objection is to the two deeds in the chain conveying the title of Robert J. Kemble, deceased; one deed being from Ann Kemble, widow of Robert J. Kemble, dated 1843, and the other from Mary D. Sumner, formerly Mary D. Kemble, daughter and sole heiress of her father, Robert D. Kemble, bearing date February 17, 1853, because there was no evidence other than the deeds to show that the one was the widow and the other the sole heiress to Robert J. Kemble, deceased. If these deeds were of modern origin, it would be necessary, as against strangers, to produce such evidence. 24 Am. & En. En. Law (2d Ed.) 60; *Wiley et al. v. Givens et al.*, 6 Grat. 277, 47 Va. Rep. 772. But such is not the law as to ancient deeds upwards of 30 years old, where possession has been continuously held thereunder. 24 Am. & En. En. Law (2d Ed.) 61; 2 Am. & En. En. Law (2d Ed.) 331; *Harman v. Stearns*, 95 Va. 63, 27 S. E. 601; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Gaines v. Stiles*, 14 Pet. 322, 10 L. Ed. 476; *Davis v. Pearson*, 6 Tex. Civ. App. 593, 26 S. W. 241; *Brown v. Simpson's Heirs*, 67 Tex. 225, 2 S. W. 644. This is on the theory that, if the recitals were untrue, they would have long since been disproved, and time and possession has raised the presumption of their truth, admissible even against strangers. Ann Kemble's deed, under the circumstances, could only be admitted as conveyance of her dower interest in the land; but it was good for the purpose, although it recited therein another deed, not produced, which might have conveyed to her some other interest. *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653. Mary D. Summers' deed conveyed her interest in the land as the sole heir of her father, Robert J. Kemble, deceased, and

thereby the Kemble link in the title is made complete.

These being the only objections to plaintiff's chain of title, and they being without foundation, we must hold it good. It is strengthened by long time, actual possession of the land thereunder beginning as far back as the year 1860. If the plaintiff had only color of title by break in his chain as to the Kemble deed, still the actual possession of the property by those under whom he claims would have ripened into good title long before the Bradens set up a claim to the land awarded to them by the judgment, and also as to the Deem tract, unless Hester Deem, or those under whom she claims, had such adverse possession as ousted from possession those under whom plaintiff claims. This brings us to the main issue in this case.

Both defendants found their title to the separate tracts claimed by them under color of title and adverse possession for the period of 10 years. The question then presented by the demurrer to evidence is as to whether the defendants, or either of them, have had such adverse, open, notorious, continuous, and exclusive possession of either of said tracts of land under color of title for the period of 10 years prior to the institution of this suit as will divest plaintiff's title and invest it in the claimant. *Hall v. Webb*, 21 W. Va. 324; *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618.

First, as to the Geo. W. Braden interlock of about 50 acres. Plaintiff's predecessors had actual possession of this interlock with a portion thereof under cultivation down until the year 1879, when Ezekiel Braden, after having surveyed this land, obtained the key of the house thereon from the tenant in charge, E. Bradley, and, as he claimed in the former trial, thereby obtained possession thereof. He afterwards tore down this house and removed it off. He did not disturb the Trembly and Daley fields, included in the interlock, which had been cleared, fenced, and cultivated by tenants under plaintiff's title. He allowed one Noland, in 1881 or 1882, to erect a cabin, and cultivate a small piece of ground in a remote corner of the interlock. After Noland moved off, he allowed one Patsy Jenkins to occupy the cabin during the year 1882. Jacob Riggs testifies that he bought 50 acres of land, including the interlock of defendant Braden, during the year 1883, built a house thereon outside of the interlock, tore down the Noland cabin, which had a clearing of about three-fourths of an acre, and cleared about 3 acres of land on the interlock, and cultivated it. He remained in the house about 18 months. After that time down to the present time there has been no house upon or actual occupancy of the interlock by the defendant Braden. Defendant Braden purchased the house from Riggs, and took the land back.

No title papers ever passed between them. In 1885 defendant Braden received a deed from his father, and moved into the Riggs house. The holder of plaintiff's title was at this time a nonresident of the state, and occupying the land by tenants. The two fields on the land known as the "Daley" and "Trembly" fields remained practically unchanged. The Daley field was in part on the interlock, and the residue extended over on plaintiff's other land. Defendant Braden claims to have farmed these fields some years. The rest of the land lay open, with probably the exception of a small uncertain amount down at the Patsy Jenkins corner. When plaintiff purchased and surveyed the land in 1888, he found nobody in actual possession of the interlock. He saw the old Riggs log house, which was unoccupied, and was not on the interlock. He saw also the Trembly field, and, although he was back and forth several years thereafter, he saw no one on the interlock, and knew of no one claiming it, until he was informed that defendant Braden was cutting some timber on it. He immediately served a notice on him to stop trespassing, and instituted this suit. The evidence shows that defendant Braden was claiming this land prior to plaintiff's purchase. He cultivated some portions of it at different times, and had cut some timber off of it. He never actually occupied it. He never fenced it, and never changed the fences around the Trembly or Daley fields, except he attempted to make some change in the fence around the Daley field a short time prior to the institution of this suit. At the time plaintiff purchased his alleged possession had not ripened into title. The manner in which this alleged possession was maintained seemed to be such as not to furnish the owners of plaintiff's title notice thereof. The building of the Riggs house off of the land and leaving the land uninclosed and in the same condition generally as it was when originally occupied by tenants under plaintiff's title are circumstances strongly against defendant Braden's contention. In the case of *Core v. Faupel*, 24 W. Va. 246, it is held: "If the land is of a character to admit of permanent useful improvement, the possession must be kept up during the whole statutory period by actual residence or by continued cultivation or inclosure. Surveys, cutting wood, occasional occupancy, with payment of taxes, will not do. Where there are several adverse possessions, they cannot be tacked together so as to effect a bar or ouster of the title of the owner, unless the several occupants claim in privity, and there was no break in the succession of the one to the other. The possessory estates must be connected and continuous." "Unless the adverse claimant is so in possession of the land that he may at any time be sued as a trespasser, the statute will not run in his favor; and, although he may have taken actual posses-

sion, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations." "The moment the premises become vacant, that moment the owner, by reason of his legal title, will be regarded in the constructive possession, and the adverse possession of the wrongdoer is at an end." The plaintiff, when he purchased, found the premises entirely vacant, and for more than five years thereafter he never found any one in possession of the premises whom he could treat as a trespasser. Even prior to that time the possession is not shown to be continuous. The defendant did not have it inclosed, did not live on it, did not cultivate it except occasionally cropped a portion of it and cut some timber off of it. His occupancy thereof in any manner was intermittent. No time after the plaintiff purchased had he notice by the defendant's actual occupancy thereof in such manner that he could have brought suit against him as a trespasser, until just before this suit was brought. The defendant has wholly failed to show such continuous possession of the land that the law requires. His evidence on the subject of possession is that in 1879 his father surveyed the land, got the key to the house thereon from a tenant in possession under plaintiff's title, tore down the house, and moved it away. Afterwards, at a time made uncertain by the evidence, being from 1879 to 1882, one Noland built a little cabin on a remote corner of the land, and lived there for about a year. After he left, Patsy Jenkins moved in the cabin. How long after is not shown. She was put off by defendant Braden after he bought the land. He says she was there about one year. After she left, no one had actual possession of the land until Jacob W. Riggs built a house on the Braden land outside of the interlock in 1883. He says he went there in September, 1883, and left in March, 1885. He cleared about three acres on the interlock, and raised a crop, including a crop of corn on the Trembly field. After he moved out of his house (how long after it is not shown) defendant Braden moved in it. He fails to show that he took actual possession of the land when Riggs moved out, nor does he show when he moved out of the house. He says he farmed the land in 1885. There is no positive evidence of any actual occupation of the land during the years 1886, 1887, and 1888. The plaintiff purchased in 1888, and on surveying the land found no one in occupation of the interlock adversely to his tenants, and the Riggs house was vacant, and in a dilapidated condition. This evidence of plaintiff is not contradicted. The years 1886, 1887, and 1888 form such a break in the continuity of defendant's possession that, if it had not been continually broken before, would permit the intervention of plaintiff's possession, and prevent the running of the statute; for it is

not shown that there was any one in such actual adverse possession of the interlock during this period that plaintiff could have at any time sued such person as a trespasser. Defendant testifies that he thinks that in 1889 he rented the land to Lee Roberts, who lived there about one year. After that (when it is not shown) he thinks Marion Deem was there about one year. George Deem, he also thinks, lived in the Riggs house (he does not know when); and that Ben Harris lived on the land at an uncertain time. After Deem he put Joshua Haught in possession of the land. Joshua Haught says he moved in the Braden house on the 26th of March, 1895, and stayed there until the 10th of March, 1897. He says he rented the improved ground, and put the Daley field and Core field in corn and oats. His occupancy was just before and after the suit was brought. The actual, open, notorious, visible, and continuous possession of the land during the years 1892, 1893, and 1894 by Braden or his tenants is not sustained by the proof. The interlock undoubtedly during those years was in the constructive possession of the plaintiff, either for all or some period of the time. "Upon every discontinuance of the possession of the wrongdoer the possession of the rightful owner is, by operation of law, restored, and nothing short of an actual adverse and continuous possession for the statutory period can destroy his right or vest title in the wrongdoer." "It is therefore absolutely necessary that the adverse occupancy shall be continuous, open, visible, and exclusive in order to effect a bar of the title of the true owner." *Core v. Faupel*, 24 W. Va. 246, 247. The defendant Braden has wholly failed to show by his evidence that he had actual, continuous, open, visible, and exclusive possession of any portion of the interlock for any period of 10 consecutive years, such as would have enabled the plaintiff, or those under whom he claims, to have sued him at any time as a continual trespasser. There are many both great and small breaks left by his evidence in the continuity of his possession, while there is no break in the continuity of plaintiff's constructive or actual possession, except when interrupted by Braden's actual occupation of some portion of the interlock. It continually hung over the land, and whenever there was a break in Braden's occupation it covered the land completely, cutting into and destroying the continuity of Braden's possession. *Parkersburg Industrial Co. v. Schultz et al.* 43 W. Va. 470, 27 S. E. 255. Such being plainly the law, the court erred in not sustaining the demurrer to the evidence.

Nor is Mrs. Deem's evidence on demurrer any more satisfactory than her codefendant's. Her counsel claim that the suit by the plaintiff admits her adverse possession at the time of the suit. This does not necessarily follow as a conclusion of law, for such

suit may be maintained against one not in possession, but who may be exercising acts of ownership on the land in dispute, or claiming title thereto. Code 1899, c. 90, § 5. Under plaintiff's title constructive possession was held under the patent from 1785 until the possession became actual by occupancy about the year 1860. To destroy possession, actual or constructive, under plaintiff's title, and the transference of such title to her, it devolved upon the defendant Deem to prove actual occupancy of the interlock, or else the use and enjoyment thereof by acts of ownership equivalent to such actual occupation. *Taylor's Devises v. Burnside*, 1 Grat. 165; *Overton's Heirs v. Davison*, 1 Grat. 211, 42 Am. Dec. 544; *Garrett v. Ramsey*, 26 W. Va. 345. It is admitted that the land in the Deem interlock is still wild and uncultivated, and has never been in the actual occupancy of any one. Defendant, to sustain her contention, proved the payment of taxes, the cutting of timber, not habitual, but at different times, the prevention of others from cutting timber, with slight notice of claim of title to agents of the superior title, now dead. In *Taylor's Devises v. Burnside*, 1 Grat. 207, it is said that: "Payment of taxes, prohibition of trespasses, surveys of the land, sales and conveyances of it, though they may serve to show a claim of title, are not evidence of actual possession." Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual. *Kolner v. Rankin's Heirs*, 11 Grat. 420; *Pasley v. English*, 5 Grat. 141. And a sale of part of the land gives the vendor no possession of the residue. Nor is the fact that the superior claimant had notice of such acts sufficient to give actual possession, where such possession does not in fact exist. Negligence on the part of the superior claimant cannot make that actual possession which would not be without such negligence. Actual possession depends on the acts of the junior claimant, and not on things left undone by the senior claimant. Such acts must be such as changes the condition of the land from a wild to an inclosed or cultivated state, and so continuous in their nature as would enable the superior claimant to proceed against the inferior claimant as an actual trespasser at any time during the statutory period. *Core v. Faupel*, 24 W. Va. 246; *Parkersburg Industrial Co. v. Schultz et al.*, 43 W. Va. 470, 27 S. E. 255. Mrs. Deem has come far short of showing actual, open, notorious, visible, continuous, and exclusive possession, such as is sufficient to overcome either the actual or constructive possession of plaintiff and those under whom he claims; and, while it would be a matter of pleasure to decide in favor of a poor woman fighting for her home as against a rich railroad magnate, the law directs a contrary decision.

The judgment is reversed, the plaintiff's demurrer to the evidence is sustained, and

judgment will be entered for the plaintiff on the conditional verdict of the jury.

On Rehearing.

Before the law will take from one landowner his superior title, and confer it upon a junior claimant by virtue of adverse possession under the statute of limitations, it requires that such junior claimant establish by positive evidence such adverse possession to have been actual, open, notorious, exclusive, and continuous for the statutory period of 10 years. No mere acts of trespass or temporary occupancy for the purposes of felling timber and cultivating patches of ground, with intervening lapses of no occupancy, unaccounted for, will satisfy such requirement of the law. If the defendant George W. Braden had enjoyed such uninterrupted possession, his evidence alone should have been sufficient to have established a *prima facie* case; whereas it is wholly insufficient for this purpose. For the period of 10 years that he claims to have owned and had possession of the interlock there was no building or other house upon it. The Riggs house, which was shown to have been occupied at various times by himself and tenants, is entirely outside of the interlock, and there is not shown to have been any continuity of possession even as to this. Because it is shown to have been occupied at various times, the court is asked to infer that it was occupied all the time, although the evidence wholly fails to show any connection between the occupancy of the various alleged tenants. This is pure guesswork, and not just legal inference. So that George W. Braden's testimony proves the weakness of his case, and clearly establishes the fact that his possession, whatever it may have been, falls far short of the just requirements of the law. He testifies that while he lived in the Riggs house, which was off the interlock, he only tried to cultivate the Trembley field within the interlock one year. "The land was too poor, and didn't bring anything." This shows plainly why nobody lived upon and cultivated the interlock continuously, and this was because the land was too poor, and would not bring anything. No doubt the house was built purposely off of the interlock to prevent its being included therein, and yet the main part of the defendant Braden's evidence and the reliance of his counsel relate to the possession of this house, and not to actual occupancy of any portion of the interlock. The plaintiff, who is not contradicted, testifies that he purchased the land in 1888, and had it surveyed the following spring (that would be in 1889), and in a year or two afterward had it surveyed by John Cain; that there was no house on the land, but that there was an old house off of it a considerable distance. "There is an old log house there at this time, but there is nobody occupying it. It is in a dilapidated condition." This undoubtedly refers to the time

when he was at and saw the house, although it may have included the time of the trial of the suit. He further says he saw nobody occupying or farming the land at any of the various times he was on or over it, and knew nothing about defendant's claim of trespassing until shortly before the institution of this suit. It seems to me that the evidence clearly shows that George W. Braden had some notion at one time of claiming the land, but, having robbed it of its timber, and found it too poor to raise anything, he abandoned it as not worth the trouble; but after it was about to be developed for oil by the plaintiff he began again trespassing upon it for the purpose of renewing his claim thereto. The same may be said as to the Hester Deem tract. The proof of neither of the claimants is of that strong, unbroken character that will justify the law in divesting plaintiff of his title to the land in controversy and vesting it in the defendants. If defendants' evidence had been sufficient, the labors of counsel would have been greatly simplified. Good argument cannot strengthen defective evidence.

The former opinion is adhered to fully and confirmed.

(56 W. Va. 383)

BARTLES & DILLON v. DODD et al.
(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

CHATTEL MORTGAGE—DEED OF TRUST—FRAUDULENT PER SE—PERISHABLE PROPERTY—EXECUTION SALE—APPLICATION OF PROCEEDS.

1. A deed of trust, duly recorded, given on the equipment and furniture of a hotel to secure a valid debt, is not per se fraudulent because there is included therein a small amount of perishable property in the shape of eatables and drinkables, and made to cover the restocking of the same, nor because it is made to cover any renewals of the notes thereby secured, nor because the property is to remain in the possession of the grantor until sold.

2. At common law an insolvent debtor has the right to execute a deed of trust on the equipment and furniture of a hotel to secure the purchase money thereof, or to secure the money loaned to him for the purpose of purchasing or paying for such property, or to secure the sureties on the notes given for such loan or the renewals thereof; and such deed, if duly recorded, cannot be held to be fraudulent in fact, because of the preference given, although it may prevent other creditors from having the proceeds of a sale thereunder applied to their debts, and although it might have been held to be void as a preference, under section 2, c. 74, Code 1899, if suit had been instituted in time for this purpose.

3. Subsequent execution creditors, whose debts are pre-existing or subsequent, may force such property to sale, but the proceeds will be first applied to the satisfaction of the trust lien thereon.

4. A deed of trust will not be held to be fraudulent per se unless the provisions thereof plainly show that it was not made in good faith, but only as colorable security for the alleged debts therein named.

(Syllabus by the Court.)

Appeal from Circuit Court, Berkeley County; **E. Boyd Faulkner, Judge.**

Bill by **Bartles & Dillon** against **John W. Dodd** and others. Decree for plaintiffs, and **Joseph H. Shaffer** and **David M. Shaffer** appeal. Modified.

Flick, Westenhaver & Noll and **W. B. Lindsey**, for appellants. **Faulkner, Walker & Woods** and **A. C. Nadenbousch**, for appellees.

DENT, J. **Bartles & Dillon**, execution creditors, instituted a suit in chancery in the circuit court of Berkeley county against **John W. Dodd**, their debtor and others, among other things for the purpose of testing the validity of a certain deed of trust executed by said **Dodd** on certain personal property for the purpose of securing **D. M.** and **J. H. Shaffer**, as his indorsers on certain notes due the National Bank of Martinsburg. The circuit court held the deed fraudulent per se as to the plaintiffs' debt, and directed a sale of the property to satisfy the same, and after sale entered a farther decree applying the proceeds to plaintiffs' debt. The Shaffers appeal from these decrees, and insist that the court erred in not holding the deed of trust valid. It is as follows:

"This deed, made and entered into this 19th day of July, 1899, by and between **John W. Dodd** and **Georgia Lee Dodd**, his wife, parties of the first part, and **X. Poole**, trustee, party of the second part:

"Witnesseth: That the said parties of the first part do grant unto the said **X. Poole**, trustee, the following described personal property, all contained in and on the premises of what is now known as the Continental Hotel, in the town of Martinsburg, Berkeley County, West Virginia, N. E. corner of Public Square, to wit: All the furniture in reading room of said hotel, consisting in part of carpet, Denning covering and paper under same, 12 high back chairs, 8 rockers, 2 leather chairs and window shades to windows and doors, writing table, etc., also the furniture in the lobby in said hotel, consisting in part of linoleum on floor, a number of chairs, settee, and office furniture and fixtures; also 16 bedroom suits, including iron beds for same; also 5 other iron beds; also linen and dressing for the above-mentioned beds; also 41 window shades, five dozen dining chairs, seven dining tables, all table linen and towels, three side tables, 31 curtain poles, 450 yards of carpet, 24 China chamber sets, all hotel dining room queensware, glassware, silver, flat ware, and hollow ware; all kitchen furniture and utensils, large ice box and contents, bar, bar buffet, ice box, bar fixtures, cash register, all wines and liquors, and stock for same, one hotel omnibus, one cab, one transfer wagon, three sets of harness and lot of halters, feed and provisions in general, also one bay mare named **Diamond**, one bay horse named **John**, one gray horse named **Frank**; also all other personal property belonging to or connected with said hotel, except such personal prop-

erty that was brought to said hotel from the residence of the said parties of the first part at 321 Burke street; also any property that may be hereafter acquired to take the place of the property herein mentioned. To have and hold unto the said Poole, trustee, forever.

"In trust, nevertheless, for the use, interest and purposes following, and none other, to wit: to secure, indemnify and save harmless D. M. Shaffer and J. H. Shaffer as endorers on six certain negotiable promissory notes, made by the said John W. Dodd, and endorsed by the said D. M. Shaffer and J. H. Shaffer, all of which said notes are negotiable and payable at the National Bank of Martinsburg, West Virginia, and were discounted at said bank, one of said notes bearing date May 23rd, 1899, for the sum of \$500.00, payable sixty days after date, and one bearing date June 19th, 1899, for the sum of \$500.00, payable ninety days after date, and one bearing date the 17th day of June, 1899, for the sum of \$500.00, payable ninety days after date, and one bearing date June 22nd, 1899, for the sum of \$500.00, payable three months after date, and one of said notes bearing date July 15th, 1899, for the sum of \$800.00, payable ninety days after date, also one bearing date the — day of —, 1899, for the sum of \$200.00, payable — days after date; the said notes aggregating \$3,000.00; also to secure, indemnify and save harmless the said D. M. Shaffer and J. H. Shaffer on any other note or notes given in place or renewal of the above notes, or any part of the same until the same is paid; also to secure D. M. Shaffer the payment of a certain negotiable promissory note bearing date the — day of —, 1899, made by the said John W. Dodd, for the sum of \$124.43, with interest from date payable to the order of D. M. Shaffer, — months after date. It is expressly understood between the parties to this deed that should default be made in the payment of the above mentioned and described notes, or any part of same, or the interest, or any part of same, or of the interest on any renewal or note given in place of same, or of any of the covenants herein mentioned, so as to cause any liability or expense to the said endorers as aforesaid, then upon written notice of such default, be given to the said Poole, trustee, of such default by the said D. M. Shaffer or J. H. Shaffer, or any one of them, then the said X. Poole, trustee, shall proceed to make sale of the property herein conveyed at public auction to the highest bidder, either on the premises of the said hotel, or any place deemed best by the said trustee, after first having advertised the time, terms and place of sale for four successive weeks in some newspaper published in the said county of Berkeley upon such terms as may be deemed best by such trustee, and from the proceeds of such sale the said trustee shall first

pay all costs and charges attending the execution of this trust, including a commission of five per cent. on the first \$300.00, and two per cent. on the balance of the amount for which said property is sold to said trustee for his services; and he shall pay, second, the indebtedness or notes hereinbefore described, or the amount for which endorers have become liable, including costs and expenses to which they are subjected by reason of such default having been made, and the residue, if any, shall be paid by the said trustee to the said parties of the first part, their heirs and assigns. It is expressly understood and agreed between the parties of this deed that the said John W. Dodd shall have or cause to have the property herein conveyed insured in some good, solvent insurance company in a sum not less than \$2,500.00 with policy so endorsed that loss, if any, shall be payable to the said D. M. and J. H. Shaffer, as their interests may appear. It is also understood and agreed between the parties to this deed that the parties of the first part shall retain possession of the property herein conveyed unless default shall be made in the covenants herein contained. The said trustee shall have power to act by agent or attorney in the execution of this trust.

"Witness the following signatures and seals, the day and year first above written. John W. Dodd. [Seal.] G. L. J. Dodd. [Seal.]"

The plaintiffs virtually admit that, if the deed is not fraudulent per se, it is not fraudulent in fact. The rule for determining whether a deed is fraudulent per se is stated in the third point of the syllabus in the case of *Landeman v. Wilson*, 29 W. Va. 703, 2 S. E. 203, as follows: "Unless, upon an inspection of a deed claimed to be fraudulent upon its face, the court sees that the intent of the grantor in executing the deed was to hinder, delay, or defraud his creditors, the court cannot hold the deed fraudulent on its face." To make such fraudulent intent appear, it has been settled by a long line of decisions that the grantor must make such reservation in the deed to himself, or some one else for his benefit, as will enable him to defeat the professed objects of the deed without violating the stipulations thereof. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 860; *Conaway's Adm'r v. Stealey*, 44 W. Va. 163, 28 S. E. 793; *Baer Sons Grocery Co. v. Williams*, 43 W. Va. 323, 27 S. E. 345; *Shattuck v. Knight*, 25 W. Va. 590; *Clafin v. Foley*, 22 W. Va. 434; *Kuhn v. Mack*, 4 W. Va. 186; *Quarels v. Kerr*, 14 Grat. 48; *Shepard v. Turpin*, 3 Grat. 373; *Lang v. Lee*, 3 Rand. 410.

At common law a debtor had the right to prefer one creditor to all others, although the effect of the conveyance might be to hinder and delay others. *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797; *Kyle v. Harveys*, 25 W. Va. 716, 52 Am. Rep. 235; *Harden v.*

Wagner, 22 W. Va. 356. This rule is abrogated to some extent by section 2, c. 74, Code 1899. This section contains the following exception: "Provided, further, that nothing in this section shall be taken to prevent the making of a preference as security for the payment of purchase money, or the bona fide loan of money or other bona fide debt contracted at the time such transfer or charge was made, or as security for one who at the time of such transfer or charge becomes an endorser or surety for the payment of the money then borrowed." The appellants do not rely on the provisions of this section, for the deed was not attacked within four months after its recordation, and the debtor had the right to prefer them by executing a trust deed on the hotel furniture therein named, at common law. It is insisted, because there was some perishable property included in the deed, that this shows it to be fraudulent per se. The plain object of the deed, while not permitting the debtor to defeat it, was to permit him to proceed with the hotel business, and presumably to make the money to pay off his indebtedness. This is admitted in the allegations of the bill. In carrying on this business, it would be necessary for him to use up the eatables and drinkables on hand, and continually to purchase others to supply the place of those used. Otherwise all the other property would be valueless to him. To cover the things so used, it is provided in the deed that it shall extend over "any property hereafter acquired to take the place of the property herein mentioned." The plain object of these provisions was not to hinder, delay, and defraud creditors, but was to keep the security good. The amount thereof being small in comparison with the residue of the property, and the object of including it in the deed being apparent does not render the deed fraudulent on its face. *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642; *Lewis v. Caperton's Ex'r*, 8 Grat. 148; *Cochran v. Paris*, 11 Grat. 348. The extension of its provisions to cover after-acquired property would be void at law, but is valid in equity. *Horner-Garlord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

It is also insisted that the deed is fraudulent on its face because its provisions are so extended as to cover any renewals of the notes secured, thus permitting the indefinite extension of the deed until the property is worn out or destroyed. The deed, without so expressing, would cover all renewals of the notes until the debt is paid or the deed released. Hence the expression thereof on the face of the deed did not change its effect. Neither can the notes be renewed, nor the time of the deed of trust be extended, without the consent of the appellants. The debtor cannot make such extension alone. Hence he is not able to defeat the purposes of the deed if he adheres to its stipulations

without the aid and assistance of those secured thereby. If their claim is just, they will not permit the debtor to defeat the purposes of the trust.

There are some elementary principles of law which counsel have overlooked in their anxiety to misconstrue this deed: First, that the deed should be most strongly construed against the grantor, in favor of the grantees; second, that it must be construed, as a whole, to effect the ends and purposes thereof, rather than to defeat them; third, the validity of the deed will be upheld if possible to do so without doing violence to the intention of the parties thereto; fourth, a strained and unreasonable construction will not be given to the language of the deed for the purpose of holding such deed made with intent to delay, hinder, and defraud creditors, when there is no such intent apparent from a reasonable construction of such language. The clause upon which counsel rely to establish the invalidity of the deed is as follows: "It is expressly understood between the parties to this deed that should default be made in the payment of the above-mentioned and described notes, or any part of same, or of the interest or any part of same, or of the interest on any renewal or note given in place of same, or of any of the covenants herein mentioned, so as to cause any liability or expense to the said endorsers as aforesaid, then upon written notice of such default, be given to the said Poole, trustee, of such default by the said D. M. Shaffer or J. H. Shaffer, or any one of them, then the said X. Poole, trustee, shall proceed to make sale of the property herein conveyed." The construction that counsel attempt to place upon this clause is that the indorsers are bound to renew the notes indefinitely on the request of the grantor in the deed of trust, and, on their failure to do so, they have no right to enforce the deed of trust because of default in payment of the notes, so long as he shows himself willing to renew the same with them as indorsers. This construction is attempted to be sustained by definition and play on the word "or," without regard to the plainly expressed purposes of the deed of trust. As heretofore said, there is nothing in the deed that compels the indorsers to renew the notes. Having the right to refuse to renew the notes, they have the alternative right to require the grantor to pay the notes, or renew them without their indorsement, which is the equivalent of payment, or to require the trustee to make sale under the deed of trust; the plain meaning and import of the language being that when the grantor fails to make payment of the notes, or any part thereof, or the renewals thereof, or the interest thereon, when legally requested to do so by the indorsers, they may demand the enforcement of the deed of trust, for by such refusal the liability for the payment of the notes, or any part thereof, becomes

fixed upon them. The indorsers had the same legal right to demand payment of the notes as they fell due as they had the right to refuse to renew them. Being under no obligation, moral, legal, or equitable, to renew the notes, they have the right, when they fall due, to demand the payment thereof or that they be relieved from liability, or that the deed of trust be enforced for their relief. The alternatives are against instead of in favor of the grantor in the deed of trust, and he must be prepared to do any or all of the alternatives when legally requested to do so by the indorsers, and the failure to do any of them on their demand renders the trust enforceable. He cannot say to them when the notes fall due, "I am not prepared to pay, but I am ready to renew the notes, and, if you do not consent to continue as my indorsers, I will enjoin the enforcement of the deed of trust, if attempted for your relief." No court of equity would for a moment entertain such an unrighteous plea unless the deed in unequivocal terms required the indorsers to join in a renewal of the notes when demanded by the grantor. There is no such provision in the deed, but counsel, in their anxiety to avoid a deed plainly not meant to delay, hinder, and defraud creditors, attempted to imply such provision from the use of the preposition, "or." While their persistency is admirable, and their argument ingenious, and at least convincing to themselves, yet a common-sense and disinterested view of the deed as a whole entirely refutes the position assumed by them—that the grantor reserved to himself such rights of renewal as enabled him to wholly defeat the purposes of the deed. As we construe the purposes of the deed as a whole, the indorsers were not only not bound to join in the renewals of the notes, but they have both the right to refuse to do so, and the right to require the payment thereof when they fall due, and, in default of payment, have the right to insist on the prompt enforcement of the deed of trust for their relief and benefit. This being manifestly the true and only reasonable and legal construction of the deed, the grantor had no power to legally defeat the purposes of the deed except by payment of or satisfaction of the notes thereby secured, and the authorities relied on by the counsel have no application to this case, but they only apply to cases where the grantor reserves the right to wholly defeat the deed, without satisfaction of the debt secured. The bona fides of the claim depends on extraneous evidence, and the deed of trust will not be held fraudulent per se because of any doubtful provision therein which can be satisfactorily explained by extraneous evidence. If the notes were not given for purchase money or a loan made at the time, but were pre-existing debts, the deed would be held, under the statute, as executed for the benefit of all creditors, if suit were instituted in

time. Otherwise it cannot be disturbed unless it is fraudulent in fact.

It is also insisted that retention of the possession of the property until default made renders it fraudulent per se. Under section 5, c. 74, Code 1899, recordation takes the place of a change of possession both as to prior and subsequent creditors who have not obtained liens thereon. 14 Am. & En. En. Law, 371. Unless such retention of possession is inconsistent with the purposes for which the deed is executed, it will not invalidate it. *Klee v. Reitzenberger*, 23 W. Va. 749; 5 Am. & En. En. Law (2d Ed.) 987. If it were a general assignment to secure creditors, the retention of possession would have a different effect. 14 Am. & En. En. Law, 369, 371; *Houck v. Heinzman*, 37 Neb. 463, 55 N. W. 1062. All these matters may tend to show that such deed is prima facie fraudulent, and cast upon the beneficiaries the duty of showing the good faith thereof; but they are not of such potency, either singly or combined, as to render such deed fraudulent per se. Whether it is fraudulent in fact depends upon the evidence.

Plaintiffs object to the reading of defendants' depositions for the reason that they were taken before answer filed. This objection does not appear to have been specifically called to the attention of the circuit court, or the objection could have been obviated by allowing defendants to retake them. Such objection must be considered by this court as waived, especially when the depositions show that the plaintiffs appeared and cross-examined the witnesses as fully as they could have done, had an answer been filed. *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611. The evidence shows that the notes secured were given for money used in the payment for the property included in the deed of trust; the object being to provide the debtor with the means of furnishing and carrying on the hotel owned by the appellants, so that he might, out of the business, derive the means to pay off such indebtedness. Unless we can establish the rule that an insolvent person cannot borrow money and go into business, and give the lender a lien on the implements and furniture used in such business without being guilty of delaying, hindering, and defrauding his creditors, we must hold this trust free from fraud. To hold this deed fraudulent, we must believe, as stated by Judge Greene in *Shattuck v. Knight*, 25 W. Va. 596, "that the design of the grantor, clearly shown by these provisions, was, when he executed the deed, to hinder other creditors, and at the same time not to devote any of his property then owned by him and conveyed in the deed of trust to the payment of the debts professedly secured by it, but to keep possession of it, and dispose of it as he pleased, and to dispose of the proceeds as he chose." The present deed and facts proven evince no such design. On the contrary,

they show that the debtor was insolvent or in declining circumstances, and wanted to go into the hotel business to make a living and pay his debts. The appellants rent him their hotel, and agree to become the sureties to the bank to raise the money to furnish the hotel, provided he gives them a lien thereon to secure them. He does so. He takes the risk of his creditors levying on the property and forcing it to sale. He cannot do otherwise than hope that they will not undertake to do that which injures him and will not benefit them. His creditors conceive the notion that, because he is allowed by the real purchasers thereof to remain in possession of and use the property in his business, they have the right to seize and appropriate the same, because their debts are unpaid, and the trust arrangement between him and his sureties delays, hinders, and defrauds them. The property is taken, is sold, and sacrificed for less than one-half enough to pay the trust lien thereon. The business is stopped, the debtor is thrown out, and the attacking creditors hold up their hands to receive the remnants of the ruin they have made. But the law steps in and says to them, "You have the right to destroy, but the remnants of the ruined business must go to those who have furnished the means in good faith to establish such business." This is equity, this is justice, and is in perfect accord with the intention of the law. While the law recognizes that an insolvent man is at the mercy of his creditors, yet it endeavors to protect those who extend to him a helping hand, and try to save him and his business from hopeless bankruptcy. "The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent." Mr. Justice Brewer in *Etheridge v. Sperry*, 139 U. S. 268, 11 Sup. Ct. 565, 35 L. Ed. 171.

The decrees are reversed in so far as they hold said deed of trust fraudulent as to creditors, and in so far as they direct the payment to the plaintiffs of the sum of \$1,105.36, the proceeds of the sale of the hotel furniture, and will be so amended as to direct said sum of \$1,105.36 to be paid to the appellants, to be credited on the sum of \$2,750.35 due the National Bank of Martinsburg; and, as so amended, the decrees will be in all other respects affirmed.

(56 W. Va. 650)

PEARSON v. WEST VIRGINIA LIME & CEMENT CO.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

1. Though upon a question of fact, as to which there is conflicting evidence, the finding of the trial court is entitled to peculiar weight, and will not ordinarily be disturbed, the ap-

pellate court will reverse such finding when there is a decided preponderance of the evidence against it, and the finding itself is inconsistent with what the evidence, on the whole, clearly shows was intended to be the relation of the parties toward one another.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Action by Richard P. Pearson against the West Virginia Lime & Cement Company. Decree for plaintiff, and defendant appeals. Reversed.

W. B. Maxwell and A. Jay Valentine, for appellant. Talbott & Hoover and Fred O. Blue, for appellee.

POFFENBARGER, P. The main question in this case, necessary to be considered in order to determine the propriety of the decree appealed from, is the nature of the respective interests of the plaintiff on one side and the defendants on the other in a certain mining property in Tucker county, known as the West Virginia Lime & Cement Company property. There is a corporation bearing the name of the property, and as belonging to which it is treated in the decree complained of, and in a certain sense by the parties; but it seems that no formal conveyances of the property have ever been made to it, and that the parties in whose names the legal titles of the property stand have executed no formal contract with the corporation binding them to convey. Their rights and interests are dependent upon parol evidence, and to effectuate the object of the bill on the one hand, and to maintain the defense on the other, by upholding the alleged rights of the defendants, specific performance of certain parol contracts, in respect to which, however, there is some correspondence, must be either enforced, or the parties left free to vindicate their rights in some other suit. On the basis of the understanding between the parties concerning this property and its development, the defendants have expended about \$30,000. They furnished the money and intrusted its expenditure to the plaintiff. After the property had been purchased and the plant erected, the defendants became dissatisfied with the management of the plaintiff and ousted him from the control of the business. Up to the date of this occurrence, about December 1, 1902, there seems to have been no misunderstanding or differences as to the respective interests of the parties, except that when the agreement to form the corporation was presented to the plaintiff, and he was informed that only one share was to stand in his name for the time being, so that he might be a director, and that, with the exception of four shares, to be held by him and other parties, for the like purpose, all the shares were to stand in the name of the defendant Henry E. Weaver, the principal financial man in the concern, as trustee, or were not to be issued, the plaintiff refused

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. §§ 3383, 3390.

the agreement. Thereupon his name was taken out, and that of another person was added as a nominal stockholder to subserve the purpose of organization. After the plaintiff continued to manage the business, and the defendant to furnish the money, until the change of management, December 1, 1902.

Pearson, the plaintiff, had been in the employ of the defendant Weaver and certain other mining and railway corporations, under the management of Weaver as president, in the capacity of civil engineer, for some time before the starting of the business in question in this case. By reason of his capacity and information possessed by him concerning the business of Weaver and his corporations, his services for some time after he joined the idea of the development of the property here in controversy were very necessary to his employers, and there is evidence going to show that they dissuaded him from leaving their employment and starting his own venture by offers to furnish the money for the development of the property.

Pearson's interest in the property at that time consisted of a lease dated October 6, 1898, for 35 years, giving him the right to mine the coal and manufacture into lime the limestone in two tracts of land containing together 172½ acres, paying to the owner of the land a royalty of 10 cents a ton for the coal and one-half cent per bushel for lime. He had no capital with which to develop this property.

About August 19, 1901, up until February 1, 1902, he brought this lease to the attention of Weaver, from time to time, and expressed great anxiety to begin work upon it, and represented to Weaver that other parties were willing to furnish the money. In January, 1902, he went to Chicago, taking the lease with him, and there made the arrangement upon the faith of which all this money was expended. What that agreement depends upon the testimony of himself, Weaver, and C. A. Bickett, an associate of Weaver in his mining and railroad enterprises, and the subsequent conduct and admissions of the parties.

Pearson says that nobody was present when the contract was made except himself and Weaver, and that the latter proposed to place the concern as a joint-stock corporation to which the former objected, on the ground of the possibility of his being deprived of the control of the business; and that upon Weaver explained the laws relating to the management and control of corporations, and the danger to his private fortune of going into the business upon any other basis than that of a stockholder in a corporation, and closed with an offer to allow Pearson to hold 51 per cent. of the stock, which would enable him to manage and control the corporation. Weaver admits that he and Pearson were alone when the contract was made, but says that, upon its con-

clusion, Bickett was called in and informed of the terms of the agreement. Bickett substantiates this statement, and Pearson corroborates it in part by his admission that the lease and some other papers which he had brought with him were delivered into the hands of Bickett on that occasion. Bickett and Weaver both swear that they did agree to form a corporation; that the lease was to be the property of the corporation; that the stock was not to be divided, but held by Weaver in trust until the property was developed; that Weaver was to furnish all the money for that purpose; that he was to be repaid all that money before a division of the stock was made; that Pearson was to have, in the meantime, a salary of \$125 a month; and that upon the repayment of Weaver's money the stock was to be divided into four equal parts, one to Pearson, one to Weaver, one to Bickett, and one to Gardner.

At the date of the meeting Pearson owned only the lease. Weaver and Bickett say it was agreed at that meeting that the fee in the property on which the lease was held should be purchased and ultimately conveyed to the corporation and the lease thereby extinguished. They say Pearson was distinctly informed that they would have nothing to do with the property unless this could be done. Pearson was authorized to purchase it, and did so, Weaver furnishing the money for that purpose. Other property adjoining this land was also purchased in the same way. These properties cost a little less than \$6,000. On March 31, 1902, about a month after the talk in Chicago, an option on the land on which Pearson's lease was taken was secured in the name of E. J. Billings by the procurement of Pearson, and assigned to the West Virginia Lime & Cement Company, and delivered to Weaver. This act is corroborative of the statements of Weaver and Bickett, and inconsistent with the position now taken by Pearson. Pearson claims the property so purchased was to be the individual property of Weaver, held subject to the lease, and not the property of the corporation to be organized. The deed for the land was afterwards made to Weaver, and Pearson explains that by saying Weaver had requested it, because the West Virginia Lime & Cement Company had not yet been incorporated, for which statement he vouches by Weaver's letter. This is not at all inconsistent with Weaver's position, since it was necessary to put the title provisionally in the hands of some individual.

It is agreed that Pearson represented that the cost of putting the plant in operation would be about \$6,000, on the basis of putting in but one kiln. Bickett, at one time, suggested a six-kiln plant, but that was not carried out. Two were put in, and the total cost of the plant, exclusive of the purchase money for land, amounts to over \$23,000. A costly and possibly useless structure, per-

up as part of the plant, is a coal chute from the top of the mountain to the kilns. It cost about \$10,000, and its satisfactory working is in dispute, as is also the value of the coal for use in the plant. But Bickett knew it was being put up. As before stated, the defendants furnished this money as demanded by the plaintiff, Pearson, and intrusted its expenditure to his ability, judgment, and discretion. Many complaints were made from time to time by defendants of his failure to render accounts and send in reports. Assuming that attention to the work of erecting the plant and other outside operations were so exacting as not to allow him time for proper bookkeeping, auditing of claims, and sending reports, the defendants directed one of their employes by the name of Thomas to go there and assist him. He declined the proffered assistance, and went on in a manner unsatisfactory to defendants. He complains against the defendants of their failure to meet his pay rolls promptly and furnish machinery and materials at the stipulated times, by means of all of which he was embarrassed in his operations. When the plant had been completed and was beginning to turn out lime, a difference as to the price at which it should be sold arose. Pearson had represented that it could be produced at a small cost, and sold in the vicinity of the place of manufacture at less than it could be bought for elsewhere and still at a good price, so that the profits anticipated were from 25 to 100 per cent. The defendants claim that lime was selling in the community at 24 cents. Pearson offered or sold some of the first product at 15 cents. Bickett maintained that the price should be not less than 22 cents, urging upon Pearson the necessity of it in view of the large amount invested and the impossibility of raising prices after being once fixed, as well as the practicability of it, that being 2 cents cheaper than the price at which others were supplying it. A man by the name of Ferguson, an employe of the defendants in some of their enterprises, was sent to the plant and into the community to negotiate the sales, and it seems that some sales were made or offered by him at 18 or 19 cents.

Bickett made one or two trips to the plant, and was assured by Pearson that his progress was good, and does not seem to have made, or to have been there long enough to make, any investigation. They relied upon Pearson. After the differences arose, and when it seemed to the defendants that the plant ought to be running and doing well, but was not, they sent John McFadyen, a man in whose business capacity and skill as an engineer they had confidence, to make an examination of the plant, and report his conclusion as to its value. His report was not in all respects satisfactory, because it showed that the cost of manufacturing lime would be from seven to ten cents, consider-

ably more than was estimated by Pearson. The defendants came to the conclusion also that Pearson's management was incompetent and extravagant, and they resolved to displace him as manager, and did so about December 1, 1902.

It would be a work of great labor and of doubtful utility to review all of the correspondence and the testimony relating to these matters. Enough has been stated to show that the plaintiff and the defendants entered into an arrangement looking to the development of a property of doubtful and uncertain value. Whether Pearson's lease was worth anything could only be tested by the expenditure of a large amount of money. Whether the investment of this money would prove to be worth anything to him or its owners no man could tell without the test, a costly experiment. Though Pearson does say other persons had offered the means to test the property, he does not indicate who they were or upon what terms they contemplated investing their money with him. His lease being valueless without the expenditure of a large amount of money, which he did not have, and the result of that expenditure by the defendants being a matter of great uncertainty, as is almost any other mining venture, the agreement as contended for by the defendants is not unreasonable. It gave Pearson a salary of \$125 a month, saved to him one-fourth of his lease, and gave to him one-fourth of all the property purchased, and made the arrangement appear to be feasible and business-like in its outlines. Assuming that he was competent as a manager, there was ample capital then behind the enterprise, and there was no reason why, in case the property should prove valuable, the business might not go on successfully. Though the money invested by Weaver and his associates was all to be returned out of the earnings of the plant, before any division of the stock should be made or dividends declared, Pearson was to have his salary, the royalties in his lease were to be cut off and saved to the company, and nearly \$4,000 worth of other property was purchased for the company. It would be difficult to understand how sagacious business men, such as Weaver and his associates are shown to be, could be induced to put money into such an enterprise to an extent limited only by the requirements of the business, without an understanding that it should be returned to them. On the basis contended for by the plaintiff, the most ordinary, even inferior, business foresight, would demand that the amount to be contributed be limited in advance, and balanced, on some sort of valuation, against the property contributed by the other party. It is incredible that these defendants should blind themselves to furnish the money necessary to buy all this property and put up the plant, without fixing any limit upon the amount, with

understanding that the plaintiff, contributed only the value of his lease, should own 51 per cent. of it when completed. He says defendants were not bound by the contract to purchase the fee in the land and her lands, and that they did so of their volition. This was a most remarkable act of generosity, for the evidence abundantly shows that the property so purchased was to become the property of the company. If not, why did Pearson cause the land to be assigned to the company and not to Weaver individually? Some of Pearson's letters are inconsistent on this point. On March 21, 1902, he wrote Bickett, saying, "I am tired of promises." What purchase could he have referred to, less than a purchase after the Chicago interview, other than the purchase of the fee in the land on which he had the lease? How can he reconcile this with the pretension that that purchase was made by Weaver and his associates of their own volition, and not in pursuance of the agreement made in Chicago? In his attempted explanation of this inconsistency he does not say he did not refer to the purchase, nor attempt to repel the inference arising from it as to what the contract was, but goes off into a long, unintelligent rambling discussion of other matters, complaining of delays, and making accusations of noncompliance with his promises as to the time within which certain things were to be done. As a circumstance raising an inference against the position of the defendant he relied upon the fact that, at the time of the purchase of the land on which the fee was, an abstract was shown to Bickett in which it appeared that the land was subject to that lease, and that the deed was subject to that lease—facts which all parties knew. In the hands of the owners and grantors in the deed, of course the land was subject to the lease, and in conveyance they could not afford to put in a warranty without excepting the lease. If Bickett and Weaver were relying upon their conduct made in Chicago, these facts could make no difference, and were not calculated to elicit any comment, or induce any different course of conduct on their part, for they understood that both the lease and the land were to become the property of the company. It is not pretended that at that time they had received any notice from Pearson of his contention as to the Chicago agreement being different from theirs. He does not deny that any notice of that kind had been

given them. The first act on his part, charged as being inconsistent with their claim, was his refusal to sign the agreement to incorporate in June, 1902. He does not say he even then gave notice of a claim of 51 per cent. of the stock. When asked what he had said to Mr. Robinson, who presented the agreement for his signature, he replied as follows: "I declined to sign them, and when pressed for the reason gave it to Mr. Robinson. Told him about my lease, and that when I got my stock I would assign the lease, just as was intended in Chicago." In his examination in chief he says he refused to sign because they had not allotted him 51 per cent. of the stock, but does not say he told Robinson he claimed that much. There is, therefore, in the record nothing to show that the defendants had notice of the full nature and extent of the claim he now makes until after he had been ousted from the management of the business. With the single exception of his refusal to sign the articles of incorporation, no act of his, up to the date of his ouster, was inconsistent with the contract as claimed by defendants. On the contrary, with the exceptions of his refusal to accept the assistance of Thomas, he seems to have been submissive to the will and instructions of the men who were furnishing the money. In a letter to Bickett dated July 21, 1902, he said: "The main point I want you to be impressed with in regard to your letter is that neither now nor any time in the future need you have any apprehension as to my acting hastily or injudiciously in regard to sales or financial matters here. You have far more experience and sagacity than I have in such matters, and no one appreciates that fact more than I do, and I am only too pleased that our little corporation has a right to all benefits arising therefrom."

After having examined all the evidence, much of which cannot be set out here for want of space, we are clearly of the opinion that the agreement made in Chicago is not what it is claimed by Pearson to be, but is substantially what it is claimed by the defendants to be.

After he had been deprived of the management of the plant and property Pearson brought this suit in equity, setting out in his bill his pretensions and claims substantially as hereinbefore stated, and praying alternately that the charter of the West Virginia Lime & Cement Company and its pretended organization be declared nullities, or, if that could not be done, that his interest in the corporation be ascertained and fixed at 51 per cent. of the capital stock; that Weaver, Ferguson, Bickett, Stern, and Robinson, the incorporators of said company, be declared trustees, to hold said 51 per cent. of stock for his use and benefit; that they be required to deliver the same to him; that a special receiver be appointed to take charge of the

property pending the suit, with full power and authority to preserve from waste and injury and operate said plant; that the defendants, their agents and servants, be required to turn the same over to the receiver; and that they be enjoined from in any manner interfering with the property. The bill also prays for general relief. Upon the bill a receiver was appointed and an injunction awarded. The defendants appeared, and filed their demurrer and answer at March rules, 1908. The answer denies the material allegations of the bill, charges incompetency and extravagance on the part of the plaintiff as manager of said works, and sets forth the claims and contentions of the defendants, as to their rights and interests in respect to the property, substantially as hereinbefore stated, except that they claim that the property purchased, and standing in the name of Weaver, is not to be conveyed to the corporation until after the plant is completed, the business thoroughly on its feet, and their money fully returned to them, and that the delivery to them of plaintiff's lease was intended to and does operate as an assignment to Weaver, to be also held in trust with the land. Several unimportant interlocutory orders were made from time to time, and on the 1st day of December, 1903, a decree on the merits was entered, whereby the court ascertained and adjudged that by the verbal agreement between the parties the plaintiff had bound himself to contribute his lease and Weaver to contribute a sufficient amount of money to erect and complete the plant for the manufacture of lime, and to open the coal mine on the lease; that the West Virginia Lime & Cement Company had been duly incorporated; that by the terms of the verbal agreement the plaintiff was to receive, as consideration for his lease, 51 per cent. of the capital stock, and Weaver the remaining 49 per cent.; that Weaver did advance sufficient money; and that he had refused to give the plaintiff the stock to which he was entitled. Thereupon it was adjudged, ordered, and decreed that 51 per cent. of the capital stock be issued to the plaintiff, and the residue to Weaver and his associates; that Weaver was the owner in fee of the land, and entitled to receive the royalties as they may accrue from the lease; that upon the issuance to the plaintiff of 51 per cent. of the capital stock he assign and transfer to said corporation his lease. The receiver was ordered to deliver possession of the property to the corporation, and it was further ordered that upon such delivery his powers should cease. His compensation was fixed at \$600, and decreed against the corporation, and the cause was referred to a commissioner to ascertain and report whether there are any liens upon the lease, and upon the property and stock of the corporation, and to audit and settle the accounts of the special receiver.

From the finding of facts already stated,

it is apparent that this decree is erroneous, and that the principal errors are in decreeing to plaintiff 51 per cent. of the capital stock and adjudicating the land purchased to be the property of Weaver. We do not think, however, that the evidence fully sustains, in all its details, the claim of defendants. They say no property was to be conveyed to the corporation, and that no stock was to be issued, until all their investment had been returned out of the profits of the enterprise, but that all was to remain in Weaver's hands as trustee. This claim is contradicted by Weaver's letter to Pearson, directing the Baker land to be conveyed to him, because the corporation had not, at the time of its purchase, been chartered and organized. This fact shows that the property was to be conveyed to the corporation as soon as organized and ready to receive the title. It is not to be assumed that the corporation was to own part of the property, while another part was to be withheld from it in trust, without any reason therefor. And it would be inconsistent with business principles to convey the property to the corporation without receiving anything in return for it. Consistency in the claim of the defendants also denies the proposition that no stock was to be issued; for a corporation receiving property or funds without issuing or recognizing any title to stock is a sort of anomaly, not to be established except by very clear, consistent, and positive evidence. We think the trust arrangement in the agreement was only to continue until the organization of the corporation, and that upon its organization the stock was to be issued to the persons, and in the proportion, hereinbefore stated, namely, one-fourth to Pearson, and the remaining three-fourths to Weaver and his associates, in consideration of property conveyed and credit extended. As the corporation is charged with all the money laid out and expended by Weaver and his associates, the value of the stock in the hands of all the parties is dependent upon future development, as contemplated by the agreement. No reason is perceived why Weaver and his associates should hold the title to Pearson's stock, since their outlay is a charge and an indebtedness against the corporation, rendering all the stock less valuable to the extent of that outlay, in whose-soever hands it may be. It is also inconsistent to say that Pearson's stock should be specially pledged to the repayment of the corporation's debt.

Though not entitled to all the relief given him by the decree, the plaintiff is clearly entitled to have specific performance of the contract for the purchase of his lease, conveyance of the land, and an adjudication of his right to said 25 per cent. of the capital stock of the corporation as aforesaid, and the same issued and delivered to him upon the assignment of the lease and conveyance of the other property. No adequate legal

remedy for the vindication of his rights in these respects is perceived. The contract contemplates the full and complete development of a property which seems to have considerable merit and value as a mining property. It embraced among its provisions the vesting in him, as a stockholder, of a beneficial interest in real estate, not only as to the interest in his lease, so indirectly to be retained, but also in the property purchased for the corporation by Weaver and his associates. It is needless to say that equity has jurisdiction to enforce specific performance of almost all kinds of contracts relating to real estate. See West Va., etc., *Co. v. Vinal*, 14 W. Va. 637; *Oil Co. v. Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; 26 Am. & Eng. Ency. Law (2d Ed.) 104. No question is made as to whether the plaintiff has put himself in position to call for such relief by performing his own duty and demanding performance by the defendants. The demurrer is not insisted upon here, and the appellee seems to desire a decree determining the rights of all parties interested.

Why there should be any reference as to liens is not perceived. Nobody has asserted and asked enforcement of any liens by any pleadings in the cause. A reference for the settlement of the accounts of the special receiver may become necessary, but no cause for it appears as yet. No exception to any items of his report is disclosed by the record. His bill for services, amounting to \$600, was excepted to, and its excessiveness is here admitted by both sides. The claim is not itemized, and the court had nothing before it from which the true character and amount of the services could be determined, and no evidence was adduced in support of the claim. Its allowance is therefore erroneous, but upon an itemization and proof of his services the court can, without difficulty, fix the amount of his compensation, and no reference for that purpose is necessary. References are expensive and should not be made without cause.

For the reasons stated, the decree complained of will be reversed, and the cause remanded, with directions to decree an assignment by the plaintiff of his lease to the West Virginia Lime & Cement Company, and a conveyance to said corporation by the defendant Henry E. Weaver of the land purchased, as hereinbefore stated, for it, and, by such proper orders as may be necessary, to cause such assignment and conveyances to be made, and also to require the defendant the West Virginia Lime & Cement Company, upon such assignment and conveyance being effected, to issue and deliver to the plaintiff certificates for one-fourth of its capital stock, fully paid and nonassessable, and for such further proceedings, according to the rules and principles of equity, as may be necessary to secure and protect the rights and interests of the parties under their said agreement.

(56 W. Va. 581)

CARNEY et ux. v. BARNES et a.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

EQUITY — CANCELLATION OF DEED — JURISDICTION.

1. Chancery has jurisdiction to cancel a deed granting petroleum oil for failure to perform its covenants, where the deed has a clause annulling it for such failure.

2. Touching equity jurisdiction to cancel a deed for realty or a contract for mere failure to perform its covenants, when there is no clause of forfeiture for such failure.

3. Touching equity jurisdiction to cancel a deed void on its face, and deeds made void by evidence outside the deed.

4. To deny equity jurisdiction because of a remedy at law, the legal remedy must not be merely partial, but it must be adequate, and as complete and efficacious as that given by equity.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by Eli Carney and wife against George W. Barnes and others. Decree for plaintiffs. Defendant Barnes appeals. Reversed.

Hall & Hall and T. P. Jacobs, for appellant.
E. L. Robinson and E. B. Snodgrass, for appellees.

BRANNON, J. Eli Carney and wife made a lease, 3d February, 1898, to E. H. Jennings & Bros. for oil purposes of a tract of land, the lease providing that the lessee should give to the lessors one-eighth part of the oil produced, to be set apart in the pipe line to the credit of said Carney and wife, as royalty or rent. Jennings & Bros. bored two oil wells on the land, getting oil, which was run into the pipe lines of the Eureka Pipe Line Company. Before operations for oil production were begun, Carney and wife, 6th September, 1900, made a deed conveying to George W. Barnes all the oil in said land except one-sixteenth; but the deed recognized the existence of said oil lease to Jennings & Bros., and provided that if that lease should expire or become void under its terms, then Barnes should have all the oil, with the right to produce it on the usual terms of leases for oil and gas purposes. Thus the deed to Barnes operated to give him half the eighth, Carney retaining one-half. For the said conveyance Barnes paid Carney a bonus of \$3,000 cash, and the deed provided that Barnes should, within 30 days after the first well, and 30 days after the second well, should be completed, tubed, and tested for oil, pay to Carney \$2,000 for each well, if it produced 10 barrels of oil per day for 30 consecutive days, Carney to give notice to Barnes by writing of the wells being drilled and the amount of their production. The said deed from Carney to Barnes contained this clause: "If said grantee shall, as he may do at his option, omit to pay the

¶ 3. See Cancellation of Instruments, vol. 2, Cent. Dig. § 1.

said sum of \$2,000 for first well within the time aforesaid, except as hereinafter mentioned, then this grant shall become as absolutely null and void as though it had never been made, and said grantors shall retain the sum above mentioned as full liquidated damages." As above stated, oil was produced in the two wells bored by Jennings & Bros. As to the quantity, there is conflict of evidence, some of it tending to show less than 20 barrels per day, and some of it showing 22 barrels per day. Barnes never was on the ground, but the said deed to him from Carney was taken by an agent, Umstead, who transacted for Barnes all that he did with Carney in this matter. Carney demanded of Barnes, who lived in Ohio, by letters, payment of the \$2,000 for each of the wells as stipulated in the deed from Carney to Barnes, Carney claiming that the wells produced over 10 barrels of oil per day each, so as to entitle him to said money under his deed. Barnes refused to pay the money, claiming that he could not afford to do so. He says that he was under the impression that the deed required the wells to produce 30 barrels a day before he was called on to pay the money. While the matter was in this condition, Umstead went to Carney to make some compromise, and told Carney that Barnes could not afford to pay \$2,000 for each well, and proposed a compromise by which Barnes should pay \$2,000 instead of \$4,000, and if the third well should be drilled, producing 20 barrels a day for thirty days, then Carney should receive \$1,000 more. This compromise was reduced to writing, and was signed by Carney and wife, and sent to Barnes in Ohio. Barnes refused to accept it, and returned it to Umstead, Barnes claiming that no compromise was necessary, as the wells did not produce oil in such quantity as to demand anything from him. Carney and wife then brought a suit in equity against Barnes, Jennings & Bros., and the Eureka Pipe Line Company, alleging that the said oil wells had produced more than 10 barrels each for 30 days, and that, though they thus became entitled to said \$2,000 for each well, yet Barnes had refused to pay the same, had broken his contract, and that under the clause of the deed above quoted the deed had become null and void by reason of the refusal of Barnes to pay the money. The bill prayed that Jennings & Bros. disclose when each of the wells began to produce oil, and what quantity they produced per day for 30 days after their completion, and what amount they had produced since they began to produce oil; what oil from the wells had been received by Barnes, and what oil had been run from the wells into the pipe lines of the Eureka Pipe Line Company. The bill alleged that a division order certifying the right of Barnes to one-sixteenth and of Carney to one-sixteenth of the oil had been issued by said pipe line company, and it prayed that that company

file a copy of it. And it prayed that said Pipe Line Company state in what proportion the oil was divided, and who received credit thereof, and state the times when Barnes sold oil produced from the wells, and what he received therefor. The bill also prayed that the deed from Carney and wife to Barnes be declared by decree to be null and void, and that the court ascertain through a commissioner the amount of oil received by Barnes, and what oil he sold from the wells, and what money he received therefor, and that a money decree go against Barnes for money arising from his sales of such oil. The bill also prayed that the Eureka Pipe Line Company be enjoined from accounting for or turning over to Barnes the oil already in its lines, or that might thereafter come into its lines from the said wells. An injunction was granted. The bill prayed also for general relief. Barnes filed an answer to the effect that the true agreement between Carney and wife and Umstead as agent was, as appears in the deed from Carney and wife, except in one particular—that is, that, whereas that deed required him to pay \$2,000 for each of two wells producing 10 barrels per day, it should have provided that the wells should produce 30 barrels per day—that the said deed should in that place read "thirty barrels," not "ten barrels." His answer states that he was engaged in the business of buying oil royalties in West Virginia and elsewhere, and that he had blank deeds prepared to facilitate the execution of papers showing the purchases of royalty, and had furnished Umstead with a number of such blanks, and that Umstead had used one of those blanks in said transaction with Carney. He states that the agreement between Umstead and Carney and wife was in that respect for wells producing 30 barrels, not 10, and that the presence of the word "ten" in said deed was due to a mistake in the omission to strike out the printed word "ten" from the blank and insert in its place the word "thirty." The answer stated that the matter was overlooked by Umstead, and also by said Barnes, when the deed was sent to him. Barnes stated that in instruction to Umstead he directed him to require a minimum production from 30 to 35 barrels per day for 30 days where the sum of additional money for wells was of the amount specified in the deed. The answer further states that the territory in which said wells were bored was known to be Gordon or deep sand territory, wherein the drilling of wells would cost \$8,000 to \$10,000 each, and that wells producing less than 30 barrels per day would be unprofitable, and that operators under leases in that territory would refrain from drilling therein, and that wells producing more than 30 barrels would induce operators to further develop the territory, and that the payment of \$7,000 for wells of less than 30 barrels capacity would be unreasonable.

The said answer denied that Carney had ever given him notice of the true quantity of oil produced by said wells as stipulated in said contract. Said answer averred that the actual production of the first well on said land was between 16 and 17 barrels per day, as shown by the reports of the Pipe Line Company, and that neither the first nor the second well produced at any time as much as 20 barrels per day each. Barnes denied that the said deed from Carney and wife to him had become void, and denied that he owed anything to Carney and wife by reason of the said Wells, and he prayed that, as the said deed from Carney and wife to him did not express the true agreement between them and him, it be reformed, and the word "ten" be stricken out, and the word "thirty" inserted in its place. The court made a decree which declared the said deed from Carney and wife to be null, void, and forfeited on account of the provisions contained in it, and the failure of Barnes to comply therewith, and denied to Barnes the reformation of the said deed sought by his answer, and referred the cause to a commissioner for a report as to the oil which had been received by Barnes, as preparatory to a decree against him on that account. The decree perpetuated the provisional injunction which was awarded restraining the Pipe Line Company from turning over to Barnes oil produced from said wells, and required it to account to Carney and wife for all oil in its lines on the date when the injunction was served upon it, and directed such oil and all oil produced in future from the wells to be credited by the pipe line company to Carney and wife, and declared Carney and wife entitled to all the oil in the lines at the date of the injunction, or thereafter produced, going to Carney and wife under their said lease to Jennings & Bros. From this decree Barnes has appealed.

Barnes contests the jurisdiction of equity to entertain this suit, alleging that Carney and wife have adequate remedy at law. We are not aided with any authority cited upon this proposition, though we have had some difficulty with it. We have, however, concluded that equity has jurisdiction for the purpose of cancellation of the instrument that is attacked. We find in 6 Cyc. 286, that the equitable remedy of cancellation is within the exclusive jurisdiction of equity, because equity courts are alone able to decree it, notwithstanding the facts which are the occasion for cancellation are many times available by way of a law action or defense. Where cancellation is the only remedy that is full and complete for all the purposes which may arise, equity cannot be denied its jurisdiction. It is abundantly sustained. In *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146, this court sustained equity jurisdiction to cancel a promissory note given by an old man incapable of executing it. Judge Holt said, what will appear to

anybody reading the books, that they all sustained the jurisdiction of equity for cancellation where no other remedy is adequate no matter how guardedly equity may exercise the power in some instances. He said that on this branch of remedial justice there is a wide interlock of jurisdiction, no matter that a law forum will administer partial relief. It is of no force to say that if the oil wells involved in this case produce oil sufficient to call for the payment by Barnes spoken of in the deed, and he refused payment, that refusal alone worked the nullification of the deed, and it became at once void, without any decree. It was once thought that a forged deed being void, or an instrument void for any cause, could not be canceled in equity, because a thing already void need not be adjudged to be void, but its voidness may be shown whenever it comes in question; but that idea has been frequently refuted in equity, and it is now well settled that, though an instrument be void, that fact does not oust equity of its jurisdiction for cancellation. *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *Alexander v. Davis*, 42 W. Va. 465, 467, 26 S. E. 291. "Whatever may have been the doubt or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained to its fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose." Story, Eq. § 700. Mr. Hogg, in his *Equity Principles*, 80, puts this healthful jurisdiction upon logical, sound basis in saying that it rests on the principle of *quia timet*; that is, equity acts because of the reasonable fear that the instrument may be vexatiously or injuriously used when evidence to impeach it is gone, or that it may be already, as in our case, clouding title, or affecting the interest of the party. He says that the jurisdiction is firmly established. There is no jurisdiction where the face of the instrument speaks its voidness. 6 Cyc. 290; 18 *Ency Pl. & Prac.* 759; Story, Eq. § 700. *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022, holds that where the face of a deed tells its voidness, or the claimant under it must, to use it, inevitably prove facts showing it to be void, equity has no jurisdiction to cancel; but where evidence outside the deed is required to prove it void, equity jurisdiction is conceded. Such outside evidence would be required as to the deed involved in this case.

Now, it is true that these principles are applied to instruments void from their beginning, which never had any force, whereas the deed in this case was valid when

executed, and only became void afterwards by reason of a condition subsequent incorporated in it; but what difference is this? It has become void, and there is just as much danger of its being used to vex its makers, to cloud their title, to put them in danger, to injure the sale of their property, as if it had been void from the first. What the party needs, and what equity concedes him, is a formal adjudication of a court utterly destroying the deed, and rendering it ineffectual in future whenever relied upon. A law judgment cannot do so. As the opinion says in *De Camp v. Carnahan*, 23 W. Va. 839, in a case like the one at bar the remedy is not so full, adequate, and complete at law as in equity. The parties will be obliged to rest, if the court holds that the deed sought to be removed as cloud on the title is void and cancels it; if the court refuses to cancel because the deed is good, they must also rest; for in either case the question is settled. I am outspoken to say that I have always favored equity jurisdiction in such cases, because it gives the only adequate relief. Partial, incomplete relief a court of law may give, but a decree in equity wipes away the dangerous instrument—takes away its life. Is this not a plain case calling for equity jurisdiction? If Carney were entitled to relief, how could he get it at law? Suppose he sues Barnes for money received by him for oil, and sustains his action because the deed has by its terms come to an end, and he recovers. The decision would likely be *res judicata* between them and settle that the deed had become void when pleaded in a future action for oil later produced; but would that have the effect of preventing Barnes from getting oil in future, or prevent the necessity of a future action, or be effective to compel Jennings & Bros. to pay the oil in future to Carney, or compel the pipe line company to credit him with it? They, not being parties, would not be bound by these judgments. What Carney wants is an adjudication which will bind all the parties, and show that the deed is void, and compel Jennings & Bros. and the pipe line company to so treat it, and refuse to give credit for any oil to Barnes, and acknowledge Carney as the owner of the whole royalty oil. You could not make the pipe line company or Jennings & Bros. parties to an action by Carney against Barnes for the money produced for the oil. I do not see that the pipe line company could be sued for the oil by Carney.

The judgment of recovery of money by Carney against Barnes might be introduced as evidence of Carney's title in an action by him against the pipe line company in trover, detinue, or *assumpsit*, granting that one or more of those actions would lie against the pipe line company, but the recovery would not operate as an estoppel against that company. Carney wants a decree which will at one stroke destroy the deed, declare his right

to all the royalty, and compel those companies to recognize his right, making the decree *res judicata* against all of them. To deny chancery jurisdiction because of law remedy, the law remedy must be as complete as that afforded by chancery. *Rich v. Braxton*, 158 U. S. 407, 15 Sup. Ct. 1006, 39 L. Ed. 1022; *Hogg, Eq. Principles*, 5; *Nease v. Ins. Co.*, 32 W. Va. 283, 9 S. E. 233. Here is a deed passing a present estate, a vested estate, containing a condition subsequent to defeat the deed upon the contingency of Barnes failing to pay money—his nonperformance of a material condition. Has not Carney a right to call upon a court to ascertain and declare that Barnes has not performed that condition, and not leave it to controversy and doubt? We find it laid down in 6 Cyc. 288, that "nonperformance by the defendant has occasionally been treated as a sufficient ground for rescission of a contract by decree in equity, but the weight of authority is against his view. Thus a conveyance of land in consideration of the grantee's agreement to support the grantor during life will not, according to the weight of authority, be canceled for the mere failure to fulfil his contract, unless such failure amounts to the breach of a condition subsequent, in which case the deed may be canceled." From this we must understand that there are authorities of great repute, cited in Cyc., showing that, even where a paper contains a simple obligation on a party to do a certain thing, equity will cancel the paper. Among the cases cited is *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573, where a contract to supply a city with water was canceled in chancery for mere failure of performance. But in this case there is a positive provision in the deed that noncompliance shall work the death of the deed, and surely, under the rule stated in Cyc., there cannot be a doubt of the power of equity to cancel the deed for nonperformance with a subsequent condition, which by that deed, in express words, is to end it. In *Pownall v. Taylor*, 10 Leigh, 172, 84 Am. Dec. 725, it was admitted that if a covenant in a deed for support is not complied with, and the deed provides that it shall become null on that account, it would be avoided. We have cases in Virginia and West Virginia holding that failure to comply with a material provision of a deed is often ground for equity to cancel it, as for failure to support the grantor. *Lowman v. Crawford*, 40 S. E. 17, 99 Va. 688. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730, cancels a deed for support without such clause. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266, cancels a deed containing a forfeiture clause. In the absence of a clause in words defeating a deed for noncompliance with its provisions, I would limit equity jurisdiction to cases where cancellation affords, in the particular case, the only full and complete relief.

In this case the deed provides that nonperformance shall work its death, and I have no doubt of the right of Carney, if he had good cause, to appeal to equity to give him the only full relief suitable to this case.

But though there is equity jurisdiction, we hold that Carney and wife are not entitled to the relief they ask. We are of the opinion that the provision of 10 barrels in the deed does not state the true contract as made between Umstead and Carney, and that it ought to contain the word "thirty" instead of "ten." Carney now contends that the contract was 10 barrels, but his evidence and a letter from him are inconsistent with this position. He says that a few days before the execution of the deed he and Umstead made the contract; that Umstead asked him what quantity should be put in the clause specifying the quantity, and he said to Umstead that he might take his choice of 10, 15, or 20 barrels, and that Umstead said he would fix that when he came back, and that Umstead left 10 barrels in the contract, and that he, Carney, did not notice it until he later looked over it. Carney does not say, by no means does he say, that there was a distinct agreement for 10 barrels. He simply says that Umstead left the word "ten" in the contract without his knowing it. Strange that he did not have his mind on that important matter so as to tell us that the agreement was for 10 barrels, if in fact it was. I repeat that Carney does not tell that 10 barrels was the contract. Carney, in his examination in chief, said they did not settle on any number. He also said that he was surprised when he became aware that the contract had the word "ten" in it. That negatives all idea that the word "ten" had been agreed upon. On cross-examination he stated that he got a copy of the contract from Umstead some months after its execution, and was surprised that it contained the word "ten," and the question was put to him, "And you thought all the time that the contract contained 'twenty' barrels?" and he answered, "This is what I thought; that is why I wrote Mr. Umstead that letter." He was then asked, "You conceded that the contract should rightly contain 20 barrels and be the contract?" and he answered, "We talked the three propositions, 10, 15, and 20, and there was neither proposition settled down on, and Mr. Umstead said that he would fix that when he came back, and he did; he left it 10 barrels, and I didn't notice that in the contract until I looked over it." He was then asked, "He had the right to put in 20 barrels, though?" and he answered, "He had the right to; I would not have objected." Carney wrote Umstead a letter reading as follows: "Silverhill, May 1, 1901. Mr. Umstead—Dear sir: Received your letter and signed that paper and will mail it today. I am surprised in regard to that contract for I was sure in My Own Mind that it was 20 barrels instead of 30.

I am satisfied that the well was to be tested for 30 days and the production 20 barrels but was surprised to see the contract not changed from 10 to 20 I wouldn't argue the point when you was out here for I thought all that was necessary was to look up the contract. Eli Carney." That was written when he sent Umstead the compromise contract. All this shows conclusively that 10 barrels was not agreed upon, and that Carney never so understood it, and we must therefore eliminate the provision of 10 barrels from the deed.

Then the question arises, what shall be done? Shall we say that the minds of the parties never met upon the subject of the quantity of oil which the wells were to produce to demand from Barnes the additional compensation of \$2,000 per well, and cancel the contract because a material element was left out, and therefore there was no contract? Or shall we insert a quantity? If we adopt the former decision, Carney would have to refund the \$3,000, and Barnes account for what oil he got. If we conclude not to adopt this decision, but to reform the deed by inserting the number of barrels, what number shall we insert? Carney says he "thought" the contract said 20 barrels, but he does not say that was actually agreed upon. Umstead swears positively that 30 was the number agreed upon. Though this is denied by Carney, the evidence of Umstead is to be preferred to that of Carney, because the claim of Carney that no quantity was agreed upon is very unlikely. It is unlikely that they would omit to decide upon an element of the contract so important. It is very unlikely that Umstead would not be particular to have a definite understanding about a matter on which such a large sum of money was to be payable, and on which Barnes had given him direction. Carney swears to no sum. Umstead swears to a particular sum. Umstead is disinterested, while Carney has thousands of dollars involved and is deeply interested. It is so hard to believe that so important a matter as the quantity of oil should not be agreed upon when thousands of dollars were dependent upon it. It is not unlikely that Umstead forgot to strike out the word "ten" from the printed form and insert the true quantity in its place. From common experience we can realize how he might overlook that little word "ten." And it is so improbable that Umstead would pay \$7,000 for two little wells of 10 or even 20 barrel production. The evidence in this case shows that that production would not justify that price. Umstead had instructions not to pay such price for wells of less than 30 barrels capacity. This induces the belief that he did not depart from instructions. A fact which goes to confirm Barnes' claim that the wells must yield 30 barrels a day is that the first well struck oil 16th March, and Carney wrote Barnes, 29th March, that it would produce

40 to 50 barrels, inducing the belief that he wanted to produce the impression that it exceeded 30 barrels, the amount Umstead said was agreed on. He had not the contract then. After he got a copy, and saw the "ten" in it, he wrote a second letter telling Barnes it produced 20 to 25 barrels. So we hold that the deed should have contained the word "thirty" instead of "ten," and that it should be reformed accordingly. Though such reformation is now useless, because of the lapse of 30 days from the completion of the wells, we will decree such reformation, and reverse the decree of the circuit court and deny the plaintiffs the relief sought by their bill, and dismiss their bill and dissolve the injunction.

(56 W. Va. 663)

STOUT v. SANDS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

EVIDENCE—SUPPRESSION—PRESUMPTIONS—WITNESS—IMPEACHMENT.

1. Suppression, by one party to a suit, of a document relied upon as evidence by the opposite party, is not equivalent to an admission of the truth of the claim of the latter respecting its contents, and does not dispense with the necessity of prima facie proof of such claim sufficient to sustain a judgment or decree. But when a prima facie case is made, and doubt is cast upon it by rebuttal evidence or otherwise, suppression of the document raises a strong inference against the party failing to produce it, and determines the point in favor of the other party.

2. Though a party cannot impeach a witness called by him, he is not bound by all such witness says. He may prove the material facts by other evidence, even though the effect of it is to directly contradict his own witness; but he cannot show that the witness has made contradictory statements out of court.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Action by Elmore H. Stout against C. Sprigg Sands and others. Decree for defendants, and plaintiff appeals. Affirmed.

E. G. Smith, H. W. Williams, and L. C. Lawson, for appellant. Davis & Davis and M. F. Snider, for appellees.

POFFENBARGER, P. A bill and an amended bill to reform a deed on the grounds of mistake and fraud having been dismissed by the circuit court of Harrison county for want of proof of the allegations of the bill, the plaintiff has appealed.

Some time in the year 1900 the plaintiff, Elmore H. Stout, being the owner of a tract of land containing about 200 acres, part of which is underlaid with the Pittsburgh vein of coal, and all of which is supposed to be underlaid with deeper veins of coal known by other names, executed, by the procurement of one Samuel W. Kinsey, an option of

purchase of coal under said land in favor of C. Sprigg Sands, to be by him conveyed to certain persons who were then securing by purchase a large, compact body of coal in that neighborhood, composed of the aggregate area of several farms, with a view to organizing a company to open and operate coal mines. Sands had taken options on all the desired territory except that of Stout. In view of his inability to procure it at a satisfactory price, Kinsey, who was an agent of the parties to whom it was intended Sands should convey the land, was sent to Stout for the purpose of securing the option. He succeeded in doing so at the price of \$40 per acre, delivered it to Sands, caused the Pittsburgh vein of coal to be surveyed, and later a deed, bearing date October 27, 1900, prepared at the instance of Sands, was presented to Stout and his wife for execution at the bank of which Sands was cashier, which they executed under the belief that it conveyed only the Pittsburgh vein of coal, but which in fact included by its terms all the coal under the land. Having discovered this later, Stout commenced this suit for reformation on the 17th day of September, 1901. Meantime Sands had conveyed the coal to James T. Blair and Cyrus T. Achre, trustees, by deed dated November 13, 1900, who, by deed dated February 20, 1901, conveyed it, together with all the other coal secured and conveyed to them by Sands, to a corporation called the Interstate Coal Company, and that company, by deed dated September 11, 1901, conveyed it to another corporation, called the Clarksburg Fuel Company. To the first bill, which was filed at November, 1901, Sands, Blair, and Achre, trustees, and the Interstate Coal Company, were made defendants. On the 4th day of April, 1902, an amended bill was filed in court, making the Clarksburg Fuel Company a defendant. On the 5th and 7th days of June, 1902, respectively, Sands and the Clarksburg Fuel Company answered. Sands having died, the cause was revived against his executrix and devisees in September, 1903. A number of depositions were taken and filed by the plaintiff, but none by the defendants. At the May term, 1904, the Interstate Coal Company answered, and on the 4th day of June, 1904, the decree complained of was entered.

Competent witnesses prove that there was a preliminary optional contract between Stout and Sands, embodying the terms upon which the conveyance was to be made. Kinsey swears he wrote it, and Stout's son swears he was present and heard the negotiations, saw the contract signed, read it, and signed it himself as a witness. Kinsey further swears that he delivered it to Sands, and that he knows nothing of its whereabouts, but supposes it is with Sands' papers. The bill and amended bill called for its production. Sands not only failed to produce it, but denied in his answer that any

¶ 2. See Witnesses, vol. 50, Cent. Dig. §§ 1214, 1263.

t for plaintiff's coal was in his possession or had ever been written or delivered to him. His executrix did not answer, and no evidence was taken by any defendants. Kinsey's statement is undenied. To the allegation that the contract was prepared at the instance of Kinsey and his associates, or some one of them, and that plaintiff and wife to be signed and acknowledged, Sands does not respond by denial. Hence it must be taken as

plaintiff's failure to produce the contract is upon a very strong element in plaintiff's case. It is hardly pretended that there is sufficient evidence without this circumstance to establish the contents of that instrument in accordance with the theory and of the bill, and the view taken by plaintiff for appellant seems to stand almost upon the assumption that the nonproduction of the contract is an admission that, if produced, it would prove the allegations of the plaintiff. Aside from his views, however, it is not here to ascertain what the weight of the suppression of evidence is. The suppression of documents called for is an admission that they would prove what plaintiff claimed respecting their contents. It is a circumstance warranting a strong inference against the party. There must be other evidence in support of the claim. A prima facie case must be made, and, when made, and there is rebuttal evidence casting doubt upon the question of fact in controversy, the act of the party withholding evidence is taken strongly against him, and sustains the position of the plaintiff.

When, on the unexplained refusal of a party to produce on trial documents which have been called for, the opposite party introduces parol evidence of the contents of the documents, then, if there be doubt, the probative interpretation most unfavorable to the refusing party will be adopted. But this matter solely of logical inference. "The nonproduction of written evidence," says Sir W. D. Evans, "which is in the power of the party, generally operates as a strong presumption against him. I conceive that this has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as a matter of inference, in weighing the weight of evidence in its own nature applicable to the subject in dispute." *Whar. Ev.* 37. "It follows, therefore, that the presumption arising from mere nonproduction of the contract cannot be used to relieve the opposing party of the burden of proving his case. But if a prima facie case is proved, sufficient to sustain a judgment, then a party is permitted to exhibit books which would, if produced, settle the matter either one way or other, or to give other explanations, not prejudicing his case on trial, but preserving himself from subsequently objecting to the case of the opposite party, though

sufficient for judgment, did not introduce all the facts." *Id.* § 1268.

It is only a circumstance weighing heavily against the party, and does not dispense with the necessity of some independent evidence in support of every necessary element of the claim of the other party. This is well illustrated and clearly shown by the application of the rule in our own decisions. See *Wheeling v. Hawley*, 18 W. Va. 472; *Knight v. Capito*, 23 W. Va. 639; *Heflebower v. Detrick*, 27 W. Va. 16; *Bindley v. Martin*, 28 W. Va. 773; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644.

In the light of this interpretation of the rule, the evidence for the plaintiff must be examined. It consists of the testimony of the plaintiff, his son, Kinsey, and Sidney Miley. Stout's son does not pretend to quote the language of the contract. He saw it, read it, and signed it as a witness, but does not say it mentioned only the Pittsburgh vein of coal. He says Kinsey came there to buy that vein, that they talked of that vein only, and that by the contract it alone was sold. Kinsey was not examined in chief as to the contents of the contract. After having been excused from the stand, he was recalled for further cross-examination by the defendants, and then said: "To the best of my knowledge the option said all the coal, the same as all the other options we had, except the Fleming tract of coal." Then on redirect examination he admitted that the amount of coal was described in the contract as being approximately 50 acres, that the price was based upon the acreage of the Pittsburgh vein, and that, at the time the contract was made, the outcroppings of that vein were pointed out to him. Plaintiff's testimony in chief is substantially the same as that of his son. He says he sold the Pittsburgh vein, and was paid only for that vein. When, on cross-examination, he was interrogated as to the language of the contract, he did not say it was limited to the Pittsburgh vein. It appears from what he said that he bases his case upon quite different grounds. He said he looked at the contract to see if the coal was sold by the acre, and it was, but not that he looked to see if it included only the Pittsburgh vein. The following question and answer disclose unequivocally the basis of his claim: "Q. And all you remember about it is that you sold it by the acre, and that you remember very distinctly? A. Yes, sir; that's enough to remember about it, isn't it? And I remember it very distinctly, and I remember they said it was ninety-four and a fraction acres." That the price was determined by the acreage of the Pittsburgh coal is uncontradicted. Miley says he called upon Sands, at the instance of Stout, to obtain an admission from him or a release. The material part of his evidence is as follows: "I said, 'Mr. Sands, how much did you get?'"

and he said, 'Ninety-four acres,' and I said, 'That's what he said;' and I said, 'How much did you pay for?' and he said, 'Ninety-four acres;' and I said, 'Do you claim anything outside of that?' and he said, 'Not a thing in the world;' and I said, 'You ought to release that;' and he kind of laughed and bluffed me, and I said, 'Will you release him? If you don't he will sue you;' and he said, 'I have two of the best lawyers in town, paid by the year, and they might as well do something as nothing;' and I said, 'All Mr. Stout asks you to do is to pay for all the land in the deed or release him; you have something there you haven't paid for;' and he kind of laughed and turned away, and said it didn't amount to much, he didn't know whether there was any coal there or not, and it wouldn't be operated anyhow; and he said, 'Stout sent you here, didn't he?' and I said he did. I think that was the last word was said. He went out, and I went about my business. Q. State whether or not C. S. Sands, in that conversation or at any other time, told you whether he bought the drift coal or Pittsburgh coal or Freeport coal, or what strata of coal he bought of Stout, I mean. A. He said that he had bought the Pittsburgh vein, but that was all he claimed; that Kinsey come and looked at that vein of coal, and the underneath vein of coal wasn't talked of or thought of; and Kinsey stated he didn't think of anything else, and that was all he wanted and all he asked." For its bearing upon this admission, and, in fact, as a part of it and to be read with it, the following additional statement made by Sands to Miley is given: "A. Why, he said it seemed to be the custom to give the boundary lines. That was his answer to me—that seemed to be the custom to take in the whole thing, to give the boundary lines, but they only claimed the coal they surveyed and paid for. Q. Now, what coal do you say was surveyed and paid for? A. Why, he claimed the Pittsburgh vein; he called it the Pittsburgh, at least." It further appears that, with one exception, all the other deeds taken by Sands in that neighborhood, in getting this coal property together, called for all the coal in the farms, although the price was based upon the acreage of the Pittsburgh vein. That is admitted so far as there is any testimony relating to the subject, and it is disclosed by plaintiff's witnesses.

Kinsey, it is to be remembered, is the only witness who makes an express and direct statement as to what the contract stated in respect to the quantity of coal described, and that is that it said all the coal. Stout is not held to the truth of this statement simply because he called the witness. He cannot directly impeach his own witness by attacking his character or proving his contradictory statements, but he can show the fact to be different from what the witness states it to be by other evidence. "The

general rule that one cannot impeach his own witness must not be understood to imply that the party is bound to accept such testimony as correct. On the contrary, it is very clear that the one producing a witness may prove the truth of material facts by any other competent evidence, even though the effect of such testimony is to directly contradict his own witness. * * * A party is not bound by all the statements of a witness called by him, if adverse, even though no other witnesses are called to contradict him. The party may rely on part of such testimony, although in other parts the witness denies the facts sought to be proved. It has been well said that, if the other rule should prevail, every one would be at the mercy of his own witnesses, and, if the first witness sworn should swear against him, he would lose the testimony of all the rest. This would be a perversion of justice." Jones, Ev. § 860; Best's Pr. Ev. § 645; Phillips, Ev. (3d Ed.) pt. 2, 767; Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. Stout could have overcome Kinsey's statement by other evidence, but has he done so? He either could not or would not say that the language of the contract was limited to the Pittsburgh vein of coal. Neither did his son say so. Nor does the admission proved against Sands import that the language was so limited. The only direct evidence on that point is the statement of Kinsey. If it is broken down by anything in the record, it must be done by inference, deduced from the facts that the negotiations were for the Pittsburgh vein, that the price was based upon the acreage of the Pittsburgh vein, and the admission of Sands that he claimed nothing but the Pittsburgh vein. This admission, however, must be taken altogether. It includes the fact that his deed included all the coal, and that he claimed the right to hold it, for he unequivocally signified his intention to resist any litigation instituted for the purpose of changing his deed. The inference must also overcome adverse inferences, deducible from Stout's disclosure of the fact that he relies, not upon language in the contract, specifying the Pittsburgh coal alone, but that the contract said the coal was to be paid for by the acre, and all the acres are not paid for because of two supposed underlying veins, each equal to the entire area of the farm, making nearly 340 acres, and the admitted fact that the other deeds taken by Sands in the neighborhood are in conformity with his. How can the court reach the conclusion that he has made out *prima facie* proof of the fact that the contract was limited to the Pittsburgh coal? All this evidence must be reconciled as far as possible. Most of it can stand together consistently with the result that Kinsey's statement is true. It was in the power of Mr. Stout to directly contradict that statement, and he did not do it, but chose to rely upon another ground, not neces-

sarily inconsistent with its truth. If a man will not prove his own case by his own oath, how can he expect the court to make it out from the most unsatisfactory inferences? Had he made out a *prima facie* case, upon which the defendant casts doubt by rebuttal evidence, then the suppression of the contract, the best evidence of what it contained, by the defendant, would have been conclusive against him and in favor of the plaintiff; but the plaintiff leaves his own case incomplete, without the intervention of any rebuttal evidence, based upon mere inferences, when he was on the witness stand, had seen the contract, had read the contract, and had signed the contract, but failed to state it contained the very thing upon which he relies in this case. If he knew that it was in there, the act of withholding his own testimony is one for which the court cannot be held responsible, and an omission on his part which the court cannot supply for the purpose of holding the other party guilty of a reprehensible act, calling for a strong inference against him. Are we to assume that, in the course of this important litigation, he had not been advised by his counsel as to what it was necessary for him to prove? He offers no excuse for his failure to say, and his son's failure to say, that the language of the contract was in reference to the Pittsburgh coal only. He does not even say he does not remember its language on that point. Moreover, all that he does say is drawn from him on his cross-examination. What inference is it possible to deduce from this except that he knew the contract contained no such language, and that, as honest men, he and his son could not testify that it did contain such language?

Having reached the conclusion that the plaintiff has wholly failed to prove the initial and basic fact in his case, there is no occasion to deliberate upon the many other questions sought to be raised, all of which were dependent upon, and have fallen with, this fact.

Seeing no error in the decree complained of, the court affirms it.

(56 W. Va. 594)

TRAIL v. TRAIL et al.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

APPEALABLE DECREE—ADMINISTRATION OF ESTATE—BILL BY EXECUTOR—RES JUDICATA—FAILURE TO PROVE DEBT.

1. A decree in a suit by an executor against devisees to convene creditors and administer the assets for their payment, made on a report of debts by a commissioner, which decrees debts against the estate, and subjects its lands to their payment, is appealable, and must be appealed from within two years.

2. A bill by an executor to administer the assets of his testator for the payment of debts states that a person named claims a debt against the estate on a specific demand, and such person is made a formal party, but does not prove his claim or appear. A decree is made allowing

certain debts, but not his debts, and subjecting the estate's land to their payment. He is concluded by the decree.

3. Under Code 1899, c. 86, § 9, if a creditor of an estate of a decedent fail to present his claim before a decree upon a report of debts allowing debts against the estate and subjecting lands to their payment, such decree bars him from claiming participation in the proceeds of such lands until such decreed debts are satisfied.

4. When appeal from an appealable decree is barred by time, an appeal from a later decree will not review the former decree, and the later decree cannot be reversed for an error in it arising from following the former decree.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by George W. Trail against Alberta Trail and others. Decree for plaintiff, and defendants appeal. Affirmed.

Jos. Trapnell and Forrest W. Brown, for appellants. D. B. Lucas and MacDonald & Beckwith, for appellee.

BRANNON, J. George W. Trail, executor for Charles H. Trail, filed his bill in the circuit court of Jefferson county against the devisees of Charles H. Trail and various creditors of Trail to settle the accounts of said executor, convene the creditors of Trail, and ascertain their debts, and to subject the real and personal estate of Trail to the payment of his debts. The court referred the cause to a commissioner to settle with the executor, to report of what real estate Trail died seised, and the debts due from him and their priorities. The commissioner made a report specifying the real estate of said decedent, and numerous debts against him, and settled the accounts of said executor, and reported that there was no personal estate to satisfy the debts. The cause was heard upon said report, and a decree was pronounced against the estate for the payment to divers persons of their divers debts, fixing their amounts, and declaring them all to be of the same class as to the assets of said estate, and decreed that the real estate reported by said reporter as the property of said decedent be sold by commissioners appointed for that purpose. This decree was pronounced June 12, 1900. Eugene Baker was a defendant to the suit, the bill stating that he claimed a debt against Trail's estate by reason of Trail having been a deputy of Baker, who was sheriff of Jefferson county, on account of tax bills for collection, for which he was to account to Baker. The report of the commissioner did not report any debt in favor of Baker. Baker did not except to the report. On February 21, 1902, Baker filed a petition stating that Trail had been his deputy as sheriff, and received tax-books and collected taxes, and on that account he was indebted to Baker in a sum left blank in said petition, and it prayed that Baker's debt might be audited and paid out of the estate. On June 2, 1902, he filed an amended petition setting up the same thing

as to the indebtedness, and claiming that it amounted to \$2,880.25, and asking its payment out of the assets of said estate. On the same date he filed an answer setting up his claim. He filed no evidence of Trail's indebtedness. The sale commissioner proceeded from time to time to sell different pieces of real estate of said Trail, and made several reports of such sale, which were confirmed by the court. When the commissioner would report these sales at different times, the court would refer the matter of fixing the ratable shares or dividends in the several sale moneys of the various creditors whose debts had been decreed, requiring of the commissioner forthwith reports. This was done because there were several sales at different times, and the matter of percentage payable on the many debts was a matter of somewhat elaborate calculation. To one of these reports Baker made an exception because the commissioner had failed to report upon his claim, the court having on February 21, 1902, when Baker's petition was filed, referred it to the same commissioner to report upon Baker's demand. By a decree August 22, 1902, the court heard the cause upon the record already made and on Baker's petition, amended petition, and answer, and the forthwith report of the commissioner Cleon Moore, apportioning a fund in the hands of the sale commissioner arising from sale of a part of said realty, and the court decreed that the funds in the hands of the sale commissioner should be distributed to the creditors whose debts had been audited by the former decree under the said general order of reference, and overruled Baker's exception to the said forthwith report. Thus the court refused to allow Baker any part of the assets, to the prejudice of those creditors who had proven their demands before Commissioner Moore under the general order of reference, and whose debts had been allowed against the estate by the said decree of June 12, 1900. The court again directed the commissioner to take proof of Baker's demand, and it was afterwards reported by a commissioner's report filed February 25, 1903, at \$2,957.70. It was ascertained and reported by the commissioner that the property of said decedent was not sufficient to pay his debts. The record fully discloses that fact. It discloses that said property will not pay the debts decreed by the decree of June 12, 1900. An unsigned petition, said in the record to be the petition of James E. Watson and others, was filed in the case August 22, 1902. It states that said petitioners had joined as sureties in the bond of Baker as sheriff, and that a liability had been found to exist in favor of the state and county of Jefferson against Baker as sheriff, for which they, as sureties, would be liable, and that thus they were interested in having the property of Trail, because he was Baker's deputy, applied to pay a liability of Trail to Baker by reason of Trail's having been Ba-

ker's deputy—the same liability specified above. They specified no amount of liability. They simply prayed that the fund in the case arising from said sale of Trail's property be retained in the hands of a receiver to await the liabilities of the bondmen of Baker. By the said decree of August 22, 1902, which denied relief to Baker, as above stated, the court also denied relief upon the petition of the said bondmen of Baker. Baker died pending the suit, and it was revived against his administrator. By the decree of February 21, 1900, mentioned above as ordering a reference to convene creditors, the court directed the sale of a certain piece of the realty in advance of any convention of creditors, and that property was sold, and its proceeds consumed by application upon a debt due the Bank of Harpers Ferry, which had a mortgage thereon, giving it a preference over other creditors as to the property. This decree was made because some of the parties assented to it. From all these decrees the administrator of Eugene Baker, and James E. Watson and others, joining him, in said petition have appealed.

The objection to the decree selling the piece of property in advance of the ascertainment of the debts is based on the ground that a decedent's land cannot be sold until there has been such ascertainment. This is true, but it is useless to say more about that decree, for the reason that later decrees are barred, and cannot now be reversed, as appellants' counsel freely admit, it going with them.

An assignment of error claims that it was error to confirm the report of the commissioner auditing the debts, which excluded the debt of Baker. The argument is that the court should have recommitted it to inquire into the debt of Baker, though the report was not excepted to by him, it appearing that there was such a debt, since the bill alleged it. In the first place, we cannot affect that decree because it dates June 12, 1900, and the appeal was allowed September 10, 1903, and therefore the appeal is barred by the statute of limitation so far as that decree is concerned. It is argued, however, that an appeal from that decree is not barred, because it is not a final decree, and any error in it is to be remedied under an appeal from a later decree, as it would be carried into the subsequent decrees, which are within the appeal limit. It is very true that under the case of *Stout v. Phillippi*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843, a nonappealable decree is carried forward to the date of a later appealable decree, and is reviewable upon an appeal from the later decree. But the fault in this position is that that decree of June 12, 1900, is essentially an appealable decree, because it confirms the commissioner's report auditing debts against the estate, ascertains these debts against it, and specifies to whom they are going, and declares the assets liable, and directs the sale

the real estate to pay those debts. That decree settled the rights of the parties. For claim that this is not an appealable decree we are cited to *Hooper v. Hooper*, 29 W. 276, 1 S. E. 280. That case repels, rather than sustains, the position that the decree is unappealable. That case holds that a decree which sustains exceptions to a commissioner's report and recommits it is not appealable. Of course not, because it does nothing. But that is not to say that a commissioner's report not excepted to, and carried into an actual decree fixing the rights of the parties, is not appealable. The opinion virtually says that it is a final decree.

Appellant complains that the court did not recommit the report. Why should it have done so? Was not Baker a party? Did it not fall to except to the report? He there raised any objection to it. *Keck v. Allen*, 37 W. Va. 201, 16 S. E. 520. It does not matter that he moved a recommittal, and, if he had done so, the court ought not to have granted it, because he had had his day before the commissioner, and had presented evidence to sustain his claim. It did not matter that he had any debts. The commissioner would not have been warranted in carrying it, because there was no evidence to prove its existence or its amount. The court did not do so. It simply stated that if he had been Baker's deputy, and had taken for collection, and that Baker had pressed his claim to him. This feature of the case was only a suggestion that Baker and others claimed debts against the estate. The court did not say a word about their justness or amount. How could a commissioner, without evidence, predicate a report of Baker's debt upon that bill? The debt was properly one unliquidated.

Now, as to the action of the court in denying Baker participation along with the other creditors in the real assets of Trail, I think the decree is final upon Baker's demand. His demand was specified in the bill, and was a party. He did not except. The court ignored his demand, and thus disallowed it; in effect, it decided against his demand. On general principles of res judicata, see reference to Code 1899, c. 86, § 9, I think that Baker would be barred. He made a party. The bill stated that he was to be a creditor on a specified demand. He could have proven it under the bill. Not having done so, he is concluded by decree alone, on common-law principles; for, if the suit is such that a party that he had the matter disposed of, he is concluded. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633; *Biern v. Ray*, 49 W. Va. 129, 24 S. E. 530; *Sheets v. Selden*, 7 Wall. 416, 18 Ed. 166. His claim was involved in the suit far enough to make that decree bar his demand for the reason above stated. The matter does not rest alone on the principle of res judicata outside the statute. I think it clear that Code 1899, c. 86, § 9,

bars Baker's claim, as it says, when there has been a convention of the creditors of a dead man's estate before a commissioner according to that chapter, and the court decrees "a distribution of the proceeds of such real estate among such of the creditors as shall have shown themselves entitled thereto, which decree, so made, shall be a bar to the claim of any creditor of the deceased who has failed to present the same to the commissioner as required by said notice, except that, if a surplus remain after such distribution, the creditor so failing may share in the same upon proving his claim at any time before a final decree is made in such suit." Now, the import of that statute is plain, its letter plain, its purpose plain. A debtor dies. It is to the interest of his creditors and heirs that his estate be wound up at once. The statute gives these creditors notice to appear before the commissioner. Certain ones appear and prove their debts, and others fail to do so. A decree is rendered for the debts reported, and the property is declared liable to such debts. That moment those creditors have fixed and vested rights upon the property by the force and effect of a decree settling the rights of all the parties interested as creditors in that estate, which rights cannot be afterwards displaced at the instance of negligent creditors. Such a decree is a decree of distribution of the assets among the decreed creditors, because it says just what debts are to be paid out of the assets. It tells us just what the assets are to pay, and after-decree does but execute the decree fixing the rights of the party. After-decree only apply the assets upon the principles marked out, settled, and fixed by the first decree. It is that decree which works the distribution in a legal point of view, for when the special commissioner later sells the land he is told by the decree confirming the sale to pay the proceeds of the sale to the creditors entitled under the former decree. The later decree cannot make any other application than that adjudged in the former decree. If this be not so, then, long after, negligent creditors may come in and demand that the diligent creditors pay back money received under the former decree. We must construe the words "may decree distribution" in the light of our statute making appealable a decree "adjudicating the principles of a cause." A decree that does this is a decree of distribution under the statute. Any decree fixing debts and charging the assets with them is a decree of distribution under this statute. It is an appealable decree—I think a final decree—and must be appealed from within two years. *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984; *Core v. Stickler*, 24 W. Va. 689; *Buster v. Holland*, 27 W. Va. 510. It is in vain to rely on appeal from later decrees than the main decree of June 12, 1900, as they are only sequences from it. They only paid out money on debts allowed by it. If even the later de-

crees were erroneous, the error came from that decree, and as appeal from it was barred, and it cannot be reviewed, later decrees executing it cannot be reversed. *Buster v. Holland*, 27 W. Va. 510. But I see no error in that decree. Appeal from later decree cannot review that decree, as it is appealable, and appeal from it barred by lapse of two years. Therefore we hold that the decree of June 12, 1900, is an effectual bar against Baker's demand. The same may be said as to the petition of Watson and others, for similar reasons. We have several times held that a decree fixing liens upon a living man's realty and subjecting it in a judgment lien suit under Code 1899, c. 139, § 7, bars a judgment not presented until after such decree. *Benson v. Snyder*, 42 W. Va. 223, 24 S. E. 880; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774. For the point in hand these statutes are similar, having the same end in view. It is suggested that a difference exists between the two statutes from the fact that as to a dead man's estate the Code says the court "may" decree a distribution upon the report of debts, whereas the other statute says "shall" decree. Now, this statute was made for the benefit of creditors, and the law is that when this word "may" is in a statute made for the benefit of persons it is not simply permissive, but mandatory or compulsory. 20 Am. & Eng. Ency. L. (2d Ed.) 237. It cannot be that when a report has been made in a creditors' suit after due notice, and the case is ready for hearing, and the creditors entitled to have their debts decreed, a public court of the country has an option to postpone it, unless cause be shown therefor. None was shown in this case. Delay was not even asked.

As to the exception to Moore's forthwith report. That was only a report touching the dividends payable out of part of the proceeds of sale to the creditors under the former decree. That was no report of debts. That report was not subject to such an exception. Exception should have been made to the first report, but it was neglected. And even at that date there was not a particle of proof of Baker's debt. It is complained that the commissioner failed to report on Baker's claim as directed by the court, and went on to decree to creditors dividends out of the sale moneys. It is said the court should have recommitted the report, and we are cited to *King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010. The answer is, this was a report of dividends only. The rights of the parties had been decreed already, before Baker's petition was filed. If the debts had not been decreed, there might be some force in the suggestion that the report—I mean the forthwith report of dividends—should have been recommitted. Such was the case in the case of *King v. Burdett*. That case is wholly without force in this instance. It is useless to tell us that Code 1899, c. 86, § 3,

provides that the real estate of a decedent shall be assets for the payment of debts and all lawful demands against his estate in the order in which personal assets are to be applied, and that after preferred debts such assets go to all other debts ratably; or to cite us to section 3, c. 86, making the real estate of a decedent liable for debts. Those provisions only declare the liability of real assets and fix their order for payment of debts; but they do not change or apply to a decree which has already ascertained what debts shall be paid. Those statutes tell a court how debts that are reported shall be decreed, but they do not give ground to overthrow a decree already passed at the instance of a party who has failed to prove his case. We do not think section 26, c. 87, Code 1899, relates to the case. It applies to ex parte settlements in the probate court, not to a creditors' suit in circuit court. I add that it was right to allow Baker to prove his debt before a commissioner, so as to have a decree against the estate or a surplus, should one appear; but that did not say it was to prejudice debts already decreed.

For these reasons we dismiss the appeal as to the decrees of February 21, 1900, May 1, 1900, June 12, 1900, June 4, 1901, as appeal from them is barred, and affirm the decrees of February 25, 1902, August 22, 1902, and February 25, 1903.

(56 W. Va. 397)

HONESDALE SHOE CO. et al. v. MONTGOMERY, et al.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

ACTION—BEGINNING—CREDITORS' SUIT—DISMISSAL—RECORD—CONTRADICTION.

1. A summons to begin a suit under chapter 124, § 5, Code 1899, once issued, brings a suit into being.

2. A suit by a single creditor of an insolvent debtor, under chapter 74, § 2, Code 1899, whether in his own name only or for himself and other creditors, is from the date of the summons a suit for all creditors, and he cannot dismiss it, against the will of other creditors, at rules or in term. It may be dismissed as to him, but others can prosecute it in their names as substituted plaintiffs. If he dismisses it at rules, other creditors may at the next term have it reinstated, though the summons has not been served or the bill filed.

3. Oral or other extrinsic evidence cannot be allowed to deny, contradict, vary, or enlarge a record; but it may be allowed to prove matters as to which the record is silent, though such matters relate to, but do not vary or contradict, it.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Suit by the Honesdale Shoe Company and others against Wells D. Montgomery and others. Decree for defendants, and plaintiffs appeal. Reversed.

¶ 1. See *Action*, vol. 1, Cent. Dig. § 728.

E. G. Smith and Harvey F. Smith, for appellants. Davis & Davis and Sperry & Sperry, for appellees.

BRANNON, J. The Honesdale Shoe Company and others presented their bill, asking that it be read also as a petition, to the circuit court of Harrison county, stating that Wells D. Montgomery on and prior to March 23, 1903, was indebted to it and other named creditors, and was on that date insolvent, and that on that date he made a deed of trust to Jamieson, as trustee, conveying certain property to secure a debt to Articia C. Montgomery; that the Koble-gard Company, as a creditor of Wells Montgomery, brought suit in chancery on August 21, 1903, within four months after the recordation of said deed of trust, which was on April 22d, having the purpose to set aside said deed of trust as an unlawful preference of Articia C. Montgomery over other creditors, and to apply the property pro rata among all his creditors; that the summons issued had not been served on the defendants; that it was returnable to September rules; that by reason of some arrangement between the Koble-gard Company and Montgomery, by which the debt of the Koble-gard Company had been adjusted, said summons was recalled by the Koble-gard Company, and not served by the sheriff into whose hands it had been delivered for service; that no bill was filed, but at the September rules the suit was, on motion of the Koble-gard Company, dismissed. The said bill of the Honesdale Company was presented to the court at the next term after such dismissal on the 7th of October. It asked the court to set aside said office dismissal and reinstate the case, and to grant leave to the Honesdale Company and other creditors joining in said bill and petition to allow them to prosecute said suit in their names as plaintiffs. The bill set up the facts touching said deed of trust, and prayed that it be held void so far as it preferred the debt of Articia C. Montgomery, and held for the benefit of all creditors. The court entered an order saying that, it appearing that the summons had been placed in an officer's hands and returned unserved by order of the Koble-gard Company, and no bill filed, and that the suit had been dismissed, and the purpose for which the suit was instituted in no manner appearing from the record, the court refused to set aside the office dismissal and reinstate the case, and refused to let the Honesdale Company and the creditors joining it in said bill prosecute the suit as plaintiffs. From this order the Honesdale Company and its associates appeal.

When the writ issued, a suit came into being. Code 1899, c. 124, § 5; Manufacturing Co. v. Chewning, 52 W. Va. 523, 44 S. E. 123; Lawrence v. Winifrede Co., 48 W. Va. 189, 35 S. E. 925. Though that suit was

in the sole name of the Koble-gard Company, not one in terms for itself and all other creditors of Montgomery, yet Code 1899, c. 74, § 2, made it a suit for all such creditors by the words "every such suit shall be deemed to be brought in behalf of the plaintiff and all other creditors of such insolvent debtor." From the start it was a general creditors' suit. For this purpose we must assimilate it to a creditors' suit against a decedent's estate, or a judgment lien creditors' suit, or one against an insolvent corporation, and apply the law applicable in such cases. Our cases show that when a suit bears that character it is for the benefit of all creditors, and not, under the unlimited control of the nominal plaintiff, properly so called. Whether brought by a plaintiff in his own name only or for himself and other creditors, when a reference is made to convene creditors, it is then surely a suit for the benefit of all, because the reference is for all, and gives the character of the creditors' suit. *Arnold v. Casner*, 22 W. Va. 444; *Laidley v. Kline*, 23 W. Va. 565. Without statute the reference makes the suit a general creditors' suit, but the statute in this case makes it such ab initio. If it did not say so, the law would make it so after the reference, without aid from the statute. The statute would not be needed to make it such a suit from the reference, and we can thus fairly say that the statute makes it a creditors' suit from the birth of the suit. The statute does not say it shall have that stamp only after reference. Being a creditors' suit, the nominal plaintiff cannot dismiss it at will to the prejudice of other creditors, as it is their suit no less than his. He can dismiss it as to himself, but others can become plaintiffs by order of the court, if not already parties, or be transposed from the position of defendants to that of plaintiffs. Without this statute, after a reference the plaintiff on the record, though his debt might be paid, or he wish to dismiss, could not do so against the will of other creditors. *Linsey v. McGannon*, 9 W. Va. 154; *Bilmyer v. Sherman*, 23 W. Va. 656. In *Lewis v. Laidley*, 39 W. Va. 422, 19 S. E. 378, we held that "it is error to dismiss a general lien creditor's suit on motion of the nominal plaintiff whose debt has been paid." He may have the cause dismissed as to himself, but not as to other creditors, who are parties, formal or informal. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66, gives right to another creditor to ask the suit to go on, as do also the cases cited above. To give the nominal plaintiff absolute right of dismissal would, as the opinion in the *Lewis Case* by Judge Dent says, allow the defendant debtor to collude with the nominal plaintiff in controlling the litigation, and in this manner often greatly delay, hinder, and defraud other lien creditors.

In *Bilmyer v. Sherman*, after saying that the plaintiff might dismiss as to himself,

when the court could direct the case afterwards to go on in the name of some one else, the court, by Judge Snyder, added: "If such were not the case, the other creditors would be at the mercy of the nominal plaintiff, and the uses of the creditors' suit would be greatly impaired, if not entirely destroyed." One creditor, as in this case, brings a suit, and, after it is too late for others to sue, wants to dismiss it. Can it be that he can thus end it, and destroy other creditors, in the face of a statute which plainly intends that one suit shall go for the relief of all, and thus avoid multiplicity of suits with consequent costs? That would be a misapplication of the statute; would defeat its object and remedial utility. We must apply it as a remedial statute. We are, however, told that, while these principles may apply to a full-fledged suit, or after reference, they do not apply to a mere writ not served, where no bill has been filed; that they cannot, at earliest, apply before the writ is served; that till then there is no suit. There is a suit born of the summons. If a creditors' suit, it has that stamp from the issuance of the summons, because that summons is a part and parcel of the suit. Necessarily, there must be a period, long or short, between its date of summons and the filing of the bill; and it looks odd to say that the suit does not in that period have the cast which the bill has, which, when filed, relates back to the date of the summons. Cannot a notice of lis pendens be recorded on the date of the summons, though the bill be not then filed? It is a suit in the interim, else the lis pendens would be void. What reason for drawing such distinction, and thus work the mischief suggested by Judges Dent and Snyder? It must be conceded, under decisions above cited, that after bill filed the formal plaintiff could not dismiss to the harm of the others, and I cannot see why, if they have a right to participate in the suit at a later point in its life, they have not equally so in an earlier, since it is apparent that a dismissal may prejudice them equally in both cases. If parties, in legal contemplation, at one time, why not at another?

We must not impute to these creditors want of diligence in not bringing each one his own suit. The statute relieves them from bringing each suit, as it tells them that the one suit is for the benefit of all. In fact, it being a creditors' suit, a fair construction of the statute would make it forbid such suits. I doubt not that if, with knowledge of such suit by one creditor, they bring other suits, they would pay their own costs, because otherwise the debtor's assets would be devoured in the costs of multiplied suits. *Laidley v. Kline*, 23 W. Va. 565. The second would likely be suspended by the first suit under the case cited. Then why bring it? These other creditors applied at the earliest possible date to have the court order

the suit to continue for their benefit. The Code gives the court power at the next term to reinstate a cause dismissed in the preceding vacation. We have seen that they had such interests as entitled them to move a reinstatement.

It is urged that, as no bill was yet filed to show the object of the suit, evidence dehors the record cannot be allowed to show it, as that would violate the rule that the record speaks for itself; and evidence cannot be received to vary, explain, or supplement it. This is so on matters spoken by it. As stated in *Perry v. McHuffman*, 7 W. Va. 306, and *State v. Vest*, 21 W. Va. 796, it is elementary law that a record imports such absolute verity that nothing can be pleaded or proven against its statements. You cannot prove its statements false, or vary or explain the effect of the record as to what it speaks, or add to it to change its effect or meaning; that is, you cannot thus alter or deny its effects. In 24 Am. & Eng. Ency. L. 193 (2d Ed.), we find that this rule is limited to matters to which the record relates, and that "it is never permissible to introduce parol or other extrinsic evidence to vary or contradict a judicial record; but where the record on its face does not show the precise question determined, or in other respects leaves any matter open to doubt, parol and other extrinsic evidence, which is not in conflict with the record, may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clearing up any doubts which might exist." Under this principle oral evidence was allowed where a record of confession of judgment by attorney, not showing whether it was by an attorney at law or in fact, to show that it was by an attorney in fact, *Calwell v. Shields*, 2 Rob. 305. Evidence is always allowed where res judicata is involved, and the record does not disclose the exact matter in issue, to show the matter actually tried. "To apply the judgment or decree, and give effect to the adjudication, when the record leaves the matter in doubt, such evidence is admissible." *Russell v. Place*, 94 U. S. 608, 24 L. Ed. 214; *Legrand v. Rixey*, 83 Va. 862, 877, 3 S. E. 864. Ancient and modern law is stated in 7 Rob. Prac. 263, 264, in these words: "To take averment, which stands with the record, and which doth not impugn anything apparent within the record, the law doth well admit and allow." In this instance it is not proposed to deny or contradict anything of record. Before we talk of oral evidence to vary or explain or add to a record, we must have a record. The bill proposes to prove only the purpose of the suit of the Koblebard Company not to contradict anything already done by the court, nor even to deny a pleading.

Therefore, reversing the order of the circuit court, we set aside the dismissal made

rules, and reinstate the case to the condition of a pending cause, and order the said to be filed at rules after service of process, and give leave to the plaintiffs to prosecute the same suit in their names as plaintiffs, and dismiss it as to Koblegard Company, and give leave to said plaintiffs to set out alias or further summons in their names as plaintiffs substituted in place of Koblegard Company, and remand the case for further proceedings at rules and the circuit court.

W. Va. 510)

RICHARDS v. RIVERSIDE IRONWORKS.

Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

INTESTATE — PERSONAL ESTATE — CLAIM FOR WRONGFUL DEATH — PLEADING — SPECIAL PLEAS — ACTION BY ADMINISTRATOR — SECURITY FOR COSTS — SPECIAL INTERROGATORIES.

C. was employed as a laborer by the defendant at its manufacturing plant in O. county, Va. While engaged, under direction of defendant's labor foreman, in tearing down a scaffold which had been erected by defendant and attached to it, he was injured by the falling of one of the platforms of the scaffold, and from effect of his injuries died in Bellaire, in the state of Ohio, where he resided. He having intestate, the county court of Ohio county committed his estate to R., sheriff of said county, to be administered by him. R., as administrator of C., instituted this action in O. county. At the time of his death, C. had no mansion or place of residence, any real estate, any property situate in the state of West Virginia, and since his death no property belonging to him or to his estate, except the claim for damages sued for in this action, has come into his estate.

It is held, that said claim against defendant in action for damages for the death of plaintiff's intestate must be deemed property, within the meaning of our statute; that the county court of O. county had authority to commit the estate of C. to the sheriff of that county, to be administered by him; and that said sheriff, as administrator of C., had the right to institute and prosecute this action.

Special pleas which aver matters only that should be given in evidence under the general issue should be rejected.

A resident administrator who brings an action in a court of this state to recover damages under our statute for the death of his intestate, who was a nonresident, should not be required to give security for costs.

Where, in an action for fatal injury, it becomes a question whether death resulted from injury, or from disease with which it had no connection, the party causing the injury is not liable for full liability without showing that death must have resulted if the injury had been done.

If the master cause to be constructed in an unworkmanlike manner, and use of defective or unsound materials, all of which render the scaffold dangerous and insecure, and the master or his foreman in charge of the work knew it, or ought to have had knowledge of it by the exercise of reasonable attention, care, and diligence, but direct such to be done and that character of materials be used, he is liable to his workman, who, by himself in the exercise of reasonable care, is injured thereby while working thereon, unless the workman, by the use of ordinary care, ought

to have detected the unworkmanlike construction of, and the defective or unsound materials used in, the scaffold.

6. Point 4 of syllabus in *Andrews v. Mundy*, 38 W. Va. 22, 14 S. E. 414, approved and applied.

7. When a servant enters into the employment of a master, he assumes all the ordinary risks incident to the employment, whether the employment be dangerous or otherwise.

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by H. C. Richards, administrator, against the Riverside Ironworks. Judgment for plaintiff. Defendant brings error. Reversed.

Wm. H. Hearne, for plaintiff in error. J. A. Howard and T. S. Riley, for defendant in error.

MILLER, J. John W. Campbell, the plaintiff's intestate, was before and on the 20th day of January, 1899, and also on the 18th day of February, 1899, the time of his death, a resident of Bellaire, in the state of Ohio. For some time previous to the first-mentioned date he had been employed as a general laborer by the defendant, the Riverside Ironworks, a corporation, at its manufacturing plant in Benwood, Ohio county, W. Va. A short time before January 20, 1899, a wooden scaffold, consisting of three platforms, had been built by defendant to enable its bricklayers to work therefrom in rebuilding and painting for it a brick wall at one end of its stockhouse. The bricklayers worked on the scaffold with brick and other materials, and completed the wall after several days' labor thereon. Intestate, with other laborers, worked on the scaffold, attending the bricklayers, but did not assist in the construction of it. After the work on the brick wall had been completed, Campbell and Barkhurst, another laborer, were directed by one Lowe, a labor foreman then in the employ of defendant, to tear down the scaffold. This Campbell and Barkhurst proceeded to do, and, while so engaged, the scaffold fell. They were thrown to the ground. Campbell was injured on the head and elsewhere about his body, and from the effects of his injuries so received he died at his home, in Bellaire, Ohio, at the time above stated.

On the 15th day of May, 1899, the county court of Ohio county committed the estate of said Campbell, deceased, to H. C. Richards, then sheriff of that county, to be administered. On the 28th day of June next thereafter, Richards, as administrator, commenced this action, in which he claimed \$10,000 damages from the defendant on account of the death of his intestate, resulting from said injuries occasioned as aforesaid. The defendant interposed its plea to the jurisdiction of the court in the action, and therein denies the right of the plaintiff to maintain his said action, because it says that neither the said county court had jurisdiction to so

commit the estate of said John W. Campbell, deceased, to said Richards to be administered, nor had said Richards authority by reason of said action of the county court to institute or prosecute this action against defendant, for the following reasons, to wit: That said John W. Campbell, who was at the time of his death a nonresident of the state of West Virginia, died intestate in Belmont county, in the state of Ohio, where he then resided, and where his family still reside; that at the time of his death he had no mansion house or known place of residence, or any real estate or any property of any kind, situate in the state of West Virginia, nor since then has he had any property in the last-mentioned state, unless the claim sued for in the said action can be regarded as property.

A demurrer by the plaintiff to this plea was sustained by the court. This ruling of the court involves a construction of our statute under which the action is brought and prosecuted. Section 5 of chapter 103 of the Code of 1899 provides that: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter." The statute gives the right to institute and prosecute the suit. But for our statute, the action could not be maintained. The Supreme Court of Indiana, in *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477, 484, in discussing a similar statute, says: "The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action, had he lived, for an injury by the act or omission. The right of compensation for the bodily injury of the deceased, which died with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby by the widow and children or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and, if no such person existed, it could not be maintained. *Indianapolis, etc., R. Co. v. Keely's Adm'r*, 23 Ind.

133; *Lucas v. New York C. R. Co.*, 21 Barb. 245; *Chicago, etc., R. Co. v. Morris*, 28 Ill. 400; *State v. Gilmore*, 24 N. H. 461; *Johnston v. Cleveland, etc., R. Co.*, 7 Ohio St. 836, 70 Am. Dec. 75; *Commonwealth v. Eastern R. Co.*, 5 Gray, 473."

Section 6 declares that: "Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action, the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased." Section 4 of chapter 85 provides that, "In case of a person dying intestate, the jurisdiction to hear and determine the right of administration of his estate shall be in the court which would have jurisdiction as to the probate of his will, if there was a will." Section 22 of chapter 77, Code 1899, reads as follows: "The county court shall have power and jurisdiction to hear proof of, and admit wills to probate as follows: First. In the county wherein the deceased, at the time of his death had a mansion-house or known place of residence; or, second, if he had no such house or place of residence, then in the county wherein any real estate devised thereby is situated; or, third, if there be no real estate devised thereby, and the testator had no such house or place of residence, then in the county where he died, or in any county wherein he had any property at the time of his death." Subsection 16 of section 17 of chapter 13 of the Code of 1899 says: "The words 'personal estate' or 'personal property' include goods, chattels real and personal, money credits, investments and the evidences thereof." It is suggested that the alleged right to recover damages from the defendant in this action is not property, within the meaning of the law, but that, if such right be deemed property for the purposes of this action, the same was not consummate until the death of Campbell, which occurred at his legal residence in the state of Ohio, and that therefore the legal situs of the right or property was and is in the state of Ohio. But it will be observed that our statute gives right to the action for death caused by injuries which would have been actionable had death not ensued, without regard to the residence of the decedent at the time of his death. The statute is remedial, and should be construed liberally for the purpose of carrying out the legislative intent. *Marvin v. Maysville St. R. Co. (C. C.)* 49 Fed. 438. In *Hartford & New Haven R. Co. v. Andrews*, 38 Conn. 215, the court says that the claim, if valid, is property, within the meaning of the statute, and that it was not the province of the court of probate to pass upon

the validity of the claim. It was enough for that court to be satisfied that there was an apparent claim, and a bona fide intention to pursue it, and that administration was necessary to its pursuit. 2 Woerner, *Am. Law of Adm'n*, § 306. "Personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction into possession." *Speed v. Kelly*, 59 Miss. 47, 51. In *Perry, Adm'r, v. St. J. & W. R. Co.*, 29 Kan. 420—an action upon a statute almost identical with our own—it was held: "A claim for damages for causing the death of a party, under section 422 of the Code, is prosecuted by the administrator for the benefit of the widow and children or next of kin of the deceased, and is not an estate of the deceased to be administered within this state, within the meaning of the act respecting executors and administrators. * * * A probate court has no jurisdiction to issue letters of administration on the estate of an intestate where such intestate is not an inhabitant or resident of this state at the time of his death, and leaves no estate in the state, and none comes into it afterwards. * * * Where a probate court has no jurisdiction to issue letters of administration on the estate of an intestate, its acts in doing so are void for all purposes." In *Jeffersonville R. Co. v. Swayne*, supra, *Marvin v. Maysville R. Co.*, supra, and *Central R. Co. v. Cragin*, 71 Ill. 177, the decisions are in accord with the Kansas case above cited. A different conclusion, however, is reached in other states, where, as in our state, the fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it; and, where there is property or a fund or right of action which cannot otherwise be made available, it is competent for the probate court to appoint an administrator for the sole purpose of collecting and receiving assets, which will not be general assets of the estate of his intestate, or liable for his debts, but which will belong to particular persons who by law or by contract with the deceased will be entitled thereto. In such case it is for the probate court to determine whether there is an apparent claim, a bona fide intention to pursue it, and that administration is necessary to its pursuit. That it is the duty of the probate court to appoint under such circumstances seems to admit of no doubt, for, if the right to bring the action is given to no one but an administrator, the refusal to appoint one would render the statute giving the remedy nugatory. 1 Woerner, *Am. Law of Ad.* § 206; *Hutchins v. St. Paul R. R.*, 44 Minn. 5, 46 N. W. 79; *Brown v. L. & N. R. R.*, 97 Ky. 228, 232, 30 S. W. 639; *Findlay v. Chicago R. R.*, 106 Mich. 700, 64 N. W. 732; *Morris v. Chicago R. R.*, 65 Iowa, 727,

728, 23 N. W. 143, 54 Am. Rep. 39; *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121; *Hartford R. R. v. Andrews*, 36 Conn. 213. In the light of the authorities cited, we must hold that the county court of Ohio county had legal authority to commit the estate of the decedent to Richards, as sheriff, and that he, as such sheriff, with the powers of administrator thus cast upon him, had the right to institute and prosecute said action against defendant. The court therefore did not err in sustaining the demurrer to the plea aforesaid.

Plaintiff in error complains that security for the costs of the action was not required of the plaintiff, and assigns this for error, on the ground that the residence of the distributees or beneficiaries of the damages, if any should be recovered, reside in the state of Ohio. We think this contention is not tenable. The residence of the plaintiff in the action and the situs of the demand are in Ohio county. This being so, the law relating to security for costs does not apply.

The defendant also tendered two special pleas in bar, one of which avers that it was not decedent's injuries, but the low order of his vitality, produced by the use by him of intoxicating liquors, which produced his death; and the other, that the injuries of the deceased were not of themselves sufficient to cause his death, but that his death was due primarily to his low order of vitality and his alcoholic condition, produced by the continuous drinking by him of liquors. Both of these pleas, upon objection thereto by plaintiff, were properly rejected, because everything averred therein could have been given in evidence under the general issue. The pleas were, in effect, the general issue, which had been pleaded by defendant to the declaration and issue thereon joined. *Hagerstown v. Klotz* (Md.) 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437.

The material averments in the declaration are that the scaffold was constructed by the defendant, its agents and servants, from old and defective timber, which, on account of its defects and unsoundness, was unfit to be used in the construction thereof; that the defendant, its agents and servants, well knew of the unsoundness and unfitness of the timber at and before the scaffold was constructed therefrom; that the defendant negligently and willfully permitted the timber to be used in the construction of the scaffold; that the scaffold was built in an unworkmanlike manner, and that by reason of the unsound and defective materials, and the unworkmanlike manner in which the scaffold was built therefrom, the scaffold was dangerous and unsafe; that, with knowledge of the dangerous and unsafe condition of the scaffold, defendant ordered and directed the plaintiff's intestate, who had no notice thereof, and was not aware of the insufficiency, unsoundness, or dangerous condition of the scaffold, to ascend the same for the purpose of tearing it

down; and that, while tearing the scaffold down as directed and ordered to do, it gave way, thereby precipitating decedent to the ground, and thus causing him injuries, from the effects of which he died.

Charles Grimm testifies that he was at the time, and before Campbell was injured, the foreman of the defendant Riverside Furnace. He says: "I had the scaffold built to enable the bricklayers to do some work in trimming up the end of the stockhouse. The scaffold had three platforms." J. W. Detter, a carpenter, testifies that he is a carpenter, and had charge of the construction of the scaffold under Grimm, who told him what to do, and who had authority to tell him what to do. The material used in its construction was taken from a pile of lumber belonging to defendant, near by, and by direction of defendant's foreman. Most of the lumber had been used before. There is no question about the soundness of the four uprights of the scaffold, but there is evidence tending to prove the unsoundness and weakness of the other lumber used therein. Speaking of the lookouts which held the uprights in place, and also supported the floors of the several platforms of the scaffold, Mr. Hughes, a carpenter, who, with one Reilly, put up the scaffold, says: "Well, the timber was pretty knotty, and also windshaky." He further testifies that some of the lookouts were doubled, but states, as to the strength and sufficiency of the scaffold: "Well, I didn't think that it was a good scaffold. I wouldn't consider it a good scaffold." Campbell, the decedent, and Barkhurst commenced on the third and upper platform to tear down the scaffold. They threw off the boards and knocked the lookouts from the uprights on that floor, then went down to the second and did the same, and thence to the first. While they were standing on that floor or platform, about two minutes after they reached it, a lookout supporting one end of the floor gave way, and decedent and Barkhurst were thrown to the ground. One of the lookouts of the lower platform was afterwards seen hanging by the nails at one end from an upright to which it had been fastened, the other end having given way entirely. There is other evidence tending to prove the same and other facts, and some testimony tending to contradict them. Suffice it to say that the evidence upon the material points in issue is somewhat conflicting and contradictory.

It was shown that some of the lumber used in the scaffold had knots in it. J. W. Detter was asked to what extent a board is weakened by a knot. The question was objected to by defendant. The objection was overruled, and exception made. His answer was: "Well, in my experience, a knot is equal to nothing. A knot might just as well be out, as far as strength is concerned. It don't amount to anything. That is my experience in carpenter work." He further said that "a

knot weakens the board as much as a hole the same size." He had been carpentering for 30 years, and was the person in charge of putting up the scaffold. We see no reason why his evidence should have been rejected. G. V. Hughes, a carpenter, who had worked at his trade for 20 years, and who assisted in constructing the scaffold, was also a witness for plaintiff. The following questions propounded to him, and the answers thereto, were permitted, over the objections of defendant: "Ques. Now, state what you know as to the character of the timber in those lookouts, and as to their fitness for the use that was made of them? Ans. Well, they were not fit for the use they were made of. * * * Ques. Why? Ans. Because it was not of proper material." The witness had had long experience in working timber and lumber, and also possessed actual knowledge of the material used in the scaffold. His evidence was therefore proper. The court did not err in allowing it to go to the jury. There are several other interrogatories to witnesses, the several answers to which were objected to by defendant, but allowed to go to the jury as evidence. A discussion and decision of them here seriatim would involve much time and great labor. We have examined them carefully, and are unable to detect any error of the court in respect thereto prejudicial to defendant.

The court, at the instance of the plaintiff, gave to the jury the following instructions:

"No. 1. The court instructs the jury that the law imposes upon the defendant company the duty of furnishing its employé with reasonably safe and sound material with which the employé may be engaged in and about the doing and performing of his work, and a failure of the defendant company to discharge this duty is, in the law, negligence for which the company is liable. Therefore, in this case, if the jury believe from the evidence that the scaffold upon which the plaintiff's decedent was working, by reason of weakness or defectiveness in the material of which it was constructed, was not sufficiently strong to support itself, together with the weight that the scaffold was sustaining by the work then and there being done by the plaintiff's decedent in the course of his duties, and that by reason of such weakness or defectiveness the said scaffold fell, and thereby injured the plaintiff's decedent and caused his death, then it is the duty of the jury to find for the plaintiff.

"No. 2. The court instructs the jury that if they believe from the evidence that the witness Detter was put in charge of the construction of the scaffold in question, and of the men constructing the same, by the defendant, then his acts in the performance of his duties as a foreman in the construction of said scaffold were the acts of the defendant company, and the defendant is liable for any negligence or want of proper care on his

part, or the workmen in his charge, in the selection of the timber or the construction of said scaffold.

"No. 3. The court instructs the jury that if they find for the plaintiff the damages are not limited to the losses sustained at the precise period of Campbell's death, but may include prospective losses, provided they are such as the jury believes from the evidence will result to his distributees as the proximate damages arising from the wrongful death; and the jury may take into consideration, in estimating the pecuniary injury, the nurture, instruction, physical, moral, and intellectual training which the children would have received from their father, and, as a whole, assess such damages as, in the opinion of the jury, will be fair and just, not exceeding in amount \$10,000."

To which instructions, and each of them, defendant excepted.

The action of the court in refusing to give the following instructions was also excepted to by defendant:

"No. 5. If the jury believe from the evidence in the case that the Riverside Ironworks, by its officers and agents, was guilty of negligence in the construction of the scaffold, which negligence of construction caused the injuries to the plaintiff's intestate, nevertheless the jury are instructed that they must find for the defendant if they further believe that the injuries received by the plaintiff's intestate would not have produced death, had it not been for the low order of vitality of the plaintiff's intestate, produced by long and continuous drinking of alcoholic and malt drinks by the plaintiff's said intestate.

"No. 6. If the jury believe from the evidence in the case that the injuries to the plaintiff's intestate would not have caused death had not the plaintiff's intestate been of low order of vitality, occasioned by the drinking of alcoholic and malt drinks, then the jury are instructed that they must find for the defendant.

"No. 7. If the jury believe from the evidence that one end of one of the lookouts which supported the platform and which gave way was so far detached from the upright to which it had been nailed as to have been discoverable upon inspection or examination by the plaintiff's intestate when upon the scaffold, had he looked or used his eyes, then the jury are instructed that they must find for the defendant.

"No. 8. If the jury believe from the evidence that from some cause one end of one of the lookouts which supported the platform which gave way was detached, in whole or in part, from the upright to which it was nailed, in some manner, and that the defendant was not aware that the said lookout had been so detached as aforesaid, then the jury must find for the defendant.

"No. 9. If the jury believe from the evidence that defective materials were used in the construction of the scaffold, yet they

are instructed that they cannot find a verdict against the defendant unless they further believe that the use of such defective materials was the cause of the injury to the plaintiff's intestate.

"No. 10. If the jury believe that the same injury would have resulted to the plaintiff's intestate even if the best of material had been used, then they must find for the defendant.

"No. 11. The jury are further instructed that they must find for the defendant if they believe the injuries to the said John W. Campbell arose from the negligence of a fellow servant or workman, either in the selection of the material from which the scaffold was constructed, or in the unworkmanlike manner in which it was built."

The jury found a verdict in favor of the plaintiff for \$3,500, and also returned with their verdict four several questions in writing, which had been submitted to them by the court, on motion of defendant, with the several answers thereto, which are in the words and figures following:

"Q. 1. Was not the injury to John W. Campbell, in the opinion of the jury, caused by one end of one of the lookouts supporting the third or lowest platform becoming detached at one end from one of the uprights? A. Yes.

"Q. 2. What caused the lookout supporting the platform from which John W. Campbell fell to give way? A. Faulty construction and insufficient bracing.

"Q. 3. Was it not the case that the dropping of boards by John W. Campbell or his fellow workman, Harry Barkhurst, in tearing down the platforms above, by one or more of the boards composing the platforms falling upon the lookout which gave way, the cause its becoming detached? A. No.

"Q. 4. If the lookout that gave way, and which supported the platform which gave way, was unsafe either before or after John W. Campbell and Harry Barkhurst went on the scaffold to tear it down, did not John W. Campbell have better or at least equal means of ascertaining the unsafe condition of the lookout than the defendant? A. No."

A motion of defendant to have the verdict set aside, and a new trial of the action granted to it, was overruled by the court. Judgment was then rendered on the verdict. All of the rulings and other proceedings in the case with the evidence heard upon the trial thereof are saved and certified in a bill of exceptions, which is made part of the record. The questions arising on the instructions will be first determined.

It is a well-established general proposition that under the common law in America a master is liable to his servant for any neglect of the master's duty, whether committed by the master himself, or by one to whom he has delegated his authority. *Madden's Adm'r v. C. & O. R. Co.*, 28 W. Va. 610, 57 Am. Rep. 695; *Ray on Neg. Imp. Duties*, 35

The test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may determine the ordinary care required in the case. *Stewart v. O. R. Co.*, 40 W. Va. 188, 20 S. E. 922. *Buswell on Pers. Inj.* 391, 392, says: "So if the material used in erecting scaffolding is bad, and the master knew it, but directed the material to be used, he is liable to his workmen who, being themselves in the exercise of due care, are thereby injured. But if the workman ought to have detected the defect, or if this was due to his own fault, or, it is said, that of his fellow workmen, the master is not responsible. But the duty of the master in this respect is not to be avoided by delegating it to another, whether to a fellow servant of injured employé or to a contractor, if the means of doing the work are furnished by the owner and are defective. For the master, when acting through an agent, undertakes that his agent shall be a suitable person for the position he holds, and is responsible for his negligence." *Buswell on Pers. Inj.* § 193; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Northern Pac. R. R. v. Herbert*, 116 U. S. 650, 6 Sup. Ct. 590, 29 L. Ed. 755; *Behm v. Armour et al.*, 58 Wis. 1, 15 N. W. 806. In *Roberts v. Smith et al.*, 2 H. & N. (Eng. R.) 213, it is stated in the syllabus that: "At the trial, it was proved that the defendants had employed a laborer to erect the scaffold. The materials for the scaffold were in bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him to break no more; that the putlogs would do very well. The laborer used such as he thought sound. One of the putlogs so used having given way, the scaffold fell, and the plaintiff was injured. On this evidence, the judge at the trial directed a nonsuit. Held, on appeal to the Court of Exchequer Chamber, that there was evidence to go to the jury of the liability of the defendants." The materials for the scaffold under consideration here were taken from the lumber pile of defendant, near by. The laborers of defendant were directed by defendant's foreman to take the lumber from that pile. Some of it is shown to have been defective and unsound. Some of the lookouts were knotty. Dettler and Hughes took the materials for the scaffold from the lumber pile by order of Grimm, defendant's turn boss. Their attention was called to the defects in the lumber used for the lookouts. The defendant had good material on the ground, but it was not used because Grimm directed the use of the lumber which went into the scaffold. Decedent did not assist in handling the materials for, or aid in, building the scaffold. He is not shown to have had any knowledge of its unsound or unsafe condition. The part which gave way and precipitated him to the ground was a lookout, answering to a joint,

which was covered by, and supported one end of, the boards of that platform. While the defendant contends that intestate did not observe, but could have observed, any defects in the materials of the scaffold or in its workmanship, by the exercise of ordinary care, this circumstance, connected with the fall of the scaffold, seems to negative that presumption. We do not think that plaintiff's intestate was bound, under the law, to make an examination of the scaffold before going upon it to work. It is held in *Clark v. Liston*, 54 Ill. App. 578, cited by plaintiff in error, that: "In the destruction of a building there is no attempt or obligation to make it secure. The work of removal is one in which, in turn, each part of the structure is rendered insecure. This every workman understands, and must be governed accordingly." But the court in that case also says: "Plaintiffs in error were not bound to furnish Liston a safe place in which to work, while they were under an obligation not to send him into a place they knew to be dangerous, and which he could not by the use of ordinary care perceive to be so." The jury, in answer to question No. 4, say that Campbell did not have equal means with defendant for ascertaining the unsafe condition of the lookout which gave way; and, in answer to No. 2, they further say that faulty construction and insufficient bracing caused the lookout supporting the platform from which Campbell fell to give way. The master owes the duty in all cases of disclosing to the servant defects and dangers of which he (the master) ought to have knowledge by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. *Dresser on Emp. Liability*, 464; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612, 53 Am. Rep. 702, 1 Am. St. Rep. 548. Upon the facts as presented, the plaintiff's instructions appear to propound the law correctly. It was not error to give them.

Defendant's rejected instructions Nos. 5 and 6 do not state correct legal principles. They, in effect, say to the jury that if the injuries received by the intestate, together with another antecedent cause, occasioned his death, they must find for the defendant. In *Beauchamp's Adm'r v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30, it is held that where, in an action for fatal injury, it becomes a question whether death resulted from the injury, or from some disease with which it had become involved, the party causing the injury cannot escape full liability without showing that death must have resulted if the injury had not been done. *Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 South. 902; *Cookey on Torts* (2d Ed.) 76; *Tiffany, Death, etc.*, § 76. There being no proof upon which said instructions could be based, they were and are irrelevant, and were properly refused.

Nos. 7 and 8 assume that the lookout became detached from the upright, and that the injury was occasioned to intestate thereby. No such assumption by the court would be permissible.

Nos. 9 and 10 are the same, in substance, as instruction No. 3 given at the instance of the defendant, in the words following: "If the jury believe that the same injury would have resulted to the plaintiff's intestate even if the best of material had been used, unless the jury believe the accident resulted from defective workmanship in the manner in which scaffold was put together, then they must find for the defendant." Where an instruction has already been substantially given, the court is not bound to repeat it. *Kerr v. Lunsford*, 81 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; *Davidson v. P., C., & St. L. Ry. Co.*, 41 W. Va. 407, 23 S. E. 593. Under this rule, the two instructions last mentioned were and are improper.

No. 11 submitted to the jury a question of law relating to fellow servants, and also a question of fact, and was and is therefore erroneous. It is the duty of the court to determine the law, and the province of the jury to find the facts. "All of the adjudications recognize the principle that to the court, in civil cases, belongs the law; to the jury, the facts." 1 Rob. (Old) Practice, 342. So, if a party submit a question involving facts with law, and demand the opinion of the court on both, the motion for such opinion may be overruled. *Id.* 340. Instruction No. 11 was not erroneously rejected.

Defendant also requested the court to submit the following five several questions to the jury, for answers:

"No. 5. Was not the lookout which gave way and let the platform fall unbroken, and the nails in the end at which it became detached still in it, after it became detached, and after John W. Campbell had fallen?"

"No. 6. Would the wounds, in the opinion of the jury, occasioned by the fall of John W. Campbell, have produced death to a man in good physical condition and state of health previous to that fall?"

"No. 7. Was not John W. Campbell at that time of his fall in a low order of vitality, by reason of his previous drinking of alcoholic and malt drinks?"

"No. 8. Would not the lookout which became detached, if caused by falling boards, as asked in the question just preceding, have been caused, whether the scaffold was constructed of good and proper material, and erected in a workmanlike manner, or the reverse?"

"No. 9. Could the defendant, by any inspection before Harry Barkhurst and John W. Campbell went on the scaffold to tear it down, have detected that the lookout which supported the platform from which John W. Campbell fell, and which gave way,

was in any particular unsafe, dangerous, or in any wise detached from the uprights to which it was nailed?"—which questions the court refused to submit, and thereupon the defendant again excepted. In *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414, it is held that "submitting to the jury particular questions of fact, under our statute, is within the discretion of the trial court, subject to review; but it is not erroneous to refuse to permit such questions to be propounded when they are immaterial or irrelevant, and unless the answers thereto, if contrary to the general verdict, would control the same, and be conclusive of the issue." All of the rejected questions, except possibly No. 8, are obnoxious to the rule above stated. No. 8, in effect, assumes that the lookout became detached by reason of the falling boards. This assumption is a mere inference. Besides, the scope of questions Nos. 2 and 3, already allowed, permitted any answer which might have been given under No. 8. It was not error to refuse all of said rejected interrogatories.

We now come to the most important question in the case: Did the court err in overruling the motion to set aside the verdict and to grant a new trial? That the scaffold fell, and that its fall caused the injuries to the decedent from which he died, is conclusively established. But "the mere fact of injury received by the servant raises no presumption of negligence on the part of the master." *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999. In *Johnson v. C. & O. Ry. Co.*, 36 W. Va. 73, 14 S. E. 432, it is held that: "From the mere fact that injury results to a servant from a latent defect in the machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence connecting him with the injury. The mere fact that machinery proves defective, and that an injury results therefrom, does not fix the master's liability." There is much evidence that faulty material was used for the lookouts, but it is also shown by a great preponderance of the evidence that the lookouts which were made from faulty material were placed in the uppermost and in the second or middle platforms, and that no defective or faulty material was used for the lookouts of the lower platform, the falling of which caused the injury to decedent. It is also shown that a broken lookout was seen after the fall of the scaffold, but that it had belonged to and supported either the uppermost or the second platform. It is proved that the faulty material used in the scaffold was not used for the lookouts of the lower platform. As above stated, the jury found, and properly so, as we believe, that the injury to Campbell was caused by one of the lookouts which supported the lowest platform becoming detached at one end from the upright

to which it had been nailed; and the jury further found that the cause of the detachment, or giving way of that end of the lookout, was due to faulty construction and insufficient bracing. We have evidence that the scaffold was braced one way from the northwest post or upright to a window in the stockhouse, and was also braced from the southwest post into a beam which ran from a shed to the stockhouse. The witness says: "Those braces would have the effect of preventing the scaffold from toppling over. That is all they had to do—keep the scaffold standing. They had nothing to do with the strength of the scaffold—only to hold it up." It also appears that after its completion, and before it was torn down, the scaffold had served its purpose. The bricklayers and their attendants who furnished the brick and other materials for the repair of the stockhouse had worked upon the platforms of the scaffold without any part of it having given way, so far as the evidence discloses. Regarding the lookouts of the third or lowest platform, Mr. Hughes further testified: "I think they were sufficiently strong." One of the witnesses did not think that the scaffold was a good one. He did not consider it a good scaffold. He does not specify any particular part of it wherein the scaffold was faulty in construction. In fact, there is no evidence found by us which specifically points out wherein the construction of the scaffold was unworkmanlike or faulty. Barkhurst says that he and Campbell went upon the first or uppermost platform, and threw off the boards of that floor; and, with a sledge, weighing from 8 to 12 pounds, knocked off the lookouts and braces from the uprights without any particular care, and then went down to the next or second platform and did likewise. Three of the uprights to which the lookouts and braces near the top of the scaffold were fastened were 4x4 inches in size, and the other 4x6 inches: They were about 32 feet in length, and therefore of considerable weight. After the braces and lookouts above were removed, the uprights, not being otherwise held together, would cause great strain or tension on the lowest lookouts. Our observation and experience teach us that the destruction and manner of demolition of the scaffold would necessarily weaken it as the work thereof progressed. "Every person is presumed to know facts of common everyday experience, and the court takes judicial notice of such common knowledge. When, therefore, the risk arises from a condition of things which common experience recognizes as dangerous, the plaintiff is presumed to know and appreciate the danger, and cannot be heard to deny it or offer evidence upon the subject." Dresser, *supra*, § 95. Speaking of the master's duty, 1 Shear. & Red. on Neg. 316, says: "He is not bound to keep the place of work

constantly safe when the servant's work, in its very nature, renders the place for the time unsafe, nor where the very work which the servant is employed to do is to make a dangerous place safe." *Clark v. Liston*, *supra*. A workman employed in a quarry, in which, by reason of the constant removal of stone therefrom in the course of its operation by himself and his fellow servants, the conditions and surroundings are constantly changing, assumes the risks of the place becoming unsafe, and cannot recover for an injury due to the falling of a mass of stone loosened by succeeding blasts. *Mielke v. Chicago & N. W. R. Co.*, 103 Wis. 1, 79 N. W. 22, 74 Am. St. Rep. 834, 54 L. R. A. 139; *Peffer v. Cutler*, 83 Wis. 231, 53 N. W. 508; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Petaja v. Aurora I. M. Co.*, 106 Mich. 463, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505. The dangerous condition of the scaffold was occasioned by the work of its own destruction, which was performed by the decedent and his fellow laborer in a manner that necessarily increased the danger to themselves as the work progressed. The extent of the danger of this work to decedent, the defendant could not possibly foresee, and against which it could not, and was not required to, guard. By acceptance of the employment a servant assumes all risks of injury caused by the dangers incidental to the business. No duty is imposed upon the master to protect the servant against these risks, and he consequently cannot be guilty of negligence. *Dresser*, *supra*, § 83. In *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304, it is held that when a servant enters into the employment of a master he assumes all the ordinary risks incidental to the employment, whether the employment is dangerous or otherwise. *Reese v. Wheeling & E. C. R. Co.*, 42 W. Va. 333, 26 S. E. 204. Applying the legal principles above stated to the facts and circumstances of the case, it is plainly evident that the scaffold was rendered weak and dangerous by the work done thereon by decedent and his fellow workman in and about its removal, which they were employed to accomplish, and that decedent must have known the dangers incidental to that undertaking, and assumed the risk of such danger.

It is well-settled law that where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be disturbed by the court unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the evidence or facts proved. *Miller v. Ins. Co.*, 12 W. Va. 116, 29 Am. Rep. 452; *Grayson v. Com.*, 6 Grat. 712. In the case last cited it is held that a new trial will be granted where the verdict is against law, or where it is contrary to the evidence, or where the verdict is without evidence. *Mil-*

ler v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. We are of opinion that the verdict is plainly contrary to the law and the evidence. Therefore the judgment is reversed and annulled, the verdict set aside, a new trial granted, and the case remanded.

BRANNON, J. (concurring). I concur in the opinion and conclusion reached by Judge MILLER. I wish to add a few words of my own, as a reason weighing much with me in favor of the decision in this case. It is evident that a theory for recovery—indeed, the sole ground for recovery—was that bad material was used in the construction of the scaffold. There is no evidence to sustain the verdict on that basis. The plaintiff's very first instruction, which I think induced the verdict, was that if bad material was used, and because of that the scaffold fell, then the jury must find for the plaintiff. The evidence did not support that theory. No bad wood was used in the platform which fell. This instruction presented, with the sanction of the court, to the consideration of the jury the question whether bad wood was anywhere used in the scaffold, and whether there was ground for recovery on account of that bad material. This would mislead the jury to a false issue, an immaterial issue, under the whole evidence. A verdict on that basis would not stand. *Boyd v. Pollock*, 27 W. Va. 75, tells us that, though there is some evidence going to sustain the theory contained in an instruction, yet, if it is not sufficient to sustain a verdict, and it would be the duty of the court to set aside a verdict resting on that theory, it ought not to be given. *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033; *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613; *Pasley v. English*, 10 Grat. 236. By statute and practice this court has power to set aside a verdict on insufficient evidence. So has a circuit court. *Davidson v. Railroad*, 41 W. Va. 408, 23 S. E. 593. A court may direct a verdict when the evidence is not enough to sustain a recovery or defense, or may strike out the evidence. *Ketterman v. Railroad*, 48 W. Va. 606, 613, 37 S. E. 683; *Thomason v. Southern*, 113 Fed. 80, 51 C. O. A. 67. The judge is responsible for the trial at last, and should not allow investigation or give instruction upon questions not really and practically before the jury under the evidence. Why instruct a jury and tell it to pass on a matter when he would have to set aside the verdict standing on that question? Notwithstanding the ability of the judge presiding at this trial, I am impelled to the opinion that plaintiff's instruction No. 1 was inapt in this case. I do not see why interrogatory 9 asked by defendant was not proper.

(44 W. Va. 350)

KEMBLE'S COMMITTEE v. SMALLWOOD.
KEMBLE'S ADM'R v. SMALLWOOD et al.
(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

DECREE—REVERSAL—NECESSARY PARTIES.

Syllabus in *Reger v. Gall*, 54 W. Va. 373, 46 S. E. 147, approved and applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County;
John Homef Holt, Judge.

Bill by Kemble's committee against W. P. Smallwood, and by W. P. Kemble, administrator, against J. H. Smallwood and others. Decree for defendants, and plaintiffs appeal. Reversed.

A. W. Burdett, for appellants. C. P. Guard and J. G. Sinclair, for appellees.

MILLER, J. On the 6th day of December, 1898, George F. Powell was appointed committee of William P. Kemble, who had been adjudged a lunatic, and who was the owner in fee of a tract of land situated on the Valley river, in Taylor county, which tract was assessed in the name of A. Payne and William P. Kemble, and was returned delinquent for the nonpayment of taxes for the year 1896 in the name of said Payne and Kemble. Some time in the month of December, 1897, after Kemble had been adjudged a lunatic, this land was sold for taxes by the sheriff of Taylor county, at which sale one J. H. Smallwood became the purchaser, and on December 14, 1898, the clerk of the county court executed a deed for said land to Smallwood. George F. Powell, as the committee of said Kemble, made an effort to redeem said land by tendering to Smallwood the sum of \$25 in payment of said taxes and for the redemption of said land, which sum was in excess of the taxes, interest, etc., but the offer was declined. At the October rules, 1899, said Powell filed his bill in the circuit court, setting forth these facts, also tendering said sum in court, and charging therein that he had a right at any time during the disability of Kemble to redeem said land; that the value of the land consists in its timber; that Smallwood is insolvent, and has threatened and commenced to cut said timber; that said tax title or deed constitutes a cloud upon the title of his ward; and alleging that he is without complete and adequate remedy; praying for an injunction to restrain said Smallwood from cutting or removing any of said timber; that said tax deed might be canceled; and for general relief. The bill was demurred to by Smallwood, and the demurrer was sustained, and said Powell, as such committee, obtained an appeal.

The question presented upon that appeal was whether the committee of an insane person, during the period of his insanity, could redeem the land of such lunatic which had been sold for taxes delinquent thereon. This

court reversed the decree of the circuit court, which, in effect, denied that right, and remanded the cause. In its opinion the court said: "And in view of the facts presented by the record in this case, George Powell, the committee of William P. Kemble, an insane person, had the right to redeem the lands of said insane person during his disability, upon compliance with the requirements of the statute providing for the redemption of lands which have been sold for taxes." *Powell v. Smallwood*, 48 W. Va. 298, 37 S. E. 551.

On the 28th day of December, 1899, Kemble, having been restored to sanity, was discharged from custody in the Hospital for the Insane at Weston, where he had been confined, and was given a certificate thereof by the examining board, in accordance with Code 1899, c. 58, § 25. On the 12th day of January, 1900, he, through his attorney, A. W. Burdett, tendered to Smallwood \$30, for the purpose of redeeming the land, which sum Smallwood refused to accept. About the 1st of March, 1900, Kemble died testate, and his last will and testament was, on the 6th day of the same month, duly probated and admitted to record in the office of the clerk of the county court of Taylor county. In and by his will he devised and bequeathed all of his property, both real and personal, to Virginia Linch and Francis Marion Kemble, his sister and brother, respectively, to belong to them in common, during the lifetime of Virginia, but, at her death, to go to Francis Marion, to be disposed of by him as he might desire. Francis Marion Kemble was named in the will as executor thereof, and at the time of its probate qualified as such, and assumed his duties thereunder. At the December rules, 1900, said Francis Marion Kemble, as executor and devisee, and Virginia Linch, as devisee, filed their bill against Smallwood in the circuit court of the county aforesaid, in which they allege the insanity of their testator; his commitment to the hospital for the insane; his restoration to sanity, and discharge from the hospital; his ownership in fee of the land; its assessment with taxes in the name of A. Payne and W. A. Kemble for the year 1896; its delinquency and sale to Smallwood in December, 1897, for the nonpayment of said taxes; and the execution of a deed by the clerk of the county court to Smallwood therefor. They further allege various irregularities and defects in said sale and deed, and charge that the deed is void. They set out specifically the several items and sums legally requisite to redeem the land from Smallwood, which sums, as stated, amounted to only \$24.95 at the time the tender of \$30 was made by testator's attorney as aforesaid. They also aver and show that as heirs and devisees of William P. Kemble, deceased, they, within one year next after his restoration to sanity as aforesaid, also tendered to Smallwood \$30 for the purpose of redeeming the land, which sum

was largely in excess of the amount then legally due to him, but which Smallwood also refused to accept; and that he has refused and still refuses to accept any amount from either William P. Kemble in his lifetime, or from plaintiffs since his death, for the redemption of said real estate. The bill prays for an injunction against Smallwood; that an account be taken to ascertain the amount, if anything, which plaintiffs may be required to pay to defendant to redeem the land; that the \$30 tendered by them with their bill be held by the court until such amount may be properly ascertained as aforesaid; that said real estate be conveyed to them as devisees under the will; and for general relief.

Francis Marion Kemble having departed this life, one L. Dudley was, on the 17th day of November, 1900, appointed and qualified as administrator de bonis non with the will annexed of said William P. Kemble, deceased; and at the January term, 1901, of the court, the cause was revived, and ordered to be prosecuted to final decree in the name of Dudley, administrator as aforesaid. At the September term, 1901, an order was made and entered by the court which recites that "these two causes came on this day to be further heard upon process duly executed on the defendant; cause regularly matured; bill and exhibits filed; decree nisi; and bill taken for confessed as to first-styled cause, former orders and decrees in the second," etc. There is no caption or other mark of identification directly connecting this order with the above-styled causes, or either of them, but upon examination of the whole record, we are satisfied that it refers to the causes of *Powell, Com., v. Smallwood*, supra, and the suit now under consideration.

Smallwood answered the bill filed in the second suit, and in his answer denies that William P. Kemble, at the time of his commitment to the hospital, was the owner in fee of the tract of land in the bill described, and avers that Kemble was only joint owner thereof with one Amos Payne; denies that Kemble was restored to sanity or finally discharged from the hospital, and calls for full proof thereof; denies that there are any irregularities in the proceedings of the sheriff, relating to, or connected with, the sale of the land to respondent, which will vitiate the deed therefor to him; denies that Kemble, the decedent, his attorney, committee, or the alleged devisees, ever tendered to respondent "a sum sufficient to entitle them in law to a redemption of the land before the institution of the suit or since, but, on the contrary, avers that the sums necessarily expended by him on account of said land amounted to thirty dollars, including the interest thereon alone, without taking into consideration the improvements." He avers that he had improved the land "prior to said pretended tenders to the value of at least fifty dollars"; but he does not deny that he had refused and still refused to ac-

cept any amount from either William P. Kemble or the plaintiffs for the redemption of said real estate. No replication to this answer was filed. At the January term, 1902, another decree was made and entered, in which it is stated that "these causes came on this day to be heard together, the first named upon the papers heretofore read, former orders herein, upon process duly executed upon defendant's bill filed and exhibits therewith, the demurrer of defendant thereto sustained, in which demurrer plaintiff joined, and upon the mandate and order of the Supreme Court of Appeals entered at a special term of said court on the 24th day of November, 1900; and the last-named cause upon process duly executed upon the defendant, cause regularly matured at rules, bill filed and exhibits, demurrer of defendant thereto overruled, the answer of defendant thereto filed, the depositions on behalf of plaintiff filed and read, both causes set for hearing together, and was argued by counsel. Upon consideration whereof the court is of opinion that these causes are for the defendant, and that the plaintiffs should therefore take nothing by their said suits. And it is accordingly adjudged, ordered, and decreed that these causes be dismissed; and it is further adjudged, ordered, and decreed that the plaintiffs in said causes do pay to the defendant his costs about his defense to said suits in this behalf expended." From that decree this appeal was allowed.

The bill in the first-mentioned cause was by this court held to be sufficient, and that it presented such facts as entitled Powell, as committee, to redeem the land in controversy during the disability of Kemble, "upon compliance with the requirements of the statute." Powell, in his bill, alleges a tender of \$25 to defendant, in payment of the taxes, which sum he charges to have been in excess of the taxes, interest, etc., then due. This allegation is not denied by an answer, but, as shown by the record, is taken to be true. The answer of defendant to the second bill, in effect, admits the tenders as alleged, and does not deny the material allegation that respondent had refused, and still refuses, to accept any sum in redemption of the land. These allegations, not denied, must also be taken as true.

Before the final decree was made in the causes as aforesaid it was brought to the attention of the court by the record that after the institution of the first suit by Powell, as committee, Kemble had been restored to sanity, had afterwards died testate, leaving devisees of the land in controversy, and that one of those devisees was then dead. In whom his interest in the land vested the court is not informed. In *Straight v. Ice* (decided at the present term) 48 S. E. 837, the court, in construing section 4 of chapter 127 of the Code of 1899, says: "Under this [section], if a lunatic should become sane, whereby the powers of his committee would cease,

a revival could be had for or against the former lunatic." Therefore the first suit could have been revived in the name of Kemble after his restoration to sanity. After his death, and before final decree, it should have been revived in the name of the devisee then living, and also in the names of the heirs or devisees, according to the facts, of the deceased devisee. In the second suit the death of Francis Marion Kemble is suggested. Whether he died testate or intestate does not appear. No revival of that cause was had, except in the name of L. Dudley, administrator de bonis non, as above stated. Why this was done we cannot understand. In *Reger v. Gall*, 54 W. Va. 378, 46 S. E. 147, it is held that "if in any way it be shown by the record that the final decree was rendered in the absence of necessary parties such decree will be reversed, and the cause remanded in order that proper parties may be made." *Gallatin L. Co. v. Davis et al.*, 44 W. Va. 109, 28 S. E. 747.

The final decree made in these suits, in their then plight, was and is plainly erroneous. The decree must therefore be reversed, and the causes remanded for such other and further proceedings to be had therein as are and may be essential to a proper adjudication thereof.

(56 W. Va. 349)

BAKER v. TAPPAN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1904.)

APPEAL—DISMISSAL—SETTLEMENT.

1. If, pending an appeal, the parties, by consent and agreement, cause such further proceedings to be had in the court below as dispose of the whole subject-matter of the controversy, this court is thereby deprived of its jurisdiction, and the appeal will be dismissed, without costs.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County; L. N. Tavenner, Judge.

Suit by S. B. Baker against D. R. Tappan and others. From the decree for plaintiff, F. P. Moats, trustee, appeals. Dismissed.

V. B. Archer and William Beard, for appellant. McCluer & McCluer, for appellee.

POFFENBARGER, P. By a decree entered by consent of all the parties, and carried into full and complete execution since the appeal in this case was allowed settling all the rights of the parties respecting the subject-matter of their controversy, this court has been deprived of its jurisdiction, and the appeal must be dismissed, without costs.

S. B. Baker and D. R. Tappan were equal partners in the hotel business, but a third party held a lien by deed of trust on Tappan's interest for purchase money. Owing to complications and adversities in the course of the business, Baker caused a receiver to be appointed, who took charge of

the business, and was managing it, when the trust creditor caused Tappan's interest to be advertised for sale. Thereupon, on petition of the receiver, the court enjoined the sale, and upon errors assigned against the action of the court in refusing to dissolve the injunction an appeal was allowed. Soon afterwards a decree directing a sale of the property, consented to by the creditor, was entered, a sale was made under it, and the sale confirmed. Thus the subject-matter of the litigation has been withdrawn and disposed of by act of the parties. No matter what this court might do, there is no sale to be made or prevented now, and a reversal of the order appealed from would be without the slightest effect. The case therefore is ruled by principles announced in *Elbon v. Hamrick*, 55 W. Va. —, 46 S. E. 1029; *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176; *Taylor v. Maynor*, 40 W. Va. 588, 33 S. E. 260; and *Hamilton v. Ammons* (decided at the present term) 49 S. E. 128. In these cases the subject is fully discussed, and many authorities cited.

For the reason stated, the appeal will be dismissed, without costs.

(56 W. Va. 462)

SHOWALTER et al. v. LOWNDES et al.
(Supreme Court of Appeals of West Virginia.
Dec. 13, 1904.)

MECHANIC'S LIEN—PROPERTY SUBJECT—LEASEHOLD ESTATE SUBJECT THERETO.

1. A leasehold estate, being an interest in land, is subject to a lien under section 3, c. 75, Code 1899, in so far as any structure is erected thereon by the lessee which enhances the value or otherwise benefits such estate.

2. An oil-well derrick erected for the purposes of such lease is such structure.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by C. L. Showalter and others against Richard L. Lowndes and others. Decree for defendants, and plaintiffs appeal. Reversed.

Haymond Maxwell, for appellants. R. S. Douglass and L. C. Criles, for appellees.

DENT, J. An appeal from a decree of the circuit court of Harrison county by C. L. Showalter and others, appellants, against Richard T. Lowndes and William E. McBride, appellees. Appellants filed their bill claiming a mechanic's lien on an oil-well derrick and leasehold estate belonging to appellee Lowndes, for lumber furnished appellee McBride, and used in the construction of such derrick, amounting to the sum of \$173.70. Lowndes demurred to the will. The circuit court sustained the demurrer and dismissed the bill.

The sole question presented is as to whether an oil-well derrick attached to a leasehold estate is subject to a mechanic's lien by those furnishing the lumber to build the

same. The circuit court answered this question in the negative. A careful examination of the law and decisions shows considerable confusion on the subject, but the decided preponderance of authority tends to sustain the contention of the appellants. It is claimed that an oil-well derrick is personal property liable to be levied on and sold under execution, and that mechanics' liens do not attach to personal property. *Church v. Griffith*, 9 Pa. 117, 49 Am. Dec. 548; *Phillips on Mechanics' Liens*, § 171, p. 302. Such conclusions were arrived at under statutes not subjecting leasehold estates to such liens. The almost universal rule now is that leasehold estates may be subjected to mechanics' liens, for the reason that they are interests in land, although they are personal property, and may be levied on and sold under execution. Section 17, c. 13, cl. 16, Code 1899; *Donahue, Petroleum and Gas*, 114; 20 Am. & En. En. Law (2d Ed.) 301, 303, note 4. This is the gist of the whole question, and is in effect that, if a leasehold estate is subject to a mechanic's lien, then any structure that becomes a part of such estate or interest in land is likewise subject to such lien, although it may be treated for other purposes as personal property. *Loonie v. Hogan* (N. Y.) 61 Am. Dec. 697, note; *Lyon v. McGuffey* (Pa.) 45 Am. Dec. 678, note. The wording of section 3, c. 75, Code 1899, so far as involved in this decision, is as follows: "Every material man * * * furnishing any material * * * for the construction of any house or other structure * * * shall have a lien to secure the payment of the value of * * * the material * * * upon such house or other structure, and upon the interest of the owner in the lot of land on which the same may stand." From an examination of the foregoing authorities, it is perfectly plain that the word "interest" covers all leasehold estates, although chattels, real or personal property; and the word "structure" includes any structure that enters into, benefits, and enhances the value of the particular interest to which it is attached. 20 Am. & En. En. Law (2d Ed.) 304. When the plaintiffs' lumber was built into the oil-well derrick, it ceased to be separate personalty, but became a part of the lessee's interest in the land, to the enhancement of its value, and the materialman could no longer seize it as his property and hold it until he was paid therefor, nor could the derrick be levied on and sold separate from the lease without injury to or destroying the value of both. For the purposes of the mechanic's lien law, the lease and any structure erected thereon are regarded as real estate, although, under strict legal classification, united or separate they are personal property. These considerations lead to the conclusion that the circuit court erred in sustaining the demurrer to plaintiffs' bill.

The decree is reversed, and the cause remanded.

¶ 1. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 21.

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CHARTIERS OIL CO. v. MOORE'S DEVISEES.

Court of Appeals of West Virginia.
Dec. 20, 1904.)

DEFECT OF PARTIES—INTERPLEADER—AFFIDAVIT—PRAYER.

It is made to appear that the rights of those who are necessary parties have been neglected in a cause, who are not made parties to the suit, the decree will be reversed and the case remanded, that such parties may be heard.

A bill of interpleader there must be on the part of the plaintiff an affidavit that there is no controversy between him and any of the parties. All of interpleader should pray that the claimants be compelled to interplead their several claims, so that the court may decide to whom the same debt, duty, or obligation belongs.

as by the Court.)

Filed from Circuit Court, Monongalia County.
John W. Mason, Judge.

by the Charters Oil Company against Moore's devisees. Decree for plaintiff Simon L. Moore and others appeal allowed.

E. Glasscock, for appellants. Cox & Glasscock, for appellee.

HORTER, J. John Moore was the owner of a tract of 312 acres of land in Monongalia County, District, Monongalia county. On the 1st day of December, 1892, he made an oil and gas lease thereon to D. J. Sterling, was in the usual form of such leases, for 10 years and as much longer as oil should be found in paying quantities.

On the 29th day of August, 1893, the said John Moore assigned said lease to the Charters Oil Company. On the _____ day of _____, John Moore departed this life, having made a will devising said land to his son, to Daniel V. Moore and Abraham Moore, two specific parcels thereof. On August 15, 1900, a suit was brought in the circuit court of Monongalia county by a part of the devisees of John Moore against the other part of such devisees, for partition of the 312 acres. The same was partitioned among them, lot No. 1 being assigned to the son of Linsey C. Moore, lot No. 2 to Amos Moore, lot No. 3 to John I. Moore's heirs, lot No. 4 to Sarah Moore, and lot No. 5 to Prudence Shriver's heirs, all of which lots and parcels were described by plat and report of the commissioners making partition of that portion of 312 acres which was not claimed by John Moore specifically to his son, Daniel V. Moore and Abraham Moore, who devise to said two sons was in the following language: "I give and bequeath unto my sons, Daniel V. and Abraham Moore, the Alpheus Sine's tract of land, called for 45 acres, and also the land that I bought of Thomas and Clinton Davis." In partition there was no mention made of

the oil and gas lease, which was still in full force. The lessee and his assignee, the Charters Oil Company, paid all the rental required by said lease, up to the 21st day of June, 1901, when the said oil company commenced to drill a well, which was completed as a gas well, producing gas in paying quantities, on the 3d day of September, 1901. Said well was located on that part of the 312 acres assigned in the partition to the heirs of Prudence Shriver, who claimed the \$200 royalty money which was due to be paid on the completion of the well. The other devisees of said John Moore also claimed that they were entitled to their fair proportion of said royalty money. The Charters Oil Company filed its bill in the circuit court of Monongalia county against the devisees of John Moore, to whom were set apart and assigned in the partition lots Nos. 1, 2, 3, 4, and 5, which bill was in the nature of an interpleader, and brought into court and paid to the clerk thereof the \$200 then due under said lease for the year beginning September 8, 1901, taking and filing the receipt of the clerk for the said sum, and praying that the court should decree to whom the plaintiff should pay any after payments of money royalties on account of the gas well or any other well drilled on the 312-acre tract of land, as well as the like disposition of the royalty in oil, if it should be produced, and that the conflicting claims and interests for said royalty oil and money royalties be determined and adjudicated, and plaintiff be permitted to pay the same as the same might or should become due under the provision of said lease; that the said plaintiff might be fully protected in said payment and delivery of royalties; and for general relief. The bill was taken for confessed as to the adult defendants, and the infant defendants, by their guardian ad litem, filed their answer. On the 20th of June, 1902, the cause was heard upon the bill of complaint and exhibits, upon process duly executed upon or accepted for all the adult defendants, and the bill taken for confessed as to them, the answer of the infant defendants by their guardian ad litem, and general replication thereto, when it was adjudged, ordered, and decreed that the clerk pay and apply said \$200 as follows: "He shall first pay the costs of this suit, and the residue he shall pay to the heirs of Prudence Shriver, the defendants Presley Shriver, John Shriver, and Rebecca McCord, or their counsel of record;" and further decreed that the said heirs of Prudence Shriver take and receive and hold as their own property all sums required to be paid on account of gas by said lease for the gas from the well now on, or the wells hereafter drilled under said lease on, that part of the said 312-acre tract of land which was assigned to them in said partition, and that they take the royalty in oil under said lease from all wells drilled or hereafter to be drilled on lot No. 5, and that the several owners of the four other

1. See Interpleader, vol. 23, Cent. Dig. § 49.

several lots do receive, take, and hold, as their own property, all moneys to be paid on account of gas, and the royalty in oil to be delivered from all wells under said lease thereafter drilled on their respective lots of said 312-acre tract of land, and that Daniel V. Moore and Abraham Moore do receive, take, and hold as their own property or moneys, to be paid on account of gas and the oil royalties to be delivered from all wells under said lease thereafter drilled on the part of the 312 acres described as the Alpheus Sine's tract of land, calling for 45 acres, and also the land bought by John Moore from Clinton Martin and Thomas Martin, which land was devised to them by the last will and testament of John Moore. From this decree the devisees of John Moore, except the heirs of Prudence Shriver and Abraham Moore, appealed to this court, and assigned as error that the bill filed in the cause, being a bill of interpleader, has not annexed thereto an affidavit that there is no collusion between plaintiff and any of the parties to this cause, as is required to be done under the laws of this state; (2) because the court erred in decreeing that the heirs of Prudence Shriver should take, receive, and hold as their own property all sums to be paid on account of gas by the lease executed by John Moore in his lifetime, and from the wells thereafter to be drilled under said lease on that part of the 312 acres designated as lot No. 5, as well as the royalty on oil to be produced from said lot, and in not decreeing that the gas and oil lease having been made in the lifetime of John Moore, reserving the money royalty, if gas should be found and marketed, and the oil royalty, which being a sale of the oil and gas, the royalties reserved in money and in kind were purchase money, and especially was the money royalty reserved on account of gas purchase money, and being reserved by the lessor in his lifetime upon the sale of the oil and gas, the same then being real estate; that the purchase money should pass to the representative of John Moore, deceased, and be divided among his heirs and devisees as personal property; and because the decree adjudicated the rights and interests of Daniel V. Moore and Abraham Moore, two of the legatees and devisees of the said John Moore, in and under said lease, without having made them parties to the suit. In 2 Daniel's Ch. Pl. & Pr. 1562, it is said: "As to the sole ground on which the jurisdiction of the court in this case is supported is the danger of injury to the plaintiff from the doubtful title of the defendants, the court will not permit the proceeding to be used collusively to give advantage to either party. Therefore, with a bill of interpleader the plaintiff must file an affidavit that there is no collusion between him and any of the parties. The bill is demurrable, if the affidavit is not annexed, or, at least, filed with it. The affidavit may be

sworn before the bill is actually filed. Where there are several plaintiffs they must all join in the affidavit, or the affidavit must show satisfactorily why the other plaintiffs do not join;" and cases there cited. Also in Story's Equity Pl. (10th Ed.) § 291: "As every such bill is founded upon the admitted want of interest in the plaintiff, and is at the same time susceptible of being used collusively to give an undue advantage to one of the contending parties, two things are required as precautions to prevent any abuse of the proceeding. In the first place, the plaintiff must annex an affidavit that there is no collusion between him and any of the parties; in the next place, if there is any money due he must bring it into court, or at least offer to do so by his bill. If he does not do so, it is in strictness a good ground of demurrer." In *Dickeschied v. Bank*, 28 W. Va. 340, at page 345, speaking of bills in interpleader, the court says: "The prayer of the bill of interpleader should also be correctly framed by praying that the defendants may set forth their titles and may interplead and settle and adjust their demands between themselves. * * * To such bills an affidavit is always required of the plaintiff that he does not collude with either of the defendants." In case at bar there is neither affidavit annexed to the bill nor filed with it, which affidavit is held to be essential. It does not appear from the record that Daniel V. Moore and Abraham Moore were made parties to the bill, while it appears from the record that they are devisees of parts of the 312 acres, and are necessary parties to the suit. In *Gallatin, L. C. & O. Co. v. Davis*, 44 W. Va. 109, 28 S. E. 747, Syl., point 3, it is held: "It is immaterial in what manner it is brought to the attention of this court that the decree complained of was rendered in the absence of proper parties, the case will be reversed and remanded in order that proper parties may be made." As to the rights of the defendants, respectively, the court having adjudicated such rights in the absence of necessary parties, the decree must be reversed and the cause remanded for proper parties to be made thereto, and for further proceedings to be had therein.

(56 W. Va. 554)

MANNON v. CAMDEN INTERSTATE RY. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

CARRIERS — INJURY TO PASSENGERS — STREET RAILROADS — TROLLEY WIRES — CONTRIBUTORY NEGLIGENCE — DEMURRER TO EVIDENCE.

1. Street railway companies, for the protection of their passengers, are bound to exercise extraordinary care, and the utmost skill, diligence, and human foresight, in keeping in repair the necessary appliances used by them in the transportation of such passengers, and the slightest negligence on their part renders them liable for all accidents to such passengers occasioned thereby.

The frequent breaking of a trolley wire at a given point is evidence to justify a finding such a company negligent in discharging the duties it owes to the public and passengers.

Whether a passenger acted with ordinary care in leaping from a car in motion, or a rash apprehension of danger which did exist, under circumstances of age, time, experience, and other facts, about which able men might differ as a justification of such conduct, is a question of fact for a jury and not a question of law for the court. Judgment of the circuit court overruling a demurrer to evidence will be affirmed unless it is contrary to the plain preponderance of the evidence, or it is without evidence to support it on some material question at issue. (Labus by the Court.)

Remanded to Circuit Court, Cabell County; E. C. Coolittle, Judge.

Decision by Charles Mannon against the Camden Interstate Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Mannon & Thompson, for plaintiff in error.
Neal & Null and Campbell, Holt & Dunlap for defendant in error.

SENT, J. The Camden Interstate Rail-

Company complains of a judgment rendered in favor of Charles Mannon, rendered by the circuit court of Cabell county on 27th day of March, 1902, for the sum of \$2,500, damages occasioned by an accident on the 12th day of September, 1901, Charles Mannon, the plaintiff, an unsophisticated country boy from the state of Ohio, leaped an open car on the defendants' street railway line extending from the city of Huntington to the town of Guyandotte. While the car was running at a rapid rate, the trolley wire, which had been in use since 1900, and which had broken quite a number of times near the same spot, parted, and made considerable noise, causing the wires to rattle, and one of the poles, rotten near the ground, to break off and fall over against the wires. The boy became excited and panicked along with the other passengers, before the car could be stopped, being apprehensive of danger, leaped from the car, broke his leg, and tore the ligaments of his ankle, so that he became permanently disabled for life. The defendant demurred to the evidence, and the jury found a verdict for \$2,500. The defendant moved to set it aside as excessive, but the court, having determined the demurrer to the evidence in favor of the plaintiff, and the plaintiff having released \$1,000 of the verdict, entered judgment against the defendant for \$2,500, following the case of *Ohio R. R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957. It is not competent to say with regard to this matter that \$1,500 is not excessive, considering the nature and character of the injury received, and that the plaintiff is maimed and disabled for life. It is doubtful whether \$2,500 should be considered an excessive verdict as a matter of compensation in consideration of

the character of the injury received by a strong, healthy boy 18 years of age.

There are really only two questions of importance that are presented by the record in this case: First, was the defendant guilty of negligence? Second, was there such apparent danger as justified the plaintiff leaping from the car?

The law on both these questions seems to have been fully considered and settled. They are primarily jury questions, and, if the evidence in relation thereto is sufficient to sustain the verdict of a jury, this court is bound to affirm the judgment overruling the demurrer.

As to the first of these questions, the defendant is in duty bound to the public, from which it enjoys its franchise and fares, to exercise the utmost diligence possible to secure the safe transportation of its passengers, of all ages, character, disposition, and information. To this end it must furnish appliances of the most approved construction, and keep them in perfect repair, so far as human skill and foresight can provide. It must at all times exercise the highest degree of vigilance in superintending the appliances used by it, so that they may be kept in the best possible condition, for it is using the most dangerous of all propelling agents, and to neglect its duties in this respect is to trifle with human life, and render its negligence criminal in its nature. *Snyder v. Wheeling Electrical Company*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Searl v. Ry. Co.*, 32 W. Va. 370, 9 S. E. 248; *Cooper v. Ry. Co.*, 24 W. Va. 37. The slightest negligence on the part of the railway company is gross negligence. *Railroad Company v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railroad Company v. Derby*, 14 How. 486, 14 L. Ed. 502; *The Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019; *R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. The cases on this question are generally reviewed in the case of *Spellman v. Lincoln Rapid Transit Company*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753.

The evidence in the present case from which a jury would have the right to find negligence is the smallness of the wire, its use, wear and tear, and exposure to the elements for 10 years, its frequent breaking near the same place, its patchwork condition and the rotten character of the line poles, all tending to show want of that degree of care that the law requires. The fact that the new patch out of old wire broke tends to show that the wire used was for some reason weaker than the old wire which had been breaking previously.

In the case of *Railway Company v. Bowles*, 92 Va. 738, 24 S. E. 388, it is said: "Electricity is an agency no less powerful and dangerous than steam, and imposes equal obligations upon those who use it. The trolley wire is a contrivance essential

to the use of electricity in the mode adopted by the defendant company, and the frequently recurring accidents which happened to the particular wire which is the subject of investigation in this controversy were quite sufficient to warn the defendant of its unsafe condition."

On the question of negligence the evidence is more than abundant to sustain the verdict of a jury according to the law as settled beyond dispute or doubt.

Nor is the law less settled on the question of apparent danger. It is not necessary that the danger actually exists, but that the plaintiff has been placed by the negligence of the defendant in a position which has to him the appearance of imminent danger threatened, and forces him to momentarily act for the preservation of his safety and life. This is a question for the jury to determine from the negligence of the defendant, the nature of the accident, the age and experience of the plaintiff, and all the surrounding circumstances of time, place, and conduct of others. Whether the passenger exercised ordinary or reasonable care under the circumstances, or acted from a rash appearance of danger which did not exist, is a question of fact, and not of law. 1 Thomp. Neg. §§ 80, 81; Poulsen v. Nassau Electric R. Co., 18 App. Div. 221, 45 N. Y. Supp. 841; Gannon v. N. Y. Ry. Co., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; 3 Thomp. Neg. § 3558; Choquette v. Southern R. Co., 80 Mo. App. 515.

The plaintiff, by its demurrer to the evidence, having admitted that, if there was evidence to support it, the finding of the jury would have been against it, both as to the question of negligence and the justifiable conduct of the plaintiff under the circumstances, this court cannot do otherwise than affirm the judgment of the circuit court, overruling the demurrer to the evidence.

(56 W. Va. 545)

KENOVA TRANSFER CO. v. MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

SALE—ACTION FOR PRICE—MISTAKE—WHEN NO DEFENSE TO ACTION AT LAW.

1. In a suit at law for the possession of personal property purchased under a written contract, where the evidence of the defense shows a mistake on the part of the defendant as to the identity of the property sold, yet the defendant makes no offer to place the plaintiff in statu quo, but relies wholly on the defense of no sale, the court cannot do otherwise than render a judgment in accordance with the plain preponderance of the evidence.

(Syllabus by the Court.)

Error to Circuit Court, Wayne County; E. S. Doolittle, Judge.

Action by the Kenova Transfer Company against the Monongahela River Consolidated Coal & Coke Company. Judgment for

plaintiff, and defendant brings error. Affirmed.

Campbell, Holt & Duncan, for plaintiff in error. W. W. Marcum and Simms & Enslow, for defendant in error.

DENT, J. Writ of error of the Monongahela River Consolidated Coal & Coke Company, defendant, to the judgment of the circuit court of Wayne county in favor of the Kenova Transfer Company, plaintiff, for the possession of a white pine barge or fuel flat, or, in lieu thereof, the sum of \$1,000.

The facts are as follows, to wit:

On the 18th day of January, 1902, the agent of the plaintiff, F. R. Peck, entered into the following contract with S. D. Swaney, agent of the defendant:

"Kenova, W. Va., January 18th, 1902. The Monongahela River Cons. C. & C. Co. hereby sell to the Kenova Transfer Co., of Kenova, W. Va., two wrecks of coal boats, together with their contents, and all the coal that may have come out of said wrecks, lying on the bed of the river within a radius of 200 feet from each piece, located about 500 to 700 feet below the Kenova bridge, near the West Virginia shore.

"Also all pieces of wrecks not mentioned above lying in the Ohio river, from a point 100 feet below the Kenova bridge to Virginia Point. All as lost by the steamer 'Fred Wilson,' Dec. 30th, 1901.

"In consideration of which the said Kenova Transfer Company hereby agrees to pay to the said Monongahela River Consolidated Coal & Coke Company the sum of fifty dollars (\$50.00), receipt of which is hereby acknowledged.

"[Signed]

M. R. C. C. & C. Co.,

"Per S. D. Swaney,

"Master Str. Fred Wilson."

Under this contract the plaintiff raised, brought to the shore, and repaired the fuel flat in controversy, claiming the same as covered thereby. The defendant then seized and carried the same away. The plaintiff sued and recovered judgment, and the defendant complains thereof. The question raised depends entirely upon the evidence. The plaintiff proves by a strong preponderance of the testimony that the fuel flat is one of the wrecks named in the contract and purchased by it, and it is almost clear on the defendant's behalf that defendant's agent, when he sold the fuel flat, thought it to be an ordinary coal barge—it then being covered by water—and that he did not intend to sell it, if it were the fuel flat. It is a case of mistaken identity as to the property sold. The mistake, from the evidence, which it is wholly unnecessary to set out in full, was on the part of the defendant; and, had it sought to have had the contract rescinded, and offered to place the plaintiff in statu quo, it might have furnished a good defense to plaintiff's suit. In total disregard of plaintiff's rights, it determined

arily settle the controversy by an seizure of the fuel flat. 24 Am. & Law (2d Ed.) 645. It now makes to restore the plaintiff its money, pense it for raising and repairing flat, but stands purely on its legal If there was any doubt as to the rance of the testimony, that doubt e resolved in favor of the finding recuit court. Hysell v. Sterling Coal facturing Co., 46 W. Va. 158, 33 S. but the evidence furnishes no doubt to the fuel flat having been one of ks purchased, nor as to \$1,000 being value thereof, although there ap- have been a mistake on the part of it's agent, against which this court, e circumstances, is powerless to af- ef.

adgment is affirmed.

547)

RICHARD & CO. v. CRITCHLOW
TH PENN OIL CO., Garnishee).

e Court of Appeals of West Virginia.
Dec. 20, 1904.)

EMENTS—STAY—JURISDICTION OF CIR-
CUIT COURT.

ceedings on junior attachments against hee should be stayed until proceedings r attachments against the same gar- re determined, unless the amount gar- s sufficient to satisfy both sets of at- ts.

oral attachments are sued out in Greene Pa., and served on a garnishee. A sub- attachment is sued out in Marion coun- Va., by a different plaintiff, against the defendant, and served on the same gar-

The question is presented in each of achment suits as to which attachments itled to priority under the statute of vania, as a matter of comity, and to onfusion and conflict of decisions to the nt of the garnishee. The proceedings he jurisdiction of the courts of this state be stayed until the matter of priority is by the courts of Pennsylvania having tion thereof.

bus by the Court.)

r to Circuit Court, Marion County;
7. Mason, Judge.

on by F. A. Prichard & Co. against l Critchlow, in which the South Penn npany was garnished. From the judg- plaintiffs bring error. Reversed.

3. Meredith, for plaintiffs in error. A. R. F. Fleming and U. N. Arnett, for ants in error.

VT, J. F. A. Prichard & Co. sued out achment on the 30th day of October, against Samuel Critchlow for the sum 353.26 in the intermediate court of n county, and had the same served ith on the South Penn Oil Company, rnishee. The garnishee filed several rs and amended answers, setting up et that it was a corporation of the of Pennsylvania; that it was indebted

to the defendant in said state of Pennsylva- nia, where said debt was contracted and pay- able, to the amount of \$796.71, which it was ready and willing to pay over according to the direction of the court; that W. G. Phil- lips had instituted suit on the 19th day of October in the common pleas court of Greene county against the same defendant for the sum of \$673.34, and had an attachment is- sued, and forthwith placed in the hands of the sheriff of said county to be levied; that James Phillips had done likewise for the sum of \$292; that on the 20th day of October, 1900, Ingraham had done likewise for the sum of \$419.38½; that Charles Ligne had done likewise for the sum of \$385; that the Lidecker Tool Company had done likewise for the sum of \$624; that on the 2d day of November, 1900, all said last-named attach- ments were served on the garnishee. With its answers the garnishee filed exemplifica- tions of the records of such suits, which clearly show the issuance and service of the attachments as alleged, and also that the garnishee has filed answers to such last- mentioned attachments, setting up the serv- ice and pendency of the writ of attachments in this suit. The intermediate court of Mar- ion county was of the opinion that the plain- tiff's attachment, although issued last, hav- ing been served on the garnishee first, was entitled to priority over the Pennsylvania at- tachments, although they were issued and placed in the hands of the officer first, but were last in service on the garnishee, and gave judgment in favor of the plaintiff. The garnishee appealed to the circuit court, and that court, being of the opinion that as the statute of Pennsylvania fixed the priorities according to the time the attachments were placed in the hands of the officer for serv- ice, and not when served, this gave the Penn- sylvania attachments priority, reversed the judgment and dismissed the plaintiff's at- tachment.

The judgment of the circuit court appears to be premature. By its own ascertainment, the common pleas court of Pennsylvania first had jurisdiction of this controversy, and, being first in time, should have been permit- ted to adjudicate the same, and the circuit court of the state should have awaited such adjudication. If prior jurisdiction were in doubt, as the question involved the con- struction of the Pennsylvania statute on at- tachments, as a matter of comity, and to save confusion in and conflict of decisions to the detriment of litigants, such doubt should be resolved in favor of the Pennsyl- vania tribunal. The court of that state should construe its own statutes, and the courts of this state are bound by such con- struction. Otherwise endless confusion would result. Nimick v. Mingo Ironworks, 25 W. Va. 184. It is true that the courts of Pennsyl- vania have apparently settled the law in ac- cordance with the contention of the gar- nishee, to wit, that the lien of the attachment

begins at the time it is placed in the hands of the officer, and not at the time of the service on the garnishee. *Underhill v. McManus*, 175 Pa. 39; *Bank v. Hilgert*, 3 Pennypacker, 440. The common pleas court has not yet passed on the attachments involved, so as to bring them within the pale of these decisions, and has rendered no judgment against the garnishee. Hence the garnishee is not in a position to plead such attachments in bar of the plaintiff's attachment, nor should the circuit court dismiss the plaintiff's attachment until such plea is available and is filed, but should stay proceedings on the plaintiff's attachment until the prior attachments are disposed of and ended. 14 Am. & En. En. Law (2d Ed.) 870. The fact that prior garnishment proceedings are pending against the garnishee is not ground for discharging the garnishee in the subsequent proceedings, as he may not eventually be charged in the prior proceedings to the full extent of his indebtedness to the defendant, or in fact may not be charged at all therein. *Id.*

The circuit court, having reached the conclusion that the common pleas court had prior jurisdiction of the property in controversy, should have left the determination of both the law and facts to that court, and should have continued the plaintiff's attachment to await such determination, as the garnishee showed by its answer that it was endeavoring to have the questions involved decided by that court.

For these reasons, the judgment is reversed and the case remanded.

(56 W. Va. 550)

STATE, to Use of TYLER COUNTY COURT,
v. SISTERSVILLE, M. & M. TURN-
PIKE CO. et al.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

COUNTY COURT—LEGAL REPRESENTATIVE OF
MAGISTERIAL DISTRICTS—PENAL
BOND—DECLARATION.

1. The county court is the legal representative of the various magisterial districts of the county, which can only sue and be sued in its name, as they have no legal existence for the purposes of suit.

2. In a suit on a penal bond, in which the county and a district are both interested, the declaration should show whether the suit is for an injury or loss suffered by the county or by the district, and in what such loss or injury consists; and, if it fails to do so, it will be held to be bad on demurrer.

(Syllabus by the Court.)

Error to Circuit Court, Tyler County; M. H. Willis, Judge.

Action by the state, to the use of the county court of Tyler county, against the Sistersville, Middlebourne & McElroy Turnpike Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

T. P. Jacobs, for plaintiffs in error. O. W. O. Hardman, Pugh & Pugh, and I. M. Underwood, for defendant in error.

DENT, J. The Sistersville, Middlebourne & McElroy Turnpike Company, E. J. Miller, Robert McCormick, G. B. West, G. B. Slemaaker, and John H. McCoy claim they are aggrieved by a final judgment of the circuit court of Tyler county in favor of the state of West Virginia, suing for the use and benefit of the county court of said county, for the sum of \$10,638.16%, with interest and costs. The suit in which such judgment was rendered was founded on a bond executed by the defendants to the state of West Virginia at the instance of the county court in the penalty of \$40,000. The condition of the bond, among other things, was that if the defendant corporation should macadamize that portion of the Sistersville and Salem Turnpike from the corporate limits of Sistersville to the iron bridge near J. C. McCoy's, according to the plan, profile, and specifications now on file in the clerk's office of said court, then the obligation was to be void; otherwise to be in full force. The county had given the company the use of this road, with the right to collect tolls thereon, provided it should improve it as aforesaid, and also turned over to the company \$20,000 in bonds of Lincoln district, in said county, for a certificate of stock to this amount. The county claims that the company failed to carry out its contract, and thereupon it brought this suit in the name of the state on the bond, for its use and benefit.

The first claim of the defendants, and seemingly their main reliance, which is raised by demurrer, motion to exclude the evidence and instruct the jury for the defendants, and motion for a new trial and in arrest of judgment, is that the county court has no such interest as entitles it to maintain the suit. The contract to macadamize this road was made with the county court. The road was under the court's supervision and care for the benefit of the public. It granted the use of the road, with the privilege of collecting tolls thereon, on condition that the roadbed was constructed according to certain plans and specifications. If the company failed to comply with such condition, the county had the right to institute proceedings to forfeit the company's right to such tolls and recover the same. The county court is also the legal representative of the district of Lincoln. Such district can only sue and be sued in the name of the county court, for it is a legal nonentity, having no existence in the light of the law, except by and through the county court. Hence the county court has the right to sue upon this bond for any injury suffered by reason of the breach thereof by such district. *Neale v. County Court*, 43 W. Va. 90, 27 S. E. 370. As a part of the consideration of the bond in suit, \$20,000 in bonds of the district was delivered to the company to enable it to prosecute the building of the road, and on condition that the road should be completed according to the plans and specifications. The failure of the

company to perform its contract in whole or in part destroyed the consideration for such bonds in whole or in part, and the county court was entitled to have such bonds returned to it, or to recover the value thereof, at least to the extent the consideration therefor had failed. The money thus recovered would belong to the district, and, according to the vote of the people, should be used in completing the company's contract, or in making the road just as good and valuable as the contract would have made it. But it is said that the district is a stockholder. This is true, but it is a conditional stockholder, subject to the completion of the road according to contract; and as to such condition, and until it is fulfilled, the district is a creditor of the company.

It is said that recovery in this action will reduce the assets of the company, and will diminish the stockholders' dividends. Such is the case with every creditor who is also a stockholder, and because the payment of his debt will diminish his dividends is no legal reason why his debt should not be first satisfied. From all this, it is plain that the county court has two distinct causes of injury for which it could sue. One would be in its own right, strictly, for the forfeiture of the toll franchise or privilege, and the recovery of the tolls, which it might have otherwise received itself, and the other in behalf of the district for the recovery of its bonds, or the value thereof, to the extent the company has failed to comply with its contract. So it seems plain that the county court has the right to maintain this suit in the name of the state, on proper allegations, for either of the purposes aforesaid.

The declaration is demurred to for the reason that the injury to the county court, and of which it complains, is not sufficiently set forth to give the defendants notice thereof. The declaration alleges that the company failed to properly construct the road, and that it "will be of defective service for the people who are compelled to use it," but it fails to allege that the county court has sustained any injury by reason thereof, or that the consideration for the bonds of Lincoln district has thereby failed in whole or part, and the county court is entitled to have the same returned to it or to recover the value thereof. The county court certainly cannot recover unless it shows by proper allegations in what manner it has been injured. Section 2, c. 10, Code 1899. If it sues for injury done to Lincoln district, it should so allege, so that the recovery may be credited to such district, and expended as its voters directed. If it sues for an injury to itself, it should so allege, for the same reason. If the county court had gone on and completed the road according to the plans and specifications, and made good the company's contract, it would be entitled to sue and be reimbursed for its outlay. The declaration fails to show whether the county is endeavoring to recover from the

company and its sureties the amount of its default for the benefit of itself, or of the district of Lincoln. If a recovery should be had on behalf of the district, the company would be entitled to have the same expended in the improvement of the road, or to have a proportionate number of the shares of stock held by the county for the benefit of such district returned to it and canceled. The county court cannot both hold the stock and recover the money back, unless it uses the money in completing the company's contract. The defendant is interested to this extent in knowing in whose behalf and for what injury the recovery is demanded. The county court has authority to sue for an injury suffered by Lincoln district, but, in doing so, it should so allege. Its double capacity makes such allegations necessary; otherwise its causes of action would be confounded, and the proof thereof confusing to both court and jury, and the recovery indeterminate as to the proper beneficiary. In short, the omission is so essential that judgment according to the very right of the case cannot be given. Section 29, c. 125, Code 1899.

To whom does the recovery in this case belong—to the county court or to the district of Lincoln? The defendants have the right to know, and the declaration should inform them, for they are interested in the disposition of the proceeds, and the conclusiveness thereof.

The declaration being insufficient, it becomes unnecessary to consider other errors presented, as the judgment must be reversed, the demurrer to the declaration sustained, and the case be remanded, with leave to the plaintiff to amend its declaration if so advised. **Reversed.**

(56 W. Va. 530)

CLARK et al. v. HENDRICKS CO., Limited,
et al.

McNEELEY v. SAME.

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

APPEAL—REVIEW—COMMISSIONER'S REPORT.

1. Where a decree is based upon a commissioner's report, in which many complicated accounts are involved, and to which numerous exceptions are filed, pointing out various mistakes in the calculations, which run through the whole statement and report, and affect the result thereof, and the exceptions are overruled and the report confirmed, some of the mistakes being admitted, but others thus pointed out being so connected and intermingled with the whole statement and report that they cannot be segregated and corrected without a restatement of the accounts, which is impracticable here, this court, for the reasons stated, will reverse such decree, and, without passing upon them seriatim, will sustain the exceptions and remand the cause, with instructions to recommit it to a commissioner.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by C. B. Clark and others against the Hendricks Company, Limited, and others,

and by W. O. McNeeley against the same defendants. Decrees for plaintiffs, and defendants appeal. Reversed.

C. W. Dailey, for appellants. Conley & Smith and W. B. Maxwell, for appellees.

MILLER, J. The Hendricks Company, Limited, was incorporated under the laws of this state on the 21st day of June, 1892, for the purpose of carrying on a wholesale and retail mercantile business. The incorporators were J. E. Poling, J. A. McNeeley, W. O. McNeeley, C. B. Clark, and T. W. Ryan. Its principal office was at Hendricks in Tucker county. The capital stock subscribed was \$15,000, in shares of \$100 each, par value, but the authorized capital was \$50,000. Acts 1893, 207 Corp. The stock was afterwards increased to \$20,400. The company did an extensive business, and acquired a large amount of property, both real and personal. It also became indebted to various persons and firms in sums the aggregate of which was not definitely known to the stockholders at the date next below mentioned. By their contract in writing, bearing date on the 18th day of May, 1897, severally signed by them, J. E. Poling, J. A. McNeeley, W. O. McNeeley, C. B. Clark, Alice Clark, and T. W. Ryan, the then stockholders of the company, determined and agreed to discontinue the business of the corporation, as such, from and after that date, wind up its affairs, provide for the payment of its debts and liabilities, and also for a division among its stockholders of its capital and property, after the payment of its debts and liabilities; it being then believed by the stockholders that the solvent claims due to the corporation were much more than sufficient to pay all of its indebtedness. It is, among other things, stipulated in the contract that the following provisions be and were thereby made for the division of the property of the corporation among its stockholders, and also for the payment of its debts and liabilities: First. That J. E. Poling and T. W. Ryan should have and hold as their own from that date, with respective interests therein, as between themselves, to be proportioned according to their respective interests in the corporation, and subject to their assumption and payment of certain enumerated debts of the company, the payment of which was therein mentioned as assumed by them, the entire stock of merchandise, belonging to the corporation, situated and being in the store and ware rooms of said corporation at Hendricks, in the county of Tucker, and at Harman, in the county of Randolph, together with all fixtures belonging thereto, as theretofore listed or inventoried, etc., and also certain claims due to the company, which were thereby transferred to Poling and Ryan, without recourse upon the company, and which claims amounted to the sum of \$4,-

504.52. Poling and Ryan were also to have and hold as their own, in the proportion aforesaid, as between themselves, the house and lot in Hendricks, called the John W. W. Moore property, all amounts due from Moore to the company on notes and account, but without recourse, and all bark and pulpwood contracts then held by the company; said Poling and Ryan thereby assuming all liabilities of the corporation in relation to said contracts accruing after 12 o'clock m. on the 18th day of May, 1897. Second. That J. A. McNeeley, W. O. McNeeley, C. B. Clark, and Alice Clark should have and hold as their own from that date all the real estate of said corporation, wherever situated, except the Moore house and lot above mentioned, and all the lumber belonging to said corporation, with respective interests therein in all of said property, as between themselves, to be proportioned according to their respective interests in said corporation. It was further stipulated that the real estate of the corporation should by proper deeds be conveyed to the persons respectively entitled thereto under the agreement whenever the debts of the company should all be settled, and that in the meantime none of said parties shall in any way convey or incumber any of said real estate, except expressly subject to the debts of the corporation. In consideration of the premises, Poling and Ryan, in and by the agreement, assumed the payment of certain specified debts of the company, amounting to \$15,004.52, and also agreed to secure for the company releases to it from all liability on account of said debts so assumed by them. It was further agreed that Poling and Ryan shall not be required to pay more than \$15,004.52 as consideration for that part of the property and rights to be acquired by them under the agreement. The other accounts and claims due the company were placed in the hands of Poling, to be by him collected in the name of the corporation, and the proceeds thereof paid out on its debts and liabilities, other than those assumed by Poling and Ryan as aforesaid. It was further agreed by the parties that if the amount collected on claims owing to the company, exclusive of those transferred to Poling and Ryan, should prove insufficient to satisfy the debts of the corporation, exclusive of those assumed by Poling and Ryan, then the parties to the agreement shall pay the remainder of such debts; each paying such proportion of such unpaid debts as the stock owned by him or her bears to all the capital stock of the company.

At the execution and date of said agreement the stock of the corporation was owned and held as follows:

J. E. Poling, 50 shares.....	\$ 5,000
J. A. McNeeley, 50 shares.....	5,000
W. O. McNeeley, 50 shares.....	5,000
C. B. and Alice Clark, 50 shares.....	5,000
T. W. Ryan, 4 shares.....	400
Total, 204 shares.....	\$20,400

At the date of the decree appealed from the stock was owned and held as follows:

J. E. Poling, 50 shares.....	\$ 5,000
T. W. Ryan, 4 shares.....	400
J. E. Poling & Co., 50 shares.....	5,000
W. O. McNeeley and W. S. Michael, 100 shares	10,000

Total, 204 shares..... \$20,400

C. B. Clark and others, the then stockholders of the corporation, except said McNeeleys, filed their bill in the first-mentioned cause against said corporation, J. A. McNeeley, W. O. McNeeley, and also many others who were its creditors; and, in the second-described suit, said W. O. McNeeley filed his bill against the corporation and its stockholders, except the plaintiff, and also against its creditors. The object of the two suits was and is practically the same; that is to say, the bills therein pray that a receiver be appointed to take charge of all of the property of the corporation, both real and personal; that its indebtedness be ascertained and paid; that its business be closed up and the corporation dissolved; that the property taken by the stockholders, respectively, be charged with its proper proportion of the indebtedness; and that the remaining assets be divided among the stockholders in the proportion that each stockholder's stock bears to the stock; and for general relief.

The indebtedness of the corporation appears to have been afterwards paid in part from its assets, and in part by the stockholders. During the progress of the suit, up to that time, two reports had been made by Jeff Lipscomb, a commissioner in chancery, and filed in said cause. But no settlement having been made between the stockholders and the corporation as to their indebtedness to it, or between themselves, under said contract, the court on the 20th day of June, 1901, again referred said causes to Lipscomb, with directions to ascertain and report upon various matters specified in the order of reference of that date, and also any other matter deemed by him pertinent, or, being pertinent, that might be required by any of the parties. Acting under this order, the commissioner made up, and on the 3d day of June, 1902, completed, a statement and report, which consists of 109 pages of the printed record; and, having retained it in his office for 10 days thereafter, he on the 13th day of the same month returned it with all of the evidence taken by him upon the hearing before him to the court. To this report W. O. McNeeley and W. S. Michael made and indorsed thereon 1, and J. E. Poling, J. E. Poling & Co., and T. W. Ryan 27, several exceptions, which were afterwards increased by them to 34. One year after said report had been returned to the court, and exceptions thereto made and indorsed as aforesaid, to wit, on the 18th day of June, 1903, the said commissioner made and returned to the court another statement in

writing, signed by him as commissioner, consisting of 14 pages of the printed record, which is styled by him as "The answer of Commissioner Jeff Lipscomb to the exceptions filed to his report by J. E. Poling, J. E. Poling & Co., and T. W. Ryan, in the chancery causes of W. O. McNeeley v. The Hendricks Company, Limited, and others, and C. B. Clark v. Same, filed in the circuit court of Tucker county." The commissioner, in his answer, which is, in substance and effect, a new or additional statement and report, reviews his former report and the several exceptions thereto, and thereby attempts to explain the same and to correct the errors therein. He says: "Relative to exception No. 2, I find that there is an error of \$18, which will be hereafter adjudicated." He also says: "Relative to this exception [No. 7], I desire to state that the report does plainly show how the commissioner arrived at his conclusions, and these exceptors do not show what other items should go into the findings of the commissioner in order to make a greater amount than ascertained by him, due J. E. Poling & Co. from the Clark interest; but, in order that the court may not be confused, I will restate the items, going into the second finding and aspect of this case." He then restates matters, making six findings, of \$3,000.74, \$290.71, \$11,432.04, \$7,546.98, and \$7,942.85, respectively. He further says: "But from an inspection of said accounts, I find an error in both the accounts of W. O. McNeeley and C. B. Clark in the matter of the Rumbarger draft, as follows: W. O. McNeeley is improperly credited with the item of \$964.00, that item being the interest of W. O. McNeeley and C. B. Clark in the Rumbarger draft. Said W. O. McNeeley was credited \$482, his one-half of the Clark and McNeeley part of said draft. Said W. O. McNeeley is charged with the whole of said draft of \$1,049.36 [Rumbarger draft], which is wrong, because he did not get the draft; and, making this correction, said W. O. McNeeley's account should stand credit \$6,227.21, instead of \$6,142.88." He then, according to this theory of the case, corrects this error by his answer. He again says: "I also find a mistake in the account of W. O. McNeeley, a credit by stock account, \$1,000, which should be eliminated from my original finding; and the same, so corrected, would leave the account of W. O. McNeeley stand \$5,227.21 instead of \$6,227.21. These errors will run through all the settlements." He follows this with a restatement, consisting of four pages, upon that branch of his former report. To this answer or additional report exceptions were also filed, and its consideration objected to by J. E. Poling, J. E. Poling & Co., and T. W. Ryan.

On the 18th day of June, 1903, five days after Commissioner Lipscomb's "answer" was filed, the said two causes came on to be again heard together upon the papers there-

tofore read, former orders and decrees therein, and upon the report of Commissioner Jeff Lipscomb, "to which there is one exception by W. O. McNeeley and W. S. Michael, and thirty-four exceptions by J. E. Poling, J. E. Poling & Co., and T. W. Ryan, the answer in writing by said Commissioner Jeff Lipscomb to said exceptions, and exceptions in writing thereto by J. E. Poling & Co. and T. W. Ryan, and were argued by counsel, upon consideration whereof the court doth overrule the exceptions to said answer, and all of said exceptions, except as to the item of the \$1,000 in the account of W. O. McNeeley, and also except as to the other errors corrected by said Commissioner Lipscomb in his answer to said exceptions; and, as corrected, the said report is confirmed. * * *

It is further adjudged, ordered, and decreed that J. E. Poling do pay to W. O. McNeeley and W. S. Michael the sum of \$6,542.77, with interest thereon from the 12th day of June, 1903; that W. O. McNeeley and W. S. Michael do pay to J. E. Poling, T. W. Ryan, and A. H. Harper, partners under the firm name and style of J. E. Poling & Co., the sum of \$2,486.11, with like interest thereon; that T. W. Ryan do pay to W. O. McNeeley and W. S. Michael the sum of \$421.65, with like interest thereon; that J. E. Poling do pay to J. E. Poling, T. W. Ryan, and A. H. Harper, partners under the firm name and style of J. E. Poling & Co., the sum of \$2,777.80, with like interest thereon; that T. W. Ryan do pay to J. E. Poling, T. W. Ryan, and A. H. Harper, partners under the firm name and style of J. E. Poling & Co., the sum of \$310.15, with like interest thereon; and that J. E. Poling do pay to T. W. Ryan the sum of \$69.46, with like interest thereon; and the said parties, and each of them, have leave to enforce payment of the amount so decreed to them respectively by execution or other appropriate proceeding, and the rights of the parties among themselves are finally adjudicated and said corporation dissolved by this decree."

From this decree, J. E. Poling, J. E. Poling & Co., and T. W. Ryan appeal, and assign several grounds of error therein. Among other things, they aver that W. O. McNeeley, J. S. McNeeley, and C. B. Clark were each allowed \$2,500 against the corporation for services as directors thereof, and that said allowances were directed to be so made after the 18th day of May, 1897; that said alleged error and the \$1,000 error which is admitted to be such by the commissioner in his answer enter into all of his calculations and findings relating to the said settlement among the stockholders, and affect the results thereof; that the final decree confirms the report, except so far as changed by the commissioner's answer as aforesaid; and that no finding in the several different statements of the commissioner warrants the decree in favor of McNeeley and Michael against J. E. Poling for \$6,542.77. The an-

swer of the commissioner, which was by him deemed necessary to explain the errors in his former report, pointed out by the exceptions thereto, is, if anything, a new or additional report. It was made up and returned to the court, so far as the record discloses, without notice to the parties, or appearance by them. It does not appear to have been required by the court or requested by any of the parties. It was an attempted adjudication of the rights of the parties out of court without notice or appearance. No notice of its completion was given by the commissioner to the attorneys of record in said causes. It was not retained in his office 10 days after its completion for examination by the parties interested (Code 1899, c. 129, § 7), but was returned to the court; and within five days after its date the said causes were heard thereon, with the report which it sought to correct. It, with the erroneous report, thus became the basis of the decree appealed from. The exceptions to this "answer" should have been sustained, the paper stricken from the record, and the cause recommitted. *Thompson's Adm'r v. Catlett*, 24 W. Va. 524; *Lynch v. Henry*, 25 W. Va. 416. The answer being improperly in the record, all of the errors which it attempted to correct remain in said report, and the exceptions thereto as aforesaid stand overruled and confirmed by the decree.

The court finds that at the date of the decree the stock of the corporation was held as follows, to wit: By W. O. McNeeley and W. S. Michael, 100 shares; by J. E. Poling, 50 shares; J. E. Poling & Co., 50 shares; and by T. W. Ryan, 4 shares.

In his answer or explanation, the commissioner says:

"J. E. Poling stands credited with fifty shares of stock in the following items in his account, and all the credit he is entitled to under any consideration, to wit:

By D. & P. note taken up by him.....	\$ 500
By D. P. note taken up by him.....	500
By D. & P. note taken up by him.....	500
By D. & P. note taken up by him.....	500
By bills payable.....	500
By stock account.....	1,000"

These several items amount to only \$3,500—an apparent discrepancy in the statements of \$1,500. All of the parties, and also the decree, treat the shares of stock as of the par value of \$100 each, and paid up. This statement is variant from others in the record as to the stock then held by Poling, and, if erroneous and carried into the decree, is prejudicial to him.

As to the alleged error on account of the allowance of \$2,500 to J. A. McNeeley, W. O. McNeeley, and C. B. Clark, each, as special salaries to them for services as directors of the corporation, we find in the record book of the company the following entries:

"Hendricks, W. Va., March 15, 1893. At a meeting of the stockholders of the Hendricks Co., Ltd., on this day and date with J. A. McNeeley in the chair and upon mo-

tion of W. O. McNeeley and seconded by C. B. Clark the following persons were re-elected directors for the ensuing year: W. O. McNeeley, J. A. McNeeley, T. W. Ryan, C. B. Clark, J. E. Poling. And the following yearly salaries were ordered allowed: W. O. McNeeley, \$400.00; C. B. Clark, \$400.00; J. A. McNeeley, \$300.00.

"Hendricks, W. Va., March 25, 1895. At the annual meeting of the board of directors of the Hendricks Co., Ltd., on this day and date with J. A. McNeeley in the chair and upon motion of C. B. Clark and seconded by W. O. McNeeley the following directors were re-elected for the ensuing year, T. W. Ryan, W. O. McNeeley, J. A. McNeeley, J. E. Poling and C. B. Clark. The minutes of the previous meetings having been read and passed upon and adopted and approved on motion of C. B. Clark and seconded by W. O. McNeeley this meeting was adjourned sine die. C. B. Clark, V. P. and Clerk. J. A. McNeeley, Secy. W. O. McNeeley, Prest.

"March 25/95. On account of the income tax the following extra salaries were approved and directed and ordered credited to this date: T. W. Ryan, \$75.00; J. A. McNeeley, \$2,500.00; C. B. Clark, \$2,500.00; W. O. McNeeley, \$2,500.00 and same to be credited to each party named in a separate salary account and to be finally transferred to their respective personal accounts and deducted from stock account earnings."

Code 1899, c. 53, § 53, relating to joint-stock companies, declares that there shall be no compensation for services rendered by the president or any director unless it be allowed by the stockholders. The commissioner, in his answer, referring to the aforesaid allowances, says: "This statement makes the totals, as they appear on page 10 of this report, and includes the special salaries of \$2,500 allowed to McNeeleys and Clark, and other additional salary allowed on the minute books, but which had never been carried into the personal accounts of the parties." These specific allowances of \$2,500, respectively, to the directors named, seem to be unauthorized by the statute. It will be readily seen that they are far in excess of the amounts to which the parties would have been respectively entitled, if entitled to anything upon that account, under the said resolution of March 15, 1893. The allowances, if erroneous, are prejudicial to the other stockholders. The explanation of the commissioner, given in his answer, if it could even be considered by us, is not clear; but the parties may be able to satisfactorily explain this transaction if given an opportunity to do so. As the decree must be reversed, and the causes remanded for a restatement and report, involving this matter with others, we refrain from expressing an opinion thereon. The foregoing excerpts are taken from the

record of the proceedings had before the commissioner to show the confusion, uncertainty, and errors therein. The briefs filed for appellants and appellees admit that there are errors in both the report and decree.

Without restating the accounts between the parties, the labor of which we are not required to perform, and which would be impracticable here, we are unable to determine whether all or only a part of the exceptions to the report be well taken, and also whether they reach all of the errors in the report. We are therefore of opinion that, without passing upon the matters raised by each of said exceptions seriatim, we should reverse the decree, and sustain all of the exceptions to the report of the commissioner, because of its uncertainty and the admitted errors therein. *B. & O. R. Co. v. Vanderwerker et al.*, 44 W. Va. 229, 28 S. E. 829.

The decree appealed from is therefore reversed and set aside; the exceptions to the report of the commissioner, and also to his "answer" to said exceptions, are severally sustained, the said answer stricken from the record, and said causes remanded to the circuit court, with instructions to recommit the same to a commissioner for the ascertainment and report thereon of the following specified matters, and any others which may be pertinent, to wit: First. What property, real or personal, did the Hendricks Company, Limited, own on the 18th day of May, 1897, at the time the said contract took effect, exclusive of the real estate, merchandise, accounts, etc., set apart and transferred by the agreement to Poling, Ryan, J. A. McNeeley, W. O. McNeeley, C. B. Clark, and Alice Clark, or to any or either of them? Second. What claims and demands were due to the corporation on that day, exclusive of those assigned to Poling and Ryan, whether from the directors of the company, or other persons, the several amounts thereof, and what disposition has been made of the same? Third. To whom was the corporation indebted on that day, and in what sums, exclusive of the several debts which were assumed by Poling and Ryan in and by said agreement as aforesaid? Fourth. Have Poling and Ryan paid the indebtedness which they assumed for the corporation, and, if not, how much is yet due thereon? Fifth. What part of the indebtedness of the corporation, exclusive of the debts assumed by Poling and Ryan as aforesaid, has been paid, and by whom, and how paid? Sixth. After applying the assets of the corporation (not including those set apart and transferred to Poling and others as aforesaid) to its indebtedness, existing on the 18th day of May, 1897, what balance remains unpaid? Seventh. Who should pay such balance, and what part thereof should be paid by each person liable therefor under said agreement?

(56 W. Va. 387)

WEST VIRGINIA SHORT LINE R. CO. v. BELINGTON & N. R. CO. et al.*

(Supreme Court of Appeals of West Virginia. Dec. 6, 1904.)

CONDEMNATION PROCEEDINGS—LOCATION—PRIORITIES—VARIANCE.

1. W. Va. S. L. R. R. Co., on the 16th day of October, 1900, by the corporate action of its board of directors, duly adopted its line of railroad, of which a preliminary survey had been made through the lands of W., whereby it acquired priority of right to condemn the right of way through the said land of W. Between the 15th day of July, 1902, and the 5th day of August, 1902, the B. & N. R. R. Co. located and staked off its line of railroad through the land of said W., which was duly adopted as and for the location of its line of railroad by the board of directors of said company on the 3d day of September, 1902. W. Va. S. L. R. R. Co. in September, 1902, by its engineer, staked out a line through the land of W., claiming it to be on the said line adopted by it on said 16th day of October, 1900, and commenced condemnation proceedings based upon the survey of September, 1902, which was shown to be at material variance from the said location of October 16, 1900, and in conflict with the adopted location of the B. & N. R. R. Co. *Held*, the line staked out in September, 1902, for the location of the railroad line of W. Va. S. L. R. R. Co., was a new location not adopted by corporate action of the company, and could not be the basis for condemnation proceedings.

2. *Querre*: Whether, under the circumstances of this case, the W. Va. S. L. R. R. Co. did not, by its delay of more than two years in prosecuting its condemnation proceedings after it had acquired the right to do so by its action of October 16, 1900, lose its right of priority thereto.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Action by the West Virginia Short Line Railroad Company against the Belington & Northern Railroad Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

C. M. Murphey, A. G. Dayton, and Fred O. Blue, for appellant. Ice & Ice, Reese Blizard, and Samuel V. Woods, for appellees.

McWHORTER, J. This is a "battle royal" between two railroad companies as to the priority of location of right of way over a particular piece of ground. On the 9th day of December, 1902, the West Virginia Short Line Railroad Company, having given due notice thereof to J. W. Wheeler, owner of the land purposed to be taken, the Burnsville & Eastern Railroad Company, the Belington & Northern Railroad Company, and the Washington Coal & Coke Company, corporations under the laws of the state of West Virginia, the latter being the owner of the coal under said land, filed its petition in the circuit court of Barbour county, proposing to condemn the strip of land, 100 feet wide, particularly described in the petition and plat filed therewith, marked "Exhibit A," containing 5.17 acres, and paying for the ap-

pointment of commissioners for that purpose. The Burnsville & Eastern Railroad Company and Belington & Northern Railroad Company, defendants, appeared to said notice and petition, and moved the court to quash the return of service upon them, of which motion the court took time to consider, and the defendants were given until the 1st day of February, 1903, to file in writing with the clerk of the court such other motion, demurrer, pleas, or answers to said notice and petition as might be good in law. At a regular term on the 20th day of February the Belington & Northern Railroad Company entered its demurrer to the petition, and moved to quash the return of the service of notice upon it, in which demurrer and motion the petitioner joined, and the said demurrer and motion were overruled. The Belington & Northern Railroad Company tendered and offered to file a plea in writing to the petition, to the filing of which the petitioner objected, and moved that the same be rejected; but the court overruled the objection, and permitted the plea to be filed, and the petitioner replied generally thereto. The said special plea is to the effect that the defendant is a corporation duly organized under the laws of West Virginia, with its principal office at Belington; that it was duly authorized to build and construct a railroad through the said county of Barbour from the town of Belington, down the west side of the Tygarts Valley river, to the mouth of the Middle Fork river, and thence to a place at the mouth of the Buckhannon river, and, acting within the powers granted to it by its charter and organization, had located, laid out, and adopted, by surveys, maps, and profiles thereof which had been duly certified and filed in the clerk's office of Barbour county court, and in the office of Secretary of State by resolutions properly adopted by its board of directors on the 3d day of September, 1902, a route for the location and construction of its branch line railway, as it might do under its charter and laws, from the mouth of the Middle Fork river in said county, down the west side of the Tygarts Valley river, to the mouth of the Buckhannon river, and that the route for its said branch line of railroad had been surveyed and located through and over the land of the defendant J. W. Wheeler, which defendant was by proper proceedings seeking to condemn and acquire; and averred that the center line of petitioner's railroad, as described in its petition in this proceeding and plat filed therewith, marked "Exhibit A," extending over and through the land of said Wheeler, did not correspond with the alleged location or either of revised lines of petitioner's said railroad over and through said land, but that the same was a wholly different line and location, and that no map or profile had ever been filed to show what portion of land of said Wheeler petitioner was seeking to condemn to its use, and that said location

*Rehearing denied.

as described in plaintiff's petition was not surveyed and laid out until the month of September, 1902, and that said line as surveyed conflicts in part with the line surveyed and adopted by defendant over and through the land of Wheeler. And, for further plea, said that the survey and location of defendant's said branch line of railroad over and through the land of said Wheeler was made between the 15th day of July, 1902, and the 5th day of August, 1902, and a map and profile thereof filed in the county clerk's office of Barbour county on the 3d day of September, 1902, and that said survey and location were made prior to the survey made by petitioner of its line of railroad over said land as described in its petition in this proceeding; and averred that the petitioner, the West Virginia Short Line Railroad Company, was now owned, controlled, and operated by the Baltimore & Ohio Railroad Company, a corporation which owned and operated a railroad extending from Grafton, in Taylor county, up the east side of the Tygarts Valley river to Belington, in Barbour county, and that for said Baltimore & Ohio Railroad to construct and build a road from the mouth of the Buckhannon river up the west side of the Tygarts Valley river to Belington would be to parallel its own line of railroad; and averred that it was not the intention of the said Baltimore & Ohio Railroad Company or of petitioner to build and construct a railroad on the pretended location line now claimed by petitioner, but that the only purpose and object of both petitioner and the said Baltimore & Ohio Railroad Company was to fraudulently hinder, delay, and prevent defendant from constructing its proposed line of railroad from the mouth of the Middle Fork river to the mouth of the Buckhannon river, in Barbour county; that, in order to carry out this purpose, the agents and employes of the petitioner and the Baltimore & Ohio Railroad Company, when defendant was attempting to acquire right of way for the construction of its said railroad over the lands of the defendant J. W. Wheeler and others, went to them and procured from them contracts whereby said landowners agreed not to sell or convey to defendant or to any one else a right of way over their lands, and defendant alleged that said contracts were made for the express purpose of hindering and delaying the construction of its said line of railroad in the manner set forth, and denied the right of petitioner to condemn and acquire a right of way over the land of J. W. Wheeler that would conflict in any manner with the right of way sought to be acquired by defendant over said land, and over which its said line of railroad was located; and averred that the survey and location of defendant's line of railroad over the land of Wheeler was prior to that claimed by the petitioner; wherefore it prayed judgment, etc. And on the said 9th day of December, 1902, the Belington & Northern Rail-

road Company filed its petition, in the same circuit court, for the condemnation of a line of its railroad through the lands of said J. W. Wheeler, having given due notice thereof to said Wheeler, the Burnsville & Eastern Railroad Company, and the West Virginia Short Line Railroad Company, praying for the appointment of commissioners for the purpose of condemning said property. On motion of the West Virginia Short Line Railroad Company, it was given leave until the 1st day of February, 1903, in which to interpose and file such motion, demurrer, pleas, and answers to notice and petition as might be good in law. On the 23d day of February said defendant, the West Virginia Short Line Railroad Company, tendered its answer in the nature of a plea to plaintiff's petition, to the filing of which plaintiff objected, which objection was overruled and answer filed, and plaintiff replied generally thereto, in which plea it is alleged: (1) That, prior to the institution of this proceeding, this defendant instituted its proceedings to condemn and acquire the same land, in whole or in part, mentioned in the petition, which proceeding was then pending in the same court; (2) averred that it was chartered on the 7th day of February, 1895, by which charter it was authorized to build a public railroad from New Martinsville, by the most practical route, to near Clarksburg, thence to the town of Belington in Barbour county, with its principal office at Clarksburg, and was then operating its road from New Martinsville to Clarksburg, a distance of 60 miles, and proposed to complete the building of said line of railroad, and was then engaged in the actual work of building and constructing its said road from Clarksburg, a distance of 39 miles, as authorized by its charter; that, before it began the building and construction of its said railroad, it caused the line therefor to be located from New Martinsville to Belington, which line was duly and legally adopted by the defendants, and maps and profiles thereof filed for record in the clerks' offices and in the office of Secretary of State as required by law; that said line was so located and legally adopted long before the location of the line of petitioner, the Belington & Northern Railroad Company, and the proper maps and profiles were on record in the proper offices long before the alleged location of the line of the petitioner, the Belington & Northern Railroad Company, and which prior location so adopted by defendant was through the land, among others, of the defendant Wheeler; (3) that the defendant desired and proposed to proceed with the construction of its said railroad through the lands of said Wheeler, and that the land proposed to be taken belonging to Wheeler, when so taken, would be used by it for the purpose of constructing, building, and maintaining its said road, and that said land was necessary for such purpose, and needed for public use, and, when condemned by defendant, would

be devoted to such public use; (4) that said land so sought to be condemned by it through the lands of Wheeler was necessary for the proper exercise of its corporate franchise, and that it could not enjoy and exercise its corporate franchise without the same; (5) that, by reason of prior location and adoption of its line, defendant had acquired priority to go through the lands of said Wheeler, and that the petitioner, the Belington & Northern Railroad Company, had not the right to acquire the land mentioned in its petition, in so far as the same would interfere with defendant in acquiring the land mentioned and described in its petition against Wheeler for the said purpose, and prayed that this proceeding might be dismissed, and the defendant recover its costs.

Certain facts were agreed by the parties in writing as to the issuance of the charters of the two railroad companies respectively, and the authority thereby granted to each of them, as to certain surveys, maps, and profiles made and filed by them respectively, and agreed that extracts from the minutes of the stockholders' and directors' meetings offered in evidence should be admitted in lieu of the original minutes of such meetings. Depositions were taken by both companies, and filed in the cases. On the 10th day of November, 1903, the two cases, by consent of the parties, having been submitted to the court, upon the question as to the rights of the respective plaintiff railroad companies to condemn the real estate set forth in their petition, and to determine and ascertain which had the superior right to take and condemn the real estate described in their respective petitions and answers thereto, as was claimed by both to be necessary for the rights of way for their respective railroads, it was ordered by consent that the two cases be heard together, and the testimony and agreement of facts and exhibits should be regarded as filed and made a part of both cases, whether formally filed in both or not, all of which being duly considered, the court was of the opinion and adjudged that the Belington & Northern Railroad Company was entitled to take and condemn the real estate in its petition mentioned and described, as against the West Virginia Short Line Railroad Company's petition, and that the case made by the Belington & Northern Railroad Company was one in which the applicant had the lawful right to take the said property, described in its petition and notice, for the purposes and public use set out in its petition, and that said lands so proposed to be taken were necessary for the said purposes; and the West Virginia Short Line Railroad Company objected and excepted to the opinion and judgment of the court, and moved the court to set aside said judgment, which motion was overruled, to which action in overruling said motion the West Virginia Short Line Railroad Company excepted, and obtained from this court a writ of error and superse-

deas, claiming that it was error to hold that the said Belington & Northern Railroad Company, from the pleading and facts in the case, was entitled to the superior right to take and condemn the real estate sought to be condemned by petitioner, and that it was error for the court to fail and refuse to hold that plaintiff in error had the superior right, as against said Belington & Northern Railroad Company, to take and condemn said real estate.

It appears from the record that a preliminary survey was made by the short line railroad company through the land of defendant Wheeler about the last of September or early in October, 1900; that at a meeting of the board of directors of said company held on the 16th of October, 1900, the following action was taken:

"Whereas it appears that on the 15th day of October, 1900, at a meeting of the stockholders of this company, the following resolution was adopted:

"Whereas it is expedient, for the purpose of avoiding difficult curves and undesirable locations, to change and revise in part the line adopted by this company on the 25th day of August, 1900, extending from Clarksburg to Belington. Be it

"Resolved, that the portion of said line extending from the mouth of the Buckhannon river, in Barbour county, to the town of Belington, in said county, be revised and altered in conformity with the accompanying map and profile, and that the location and route shown upon the map and profile hereto attached, following the course of the Tygarts Valley river, from the mouth of the Buckhannon river to Belington, be adopted as the location and route for the railroad of this company between the points aforesaid. And be it further

"Resolved, that a copy of this resolution be certified by E. M. Goodwin, acting secretary of this corporation, to the Secretary of State, to be by him recorded as provided in section 33 and subsection 5 of section 50 of chapter 54 of the Code of West Virginia; and the chief engineer of this company is likewise instructed to cause to be made a copy of the accompanying map and profile, to be duly recorded in the office of the Secretary of State and in the offices of the clerks of the county courts of Harrison and Barbour counties, as provided by law.'

"Now, therefore, be it

"Resolved, that the action of said stockholders in the premises be and they are hereby ratified, approved, and confirmed, and adopted as and for the actions of this board; and the line finally adopted under said resolutions be adopted as the location and route of the road of this company between the points therein named."

This action of the board of directors of the West Virginia Short Line Railroad Company, under the rulings of this court in case of C. & O. Ry. Company v. Deepwater Ry. Com-

pany (decided at the present term), was a sufficient location of said route, and gave the West Virginia Short Line Railroad Company the priority of right to condemn the same on that particular location so adopted for its use as a public railway. Pierce on Railroads, p. 157; Railroad Co. v. Railroad Co., 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; Kanawha & R. R. Co. v. Glen Jean & R. R. Co., 45 W. Va. 119, 30 S. E. 86; 2 Lewis on Em. Dom. §§ 306 and 307; 3 Elliott on Railroads, § 927. From that date, the 16th of October, 1900, until the 19th of November, 1902, no steps were taken to exercise its right so acquired by the West Virginia Short Line Railroad Company, when it seems to have been quickened into life by the action of the Belington & Northern Railroad Company, which in July, 1902, began to survey a line on the west side of the Tygarts Valley river between the mouth of the Middle Fork river and the Buckhannon river. This line was surveyed and staked out upon the ground from the 16th of July to August 5th by the engineer and his assistants of the Belington & Northern Railroad Company, and a map and profile thereof made, and at a meeting of the board of directors of the Belington & Northern Railroad Company on the 3d day of September, 1902, the same was "ratified and adopted as the final location of said company's branch railroad between said points." Mr. Lemley, the assistant engineer of the West Virginia Short Line Railroad Company, says he was instructed to relocate the line of said company from Craigmore to Belington in July, 1902, purchase rights of way, and proceed with the construction as rapidly as possible; that he retraced the location from Tygarts Junction to Belington after the 1st of August, 1902. He says they aimed to follow the original location as close as possible, and made plats through the properties which had been purchased, and which were placed on record with the deeds. He said he did not file in the clerk's office a map or profile of relocation of the said road; that it was not necessary to file a retracing. He was asked if the relocation of that line of road made by him occupied the same ground as the preliminary survey made in 1900. He said they retraced the location made in 1900 as close as it was possible to do from the stakes that remained in the ground from the time that they made the relocation. It is insisted by counsel for the Belington & Northern Railroad Company that the location laid out by the short line railroad company and sought to be condemned, and as described in its petition and the map "Exhibit A," describing the strip to be condemned, is a new location, and not that which was adopted by the resolution of its board on the 16th of October, 1900. If this be true and there is a material departure from that location so adopted in 1900, then the action of the board would be necessary to adopt the new location made by its engineers

in 1902. Being a new location and different from that adopted by the board of directors October 16, 1900, the same corporate action is required to adopt it as a final location as was required to adopt the preliminary survey of October, 1900; "the mere fact that an engineer alone surveyed and marked out a line is not sufficient to amount to a valid appropriation of the location by the company, and it cannot afford ground for proceedings against a rival company occupying that line." Wood on Railroads, § 269, and authorities cited. This action was not taken on the part of the board. The engineer, H. S. King, of the Belington & Northern Railroad Company, who made the survey and location adopted by the Belington & Northern Railroad Company, made the survey and staked out the line upon the ground, and testifies that he took some measurements between the two lines made for the short line railroad company in 1900, and that made by the short line railroad company in 1902, which he supposed was made by Mr. Lemley; that station 35 of the 1902 survey was 47 feet above station 37x28 of the old short line; that station 47x75 of 1902 survey by the Baltimore & Ohio is 59 feet above station 47 of the old short line. Station 58 of the 1902 survey by the Baltimore & Ohio was 95 feet above station 59 of the old short line survey. Witness was not sure as to whose land this was on, but thinks it was on Swick's land, just across the property line from Wheeler. Asked why he spoke of it as the "1902 survey by the B. & O.," said: "Because it was made in 1902. I suppose that it was the B. & O. people there at that time, and the line was run by their people;" that it was his understanding that the Baltimore & Ohio engineers ran that line in 1902. The witness was asked to "look at the map filed as 'Exhibit A with Petition,' and also the map filed as 'Profile and Map W. Va. S. L. R. R. No. 4, Oct. 15, 1900, Mouth Buckhannon River to Belington,' and state the relative length of the 8-degree curve as shown on the lines on those two maps, through the lands of J. W. Wheeler." Ans. "One of them is 633.7 feet, one is 570 feet; the difference is 63.7 feet." "The one 'Exhibit A with Petition' is the longer by 63.7 feet." And he further says the two lines on the map "Exhibit A with Petition," and "Exhibit Profile and Map W. V. S. L. R. R. No. 4, Oct. 15, 1900, Mouth Buckhannon River to Belington," cannot be made to coincide on the ground when there is the difference in the length of the 8-degree curves of 63.7 feet as shown on the maps. V. C. Norton, chief engineer of Belington & Northern Railroad Company, testifies the survey adopted by the board of directors of said company September 3, 1902, as the line of their road, was run by H. S. King, engineer, under his direction, and was a location line staked on the ground between July 15, 1902, and August 15, 1902. When questioned as to the map filed as exhibit "Profile and Map

W. Va. S. L. R. R. No. 4, Oct. 15, 1900, Mouth of Buckhannon River Belington," and the map marked "Exhibit A with Petition," and asked to state the difference between the line of railroad as represented on said maps through the land of J. W. Wheeler, he said, if actually run and placed on the ground, they would not occupy the same ground; that "the 8-degree curve on one is 63.7 feet longer than the other," and that "whenever you run a curve on a ground and turn a tangent to said curve, that tangent will have a certain bearing, and, if you run 63.7 feet farther on that curve and turn tangent, you will be going in an entirely different direction, and, in going about 1,100 feet on the tangent shown on the maps, the end of the tangent would be in the neighborhood of 80 feet apart." He testified that he had examined the calls of the line of railroad made for the short line railroad company by Mr. Lemley in 1902, and compared them with the line of railroad represented on Exhibit "Profile and Map W. Va. S. L. R. R. No. 4, Oct. 15, 1900, Mouth of Buckhannon River to Belington," between the mouth of Buckhannon river and the mouth of the Middle Fork river, and states, "There are no two curves or no two tangents of the same length." Mr. Norton corroborates the testimony of Engineer King as to the difference of location in October, 1900, and that in 1902. J. W. Wheeler testified that he saw the line that was run in the fall of 1900. Saw some stakes with figures on them, but did not understand them. Was asked, "About how far from the river was this line, as you observed it, located?" Ans. "Places I should judge to be a hundred feet or over; other places not near so far." He says a line was run through his land about September, 1902. "I do not know whether it was Mr. Lemley or his assistants. We all then understood and called them the B. & O. engineers;" that "just previous to that line being run there were other engineers had cut a line through there. We called them Wabash engineers, and they had run a line through above this old line, as we called it, or the West Virginia Short Line. About the same time the B. & N. engineers was running a line, and met not far from my line above, I think. My information from what we called the Wabash engineers, then some time after, in September, I presume, the B. & O. engineers, according to my information, runs a line over nearly, if not quite, the same ground or line that the Wabash engineers run. I saw the stakes. I mean that the Wabash engineers and B. & O. engineers." He was asked to state "how far, in your opinion, is the line last run by the West Virginia Short Line Railroad Company through your land above the first line run by it in 1900." Ans. "Well, in places I would say it was 100 feet, and then there are places—two places that I should say I notice—that is not quite 100 feet. That is just guessing at it; I never measured it."

On cross-examination, he is asked if he made an actual survey, or was his statement based on anything else than his recollection of the first line, and his belief in this variance was from such recollection of it. Ans. "I did not make any survey, but I seen the lines recently, and most of the old lines can be traced to-day."

It is very clear from the evidence that the short line company was resting satisfied with the advantage of priority of right to condemn it had acquired in the location of its line in October, 1900, until the Belington & Northern was proceeding to establish and locate its line above that of the short line, when it immediately took steps to relocate its line through the land of defendant Wheeler. The great preponderance of the evidence is that this location of September, 1902, is from 47 to 100 feet above the location of October, 1900, and is in fact a new location. In its attempt to strain its location of October, 1900, sufficiently to prevent the location of a competing line, it found itself so far above it as to amount to an abandonment of said location, and occupying ground without authority. There is no evidence directly on that point, but it appears from the record almost certainly that the location of the Belington & Northern would interfere but little, if any, with the location of the short line of October, 1900. The relocation by the West Virginia Short Line in 1902, and its proceedings to condemn it as relocated, is an abandonment of its right of priority in the line located by it in October, 1900, if, indeed, it had not already lost its priority of right to condemn by its prolonged inactivity. This question does not arise in this case, as the new location of 1902 of the West Virginia Short Line Railway Company was never adopted by corporate action, and that of the Belington & Northern was duly adopted, giving it the right of priority over the line attempted herein to be condemned by the two companies respectively so far as the lines conflict; but the circumstances of the case strongly suggest the question whether the West Virginia Short Line Railroad Company exercised reasonable diligence in prosecuting its work while holding its right of way, to the exclusion of all others. In this day of the rapid development of the resources of the state of West Virginia, when the policy of the state is to press to the front her commercial and industrial interests in active competition with the progress of her sister states; considering the topography of her territory: that railroads in the mountainous portions of the state can only be constructed along the streams, and on many of which there is room for no more than one line on the same side of the stream—would it not be decidedly against the public interests to permit a railroad company, by taking the initiatory steps or proceedings by adopting a location for its line simply by making a preliminary survey, or even a permanent survey and location of its line, and

to stop all proceedings, holding the location to be the exclusion of all others, closing to those who would gladly open up the way the only practical route, thus cutting off all competition, and creating a monopoly, so far as that particular section of the state is concerned? Is it not really an abuse of the right of eminent domain? Do not the public interests demand that a corporation thus invested with the strong arm of the law should use the power conferred with due regard to the rights of the public, and use diligence in prosecuting the work it has been, by its charter, commissioned to perform, and which it has undertaken, presumably for its own profit? In this excellent work, Elliott on Railroads, vol. 2, p. 927, we are told, "When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the corporation by which it is done has a prior claim to the right of way for a reasonable time;" in 2 Lewis on Eminent Domain, § 306, it is said, "A priority once obtained in any of the ways or cases above specified may be lost by neglecting to follow it up, or by permitting another company to occupy and build over the same property." In the case at bar there was a lapse of more than two years from the date of the adoption of its line by the West Virginia Short Line Company, from the time that of Buckhannon river to Belington, by taking any steps to procure the right of way either by purchase or condemnation. It then inspired thereto by the action of a competing railroad company in taking measures to acquire the right of way through the same property. There is no error in the judgment, and it is affirmed.

Va. 558)

STATE v. JACKSON et al.*

Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

TITLE—SALE—FORFEITURE TO STATE—EVIDENCE—TAX DEED—REDEMPTION—GRANT FROM STATE—SECOND SALE—ESTOPPEL—PAYMENT—PRESUMPTION—TRIAL BY JURY.

A record of a proceeding to sell land as forfeited to the state for nonpayment or non-payment for taxes, which condemns the land to be sold as forfeited, in which it appears that a deed issued from the state to a certain person, that by specific conveyances the land had been transferred to the ownership of another person, is prima facie evidence, against strangers to the land, of the fact of forfeiture, and also that a grant issued to such person, and that title vested in the person in whose name the land was condemned as forfeited.

Under section 29, c. 31, Code 1899, a tax deed is conclusive evidence against strangers to the land sold to show that such title as was sold to the delinquent was vested in the person in whose name it was sold.

In 1884, in a proceeding by a commissioner of school lands to sell forfeited land, a decree was made ordering the owner to redeem, and declared the land redeemed and released from forfeiture, and ordered that the owner should also occupy the land as a purchaser from the commissioner.

Such owner took not only the title redeemed, but also any other title vested in the state at the time of the redemption.

4. One purchasing land sold as forfeited in a proceeding under chapter 105 of the Code of 1899 holds a grant from the state, within the meaning of section 3, art. 13, of the Constitution, so as to take under that section the benefit of another forfeited title.

5. Section 18, c. 105, Code 1891, giving all the state's title to forfeited land redeemed or purchased, makes a legislative grant from the state, within the meaning of section 3, art. 13, of the Constitution, to enable a person coming within that statute to take forfeited titles under that section of the Constitution.

6. One who seeks to get the benefit of a forfeited title to land, under article 13, § 3, of the Constitution, must prove the payment of taxes as therein required.

7. One asking to make redemption of forfeited land under section 17, Code 1899, c. 105, must prove that at the time when his land became vested in the state he held a good and valid title, legal or equitable, superior to that of any other claimant, whether that claimant be the state, holding a superior title by forfeiture or otherwise, or an individual.

8. When land has been once sold as forfeited under a proceeding under chapter 105 of the Code of 1899 to sell forfeited land, the state cannot, in a later proceeding, under that chapter, again sell the same land as forfeited under another title. The record of the first sale is an estoppel against the state, preventing such second sale.

9. When, in a proceeding to sell land as forfeited, there is a decree of redemption, with a saving clause as to those tracts protected from the effect of redemption by section 3, art. 13, of the Constitution, the person redeeming, when his redemption comes in question, is not called on to prove the location of the tracts so protected before he can avail himself of his redemption.

10. In a proceeding under chapter 105 of the Code of 1899 to sell forfeited land, a decree allowing redemption by payment of taxes is prima facie evidence of redemption as to third parties, and cannot be collaterally attacked for error on account of the sum paid to redeem being less than the amount really due the state.

11. There is no presumption of payment of taxes arising simply from the duty of payment.

12. If a senior title to land is forfeited, and then transferred, by section 3, art. 13, of the Constitution, to the owner of a junior title, and the junior title itself afterwards becomes forfeited, a sale by the state, in proceedings under chapter 105 of the Code to sell the land as forfeited under the senior title, will pass to the purchaser both titles.

13. Forfeited land cannot be redeemed from forfeiture if already the state's title by such forfeiture has been transferred to another title under section 8, art. 13, of the Constitution.

14. The state cannot sell land that is forfeited by a suit under chapter 105 of the Code, if the title has already been transferred to a claimant by operation of section 3, art. 13, of the Constitution.

15. Trial by jury is a matter of right, under Code 1899, c. 105, § 18, in a proceeding by the state to sell forfeited land, when conflicting titles to land are to be tried, if there is a controversy of fact dependent on oral evidence, but not where there is no controversy of fact, or where that controversy depends entirely on documentary evidence.

(Syllabus by the Court.)

Appeal from Circuit Court, McDowell County; Jos. M. Sanders, Judge.

Bill by the state against Jane Jackson and others. Decree for defendants, and the state appeals. Affirmed.

Herndon & Smith, Vinson & Thompson, T. L. Henritze, and A. Burlew, for the State. Rucker, Anderson & Hughes, J. L. Hamil, Price, Smith & Spilman, and Molohan, McClintic & Mathews, for appellees.

BRANNON, J. The state of West Virginia filed a bill in chancery in the circuit court of McDowell county in 1899 against Jane Jackson and others, stating that on March 1, 1860, the commonwealth of Virginia issued to Joseph Jackson and John C. Harrison, Jr., a grant for 4,610 acres of land, and that it had been omitted from the land tax books for more than five years since 1869, and that it had thus become forfeited and vested in the state, and prayed that said tract be sold as forfeited land. W. M. Ritter filed a petition asking to be admitted as a party defendant in the case, and he was admitted as such. Ritter's petition set up that the tract of 4,610 acres was not vested in the state, but that he was the owner of it by good and valid title, superior to the claim of the state and every other claimant thereto, and that said land was not subject to sale as forfeited land vested in the state; and the petition resisted such sale at the instance of the state. Ritter's petition states that Virginia, by patent, March 4, 1795, granted to Robert Morris a tract of 320,000 acres, and that a specific portion of it (50,000 acres) had, by conveyances specified in the petition, come to the ownership of Ritter. Ritter's petition further states that while Samuel Cameron was owner of the 50,000 acres, in 1869, it was sold for taxes in his name and purchased by the state, and not redeemed, and that it had ever since, up to the year 1885, been omitted from the taxbooks, but was charged thereon for the year 1885 in the name of Max Landsburg, who had become owner of said 50,000 acres under Cameron. Ritter's petition contested the validity of the sale to the state in 1869 for some defects in the tax-sale proceedings, and avers that its omission from the landbooks after 1869 did not forfeit it for nonentry because of the state's purchase in 1869. His petition stated that Henry C. Auvil, commissioner of school lands, had on the 28th of July, 1882, filed a report and petition in the circuit court of said county to the effect that the Morris tract of 320,000 acres had been forfeited to the state for omission to enter it on the taxbooks from 1866 to 1877, and prayed that the whole tract be sold as forfeited, and vested in the state. Landsburg was a defendant to Auvil's petition, and filed an answer in 1882 asking to be allowed to redeem the tract of 50,000 acres, he claiming the same; and on the 6th of April, 1883, a decree was made adjudicating that the title of Landsburg to the 50,000 acres was superior to that of other claimants, except the junior claimants protected from the effect of redemption by law, and allowing Landsburg to redeem. In this proceeding, upon Auvil's petition, the court di-

rected a large number of junior claimants to be summoned in to show their title, and referred the case to a commissioner to report upon their titles, and to report what taxes they had paid on the land which they claimed. The Jackson-Harrison tract was not mentioned among these tracts claimed by junior claimants, nor was any owner of it made a party. A decree later recited that it was impracticable to pass on the rights of so many claimants, and dismissed them without decision of their rights, but protecting their rights from the effect of the proceeding. On the 9th of July, 1884, a decree was made in the Auvil case which fixed the sum to be paid by Landsburg to redeem the 50,000 acres at \$2,200.62, after deducting taxes which had been paid by junior claimants, and the decree declared Landsburg entitled to redeem by the payment of that sum; and it condemned the 50,000 acres as forfeited and liable to sale, and directed its sale, on failure of Landsburg, to pay within a fixed time. On the 8th of October, 1884, a decree was made in the Auvil case stating that Landsburg had paid the money required to effect a redemption, and, with the consent of Auvil, decreeing that, in addition to the privilege to redeem given him by a former decree, Landsburg be "allowed also to occupy the attitude of a purchaser of said 50,000 acres from Auvil, commissioner, for said sum; * * * the court treating said 50,000 acres as the excess of purchase money above taxes, damage, interest, and costs." The decree "ordered that the title of the state to said 50,000 acres (subject to the qualifications hereinafter stated) be, and is hereby, released to the said Landsburg, and the said tract of land is hereby fully exonerated and released from all forfeitures and former taxes whatsoever. But this order shall in no wise affect or impair the rights, titles, and claims of any claimant within the boundary of said 50,000 acres whose titles and claims are protected under the Constitution and laws of this state; but the titles and claims of such claimants shall remain as valid as if this order had not been entered."

Ritter's petition set up the said proceedings in the Auvil case, and relied upon them as an adjudication preventing the state from claiming that the 50,000 acres, which covered the Jackson-Harrison 4,610-acre tract, was forfeited and subject to sale, and relied upon the Auvil proceeding as operating to bar the state from claiming the land in any way. Ritter claimed that the state had no title to the 4,610 acres. Ritter's petition further states that a part of the 50,000 acres had been sold from Landsburg by decree of the Circuit Court of the United States, and conveyed under such sale to Henry McCormick; that all taxes had been paid on the land after the redemption in 1884, except that it was returned delinquent in the name of Landsburg for taxes of 1895, and sold in 1897 for such taxes, and had been conveyed under

that tax sale to McCormick. McCormick had conveyed the land to Ritter. Ritter claimed that, when the Jackson-Harrison grant issued for the 4,610 acres, the state of West Virginia could not confer any title by that grant, for the reason that said 4,610 acres was covered by the 50,000 acres, which was part of the old Morris grant, of 1795, of 320,000 acres. Ritter claimed that, though the Jackson-Harrison grant passed no title, yet any title that might be supposed to arise from its forfeiture inured to the benefit of the owners of the 50,000 acres by force of section 3, art. 13, of the Constitution, by reason of the owners of that land having paid taxes for five years after the year 1865, and that thus any shadow of title under the Jackson-Harrison grant was transferred to the owners of the 50,000 acres, and did not belong to the state, to be sold by it. Ritter claimed to own any shadow of title conferred by the Jackson-Harrison grant, and denied the right of the state to sell it. The Jackson-Harrison land was assessed with taxes for 1865 to 1870, inclusive, and was delinquent for the last four of those years. It does not appear that the taxes for 1865 and 1866 were paid. From 1871 to 1879, inclusive, half of the 4,610-acre tract of the Jackson and Harrison 2,305 acres was charged on the taxbooks, and four times sold to the state for some of those years. This half was omitted from the taxbooks from 1880 to 1895, inclusive. It vested in the state four times by purchase for taxes, and later was forfeited for nonentry several times, viewed without regard to Ritter's rights. In November, 1876, it became irredeemable, and vested in the state as tax purchaser; and, if thereafter chargeable with taxes, it vested in the state, for omission from the taxbooks, not later than January 1, 1885. The other half of the 4,610 acres was never on the taxbooks after 1870, and was several times forfeited for omission; the first forfeiture being complete January 1, 1876.

H. A. McCurdy, claiming the Jackson share of the 4,610 acres granted to Jackson and Harrison, filed an answer in the said suit of *The State v. Jane Jackson*, setting up his claim, admitting the forfeiture of the tract to the state, and asking to be allowed to redeem. W. R. Thompson and T. J. Pritchard, as trustees, claiming the Harrison share of the 4,610 acres, filed their petition in the suit of *State v. Jane Jackson*, admitting the forfeiture of said tract, and asking to be allowed to redeem. The petition charged that the sale to the state in 1869 of the 50,000 acres had vested it in the state, and alleged that taxes had been paid on the 4,610-acre tract from 1865 to 1879, and that by reason of such payment the state's title to the 50,000 acres had been transferred to the owners of the 4,610 acres by the Constitution (article 13, § 3). Thompson and Pritchard also filed their petition, making practically the same defense as did McCurdy, and claiming that

the 50,000 acres was forfeited, and that the forfeited title vested in the owners of the Jackson-Harrison land. Thus the state claimed the 4,610-acre tract by forfeiture, and sought to sell it; and Ritter claimed that the state had once sold this same land to Landsburg under the forfeiture of the Morris title, and that he owned the 4,610 acres because by forfeiture it was vested in the state, and that the title to it had been transferred from the state to the owners of the 50,000 acres; and McCurdy and Thompson and Pritchard claimed the 4,610 acres, and also title to its extent under the Morris grant, because of its forfeiture and inurement or transfer by the Constitution to the owners of the Jackson-Harrison grant. Ritter resisted the redemption of the 4,610 acres. It is a title contest between the state and Ritter, and between the state and McCurdy and Thompson and Pritchard on the other.

The court referred the case to a commissioner to report whether the 4,610 acres was forfeited, and in whose name, and, if forfeited, in whom the title was at the date of the forfeiture, and what person was entitled to redeem, and any other pertinent matter. The commissioner's report found that on the 4th of March, 1795, a grant issued to Morris for 320,000 acres, and that by regular conveyances 50,000 acres of it had been passed to Ritter, and that the 4,610 acres was within the 50,000 acres, and that no evidence had been adduced to show that, when the grant to Jackson and Harrison issued, the 50,000 acres had been forfeited, and that when that grant issued there was no title in the state to pass by it to Jackson and Harrison, and that the grant conferred no title on them. Said report found that the 4,610-acre tract had been assessed with taxes for 1867 to 1870, inclusive, and was delinquent for those years; that half of it was assessed with taxes from 1871 to 1880, inclusive, and it was sold in 1875, 1877, and 1879, and that in 1881 it was sold for the taxes of 1879, and purchased by the state at all the sales; that in 1897 the whole tract was sold to the state for taxes of 1896; that this half became irredeemable and vested in the state by reason of the first tax sale in November, 1876, and it was thereafter properly omitted from the taxbooks, because vested in the state by purchase for taxes. The report found that the other half of said 4,610 acres was omitted from the taxbooks from 1871 to 1896.

The report found that the whole tract was, by said tax purchase by the state of one half, and such nonentry of the other half, vested in the state. It found that the whole tract had vested in the state. The report found that on the 8th of October, 1884, in the proceeding in the name of Auvil, Commissioner of School Land, v. Landsburg, Landsburg had redeemed said 50,000 acres from any forfeiture accruing prior to that date, and had paid the taxes thereon subsequently.

The report found that no taxes had ever been paid on the 4,610-acre tract, and that its owners could not and did not take the benefit of the forfeiture of the 50,000 acres.

The report was excepted to by McCurdy and Thompson and Pritchard. One exception was because the report did not state that the 4,610-acre tract was not assessed with taxes for the years 1865 and 1866. Another was because the report found that half the 4,610 acres was sold in 1875 for the taxes of 1871, 1872, and 1873, as there was no evidence thereof. Other exceptions read as follows: "(5) The commissioner erred in finding that Max Landsburg redeemed the whole of said 50,000-acre survey in 1885." "(7) Commissioner erred in finding that W. M. Ritter was entitled to the whole of the 50,000-acre tract, including the 4,610 acres, and that the state had no right to proceed against it for the benefit of the school fund. (8) The commissioner erred in finding that the claimants of the Jackson and Harrison grant were not entitled to redeem the land embraced in said grant, and in finding that their title was not superior to that of any other claimant. (9) Because the commissioner failed to state that he has certified up with the report all the evidence before him upon which the report is based." The court made a decree dismissing the bill of the state, and refusing leave to McCurdy and Thompson and Pritchard to redeem the tract of 4,610 acres, and they appealed to this court.

As to the exception to the report for failing to state that the 4,610 acres was taxed for 1865 and 1866, it seems to be well taken; but it is immaterial, because payment of two years' taxes would not save it from default afterwards, or transfer the forfeited Morris title to the Jackson-Harrison title. If paid for those two years, it would only be one year's payment after 1865, whereas the Constitution requires five successive years' payment after that year. And there is no evidence of any payment for either year.

As to the exception that the report found half of the 4,610 acres was sold in 1875: An abstract certified by the clerk of the county court proves the fact.

As to the exception because the report found that Ritter had title to the whole 50,000 acres, and that Ritter was entitled to it, including the 4,610 acres, and that the state had no right to proceed against it for the benefit of the school fund: It is said that Ritter produced no grant from Virginia to Morris, and produced no title papers to show title in Ritter to the 50,000 acres, part of the Morris grant, and that, for want of documentary evidence, the finding that Ritter was entitled to the 50,000 acres is erroneous. This, of course, is an important matter in the case. Ritter's counsel seek to meet this

objection by saying that Ritter's petition, read as an answer, states the existence of the documents, and that its statement is taken as true without proof, there being no replication to it, and cite *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670. An answer is taken for true against a plaintiff in the absence of a replication, but the answer of one defendant is not thus taken for true against another defendant. *Hogg, Eq. Proced. § 447*. But how do we know that there was not such evidence before the commissioner? The presumption holds that there was. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357. Counsel for Ritter meet this point by saying that no exception to the commissioner's report was made on this score, but that the matter is brought up in this court for the first time, and that, if this court heeds it, it will work a surprise upon Ritter, which ought not to be tolerated, because, if it had been presented by the proper exception in the lower court, the objection would have been met by the production of the documents. I think this argument so far legitimate as to justify this court in scrutinizing the exceptions closely to see whether, when properly construed, they gave fair warning to Ritter and the court of the want of such documentary evidence. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862, tells us that exceptions are of the nature of special demurrer, and the party complaining of the report must point out the errors by his exception with reasonable certainty, so as to direct the mind of the court to them. Look at exceptions 5, 6, 7. Construe them in connection with the fact that the appellants contend that in this case Landsburg in 1884 did not redeem the whole 50,000 acres, but only a part thereof, basing this theory on the fact that he paid only the residue of taxes on it after deducting taxes paid by junior claimants, and that this amounted to a redemption of only part. The answer of Thompson shows this. Look at the repeated use of the word "whole" in said exceptions, and we are compelled to think that those exceptions were not based on the want of documents to show Ritter's title, and did not call for them, and did not have them in mind, and that the exceptions did not fairly call the attention of anybody to the want of them. They did not contest the evidence to prove Ritter's title, but only that he had redeemed only part of the tract. Therefore, as to this objection, said exceptions are abortive. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357. But let us say that those exceptions did call the title evidence in question. We hold that the report finding title in Ritter is justified by the record. The record of the proceedings in the Auvil case established that a grant did issue to Morris, and that that title had come to Landsburg, and was in him in 1884, at the date of his redemption, and that he became invested with that title both in the character of re-

emer and purchaser. I do not forget that appellants were not parties to that proceeding. I know that it is a rule very fixed at "an adjudication of a fact in one case not evidence of the fact in another case against persons not parties to the former or privity with them." *Chevallie v. Twiggs*, V. Va. 476. "No party can be estopped or any way prejudiced by any judgment or decree if the record shows on its face that had no opportunity to be heard in opposition to the entry or decree." *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. 809. Under that we may be asked how we can say that against those claimants of the 4,610 acres the record proves that there was a Morris patent, and that title under it went down Landsburg. I answer that the cases set that a proceeding to sell forfeited lands, which the land is condemned to sale for forfeiture, is *prima facie* evidence of the fact of forfeiture. *Strader v. Goff*, 8 W. Va. 214; *Coal Co. v. Howell*, 38 W. Va. 489, 15 S. E. 214; *Hitchcox v. Rawson*, 14 Grat. 535 (opinion); *Smith v. Chapman*, 10 Grat. 446. They show that such record cannot be collaterally attacked. Right or wrong, those cases give such proceedings such effect. I know no reason why the record would not be evidence of redemption even as to strangers to it. It will be said, however, that those cases only establish *prima facie* the fact of forfeiture, and that they do not justify the finding from such a record that the Morris patent existed, and that documents pass the title down the line from Morris to Landsburg. I reply that, as the record establishes the fact of forfeiture, we must inevitably say that something was forfeited, and, looking to the record, we find what that was, namely, a tract granted by patent to Morris. That is the matter stated in the petition of the Commissioner of school land, and otherwise recited in the record, and that is the substance on which the decree operates, and to which it relates. And that decree found and adjudged that conveyances had carried the Morris title to Landsburg, since it declared expressly that Landsburg owned the land derivatively from Morris by title superior to all others. Documents exhibited in this case show that part of the 50,000 acres was conveyed from Landsburg to McCormick, and that the whole tract was sold for taxes in 1899 to McCormick, and conveyed to him by tax deed, and that McCormick conveyed the land to Ritter. The tax sale was in the name of Landsburg. By chapter 31, § 29, of the Acts of 1899, that tax deed is made evidence against everybody that the material facts therein recited are true, and that the taxes assessed passed to the purchaser. Landsburg is stated in that deed to have been assessed with taxes, and this deed confirmed his title. So Ritter was properly regarded as invested with the Morris title, so far as the documentary evidence is concerned.

What title do the decrees above mentioned made in the Auvil case confer on Landsburg? They gave back to him, by force of the redemption, the Morris title to the 50,000 acres; but at that time the Jackson-Harrison tract of 4,610 acres had become forfeited by reason of sales to the state and omission as above stated. Did the said decree of redemption confer upon Landsburg title to said 4,610 acres? A decree not merely allowed redemption to Landsburg of the Morris title, and released the land under that title from all prior forfeiture, but it also allowed him to hold the character of purchaser of said 50,000 acres, as if he had purchased under the decree. I shall not say that a mere redemption under Code 1887, c. 105, § 14, would go further than simply to restore to the owner redeeming land his own title, and it may be that that feature of the decree according to Landsburg the character of a purchaser would not have any operation. True, it may be said, under *Smith v. Chapman*, 10 Grat. 446, that that would be error only, not liable to attack collaterally, and there is some force in this position; still, if there was no law to warrant such a provision, I would hesitate to say that it would bind the claimants of the 4,610 acres. If Landsburg held the character not only of a redeemer, but of a purchaser, he would get not merely the Morris title by redemption, but also any other title by forfeiture or otherwise vested in the state, including the Jackson-Harrison title, by the letter of section 15 of said chapter 105, Code (Acts 1891, p. 289, c. 94). *Coal Co. v. Howell*, 38 W. Va. 489, 15 S. E. 214. The proceeding to sell forfeited land is statutory, and nothing can be done not warranted by the statute, and I repeat that I would doubt the intrinsic force of the provision in said decree alluded to to give Landsburg the character of a purchaser. *Twiggs v. Chevallie*, 4 W. Va. 463. But the question of the inherent effect of that clause of the decree is not all important, since Code, c. 105, § 19, as found in chapter 94, p. 291, Acts 1891, and edition of 1891 of the Code, says: "And when in proceedings heretofore had under this chapter, for the sale of forfeited lands, the former owner shall be permitted to redeem or purchase the same from the forfeiture thereof by the payment of the taxes, interest, damages and costs, due to the state thereon, and fixed and determined by the decree of the court in which such proceedings were pending, and has actually paid the same, or shall within one year after the passage of this act pay the same as required by such decree, such payment shall be valid and binding on the state, regardless of the irregularity of the proceeding or of any want of jurisdiction in the court to render such decree; and whatever right, title or interest the state may have had in such lands shall, by virtue of such decree and payment, be transferred to and be re-vested in such former owner." Was this provision made

for this case expressly? At any rate, it fits the case. It validates that feature of the decree of redemption according to Landsburg the character of a purchaser, carrying with it the effect of the decree to pass to him all state title to that particular land, however derived; and, besides making the decree have that effect, the act itself is a legislative grant of all the state's right in that land to Landsburg. *Cecil v. Clark*, 44 W. Va. 676, 30 S. E. 216; *Wild v. Serpell*, 10 Grat. 405 (point 3). This retroactive feature as to redemption is omitted from the section as it reads in chapter 24, p. 66, Acts 1893 (Code 1899, c. 105, § 19), and section 17 gives redemption only the effect of reinvestment of the former title; but the act of 1891 has had its effect, and was likely not unwise legislation, being intended to give a person paying all taxes demanded by the state under one title adverse titles vested in it, to give rest and peace among conflicting titles. So it is the decree of redemption and purchase in that *Avuil* case and that act of 1891 gave, of their own force, title emanating from the state—made a grant, without calling on Ritter to show a grant to Morris or to connect with the Morris grant. *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214, tells us that a purchaser under a decree selling forfeited land, or one tracing right from him, connects with the state. His purchase is a grant from the state. So is the grant made by the act of 1891. Therefore Landsburg had such grant as enabled him to take title under the Jackson-Harrison grant by virtue of the Constitution (article 13, § 3). That section provides for giving the state's title to three classes of persons; the second class being persons claiming under a grant from the state, and paying taxes for five successive years after 1865. When Landsburg redeemed he paid taxes for more than five years. This would give him the Jackson-Harrison title, which was then forfeited. And by payment afterwards Landsburg would get that title, if afterwards forfeited. Being a purchaser, he would get all the state title by forfeiture or otherwise, by the Constitution, and by section 12, c. 105, of the Code, as found in chapter 95, p. 259, Acts 1882, and Code of 1887, in force at the time of Landsburg's redemption, and as that section still is. Thus Landsburg got the Jackson-Harrison title, both by statute and Constitution, under that decree.

As to the contention that the order of redemption excepted junior claims, and that the Jackson-Harrison is a junior claim, and that the redemption does not affect it, it is only necessary to say that that land was not before the court in the proceeding among the junior claims represented by parties to it, and, further, that the order excepted from the effect of the redemption only those junior claims which had paid taxes for five years after 1865, so as to have the benefit of the forfeiture. This could not save the Jack-

son-Harrison title. It had not paid any taxes. It follows from what is said above that McCurdy and Thompson and Pritchard, claiming under the Jackson-Harrison grant, had no right to redeem.

The statute touching redemption demands that the person asking it shall prove that at the time of the forfeiture of his title "he had a good and valid title, legal and equitable, superior to that of any other claimant," because the intent was to drown the inferior title, and not let it be redeemed, to foment litigation with a superior title, whether in the state by forfeiture or in private ownership. This Jackson-Harrison claim could not answer this demand, because there was the older Morris title in Landsburg. And if it was in the state, not yet redeemed, it would be not dead, but a living, superior title. That the state held the title makes no difference as to an inferior title asking redemption. Moreover, in connection with Landsburg's redemption and purchase, I will add that by chapter 105 of the Code of 1899, § 6, it is provided that, "if at any time during the pendency of such suit, it shall appear to the court that any part of any tract of land in question therein has been sold by the state in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person, under article 13 of the Constitution of this state, the bill, as to such part, shall be dismissed." Landsburg had purchased, paid subsequent taxes, and held the 4,610 acres under the Constitution. The statute would justify the dismissal of this suit without a sale, as the state had once sold this soil. I do not say that it would justify a refusal of redemption by one entitled to redeem.

It is claimed that the redemption in 1884 by Landsburg is void for the reason that the whole 50,000 acres was not redeemed, but only 26,000 acres, and that the part redeemed was not defined by a survey and plat, as required by chapter 105, § 14, of the Code of 1887, and *State v. King*, 47 W. Va. 437, 35 S. E. 300. This argument rests on the fact that a great number of adverse claimants of parts of the Landsburg 50,000 acres had been summoned into the case; but the court did not try their rights, but dismissed them from the suit, and then ascertained what taxes Landsburg owed on the whole 50,000 acres, adopting the process of charging him by acreage with taxes on so much as was not claimed by adverse claimants, deducting taxes paid by them, and by this process charged him with taxes on 26,000 acres, out of the whole 50,000 acres, with the proviso that the redemption should not impair the title of any claimants protected under the Constitution. Now, this is nothing but a decree of redemption of the whole 50,000 acres, with only a saving clause in favor of claimants made by the statute and Constitution. It is not a redemption with specific exceptions. In letter and intent, the decree is a redemption of

the whole tract. If this decree is void, then any decree of redemption of a whole tract, containing such a saving clause, simply restraining the decree from injuring other claimants, like a clause of "without prejudice," is void. It is not error to make that proviso, as it only declares what section 17 of chapter 105, Code 1899, declares. Very different was the King Case, cited above, in which in express words only a part of the tract was redeemed by specification of quantity, and that part in no wise defined. For these reasons, the rule of *Stockton v. Morris*, 39 W. Va. 432, 19 S. E. 531, cited by counsel, does not apply. That rule is that, where there is an inclusive grant, its owner, suing in ejectment, must prove that the defendant is not on reserved land. It therefore cannot be successfully contended that Ritter must prove just what part was redeemed and what excepted.

It is argued that the redemption is invalid because the sum paid by Landsburg was too little. If there is error in this, how can strangers complain? Not even the state could now complain. In collateral proceedings strangers cannot assail the decree for such error. *Hall v. Hall*, 12 W. Va. 1; *Smith v. Chapman*, 10 Grat. 445; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216. *Hall v. Swann*, 39 W. Va. 353, 19 S. E. 509, holds that a decree of redemption is final, and works a redemption though the amount paid is too small.

But it is claimed that as Landsburg's 50,000 acres was sold for taxes in 1869 to the state, and was thereafter omitted from the taxbooks, and the tract thus vested in the state and was forfeited, the title to it passed to the benefit of the Jackson-Harrison title, under section 3, art. 13, of the Constitution. Doubtless, if, before Landsburg's redemption and purchase, the Jackson-Harrison title had become invested with Landsburg's title by reason of its forfeiture, Landsburg's redemption would be without effect. For Ritter it is contended, in answer to the claim that Landsburg's title was transferred to the Jackson-Harrison title, that the tax sale in Landsburg's name to the state in 1869 is void, and vested nothing in the state, because the sale list was not returned to the clerk's office within 10 days, and because no note of its return was made in that office, and because the sheriff's affidavit was not signed by him, and because the affidavit was not sworn to. *McCallister v. Cottrille*, 24 W. Va. 173. As to forfeiture for omission after the purchase by the state, it is answered for Ritter that the law forbade the change of any land after its purchase by the state, and that this would prevent the forfeiture for nonentry; and for this position counsel for Ritter rely on *Sayers v. Burkhardt*, 29 C. C. A. 137, 85 Fed. 246. As these matters are being considered in another case before the court, and are not necessary for the decision of this case, though pertinent to it, I pass them without discussion, for the reason that the Jackson-Harrison land

clearly did not pay taxes for five years after 1863, so as to claim the benefit of the forfeiture of the 50,000 acres, if forfeited it was. As stated above, the Jackson-Harrison land was charged from 1865 to 1870, inclusive, and returned delinquent for the last four of those years. Half of it was charged to Jackson for 1871 to 1879, inclusive, then omitted until 1896, and delinquent in 1872 to 1879, inclusive. The other half was omitted from 1871 to 1875, inclusive. So it is clear that this land did not pay taxes to enable it to claim the inurement to it of Landsburg's land. It was purchased by the state in 1875 for taxes of 1872, 1873, 1874, and again for years subsequent to 1879. It is incumbent on one seeking to take the benefit of the forfeiture of another's land under any one of the three classes provided for in article 13, § 3, of the Constitution, to establish facts which will bring him within one of those classes. He holds the affirmative. He is claiming title. He claims a grant created by the Constitution, and must prove the facts to give him that grant or transfer. It is claimed that the Jackson-Harrison title took the benefit of the forfeiture of the Landsburg land under the second and third classes specified in the Constitution. Under either class the claimant must prove payment of taxes for five years. It is argued that, as to taxes from 1865 to 1870, no sale appears, and that the continuance of the land on the books from year to year within that period affords a presumption of payment. Why so? The land would continue on the books till sale, though delinquent for any year. It is said that, as it does not appear that the land was sold for taxes for those years, the presumption is that such taxes were paid, because section 6, c. 31, Code, 1868, says: "After such sale as in the succeeding section is mentioned, if any real estate be not sold as therein required, it shall be presumed that such taxes * * * were paid." That presumption is raised merely to charge the sheriff in favor of the state, I think. At any rate, the record contains no list of sales for those years. If it did, and this land was not on it, that presumption would prevail, but in the absence of that list no such presumption holds. It is argued in this case, however, that, because it is a taxpayer's duty to pay his taxes, the law assumes that he has paid them. Such a proposition is repelled in this instance by the delinquency appearing for four of those years. But the law raises no presumption of payment of taxes. "No presumption of payment arises from the duty of the property owner to make it." 27 Am. & Eng. Ency. L. (2d Ed.) 753. *Smith v. Tharp*, 17 W. Va. 221, sustains this position. For these reasons, the claim of the Jackson-Harrison title for the inurement to its benefit of the forfeiture of the Landsburg land must be refused. The Jackson-Harrison title never paid any taxes, and was clearly itself forfeited, before Landsburg's redemption and after it. It was for-

felting again and again. Its forfeiture is admitted by appellants.

Again: Say, merely for argument, that the Jackson-Harrison title got the Landsburg title by transfer under the Constitution. The answers admit that half the Jackson-Harrison land was forfeited for omission from 1871 to 1875, and its forfeiture complete at the close of 1875, and the other half was sold to the state for taxes from 1871 to 1878, or some of those years, and forfeited for omission from 1880 to 1895, inclusive. Now, as the Landsburg title paid taxes before and after redemption, would it not get the forfeited Jackson-Harrison title as such purchaser?

The complaint of the appellants is that the court would not allow them to redeem the Jackson-Harrison land; but, as above shown, when they asked the redemption the Jackson-Harrison title had been transferred, because of its forfeiture, to the Morris and Landsburg title, and there was no title in the state for appellants to redeem, as their title was gone. The state had, by Landsburg's redemption, coupled with said statute of 1891, and section 3, art. 13, of the Constitution, made grants of it to the owners of the Landsburg title. "Non dat qui non habet." *State v. Collins*, 48 W. Va. 64, 35 S. E. 840. Besides that, the very letter of section 17, c. 105, Code 1899, demands that at the time of forfeiture the redeemer have "good and valid title, legal or equitable, superior to that of any other claimant." Even if at that time the Landsburg title was forfeited and vested in the state (it could not be vested in the owner of the Jackson-Harrison title), it was vital and instinct with life; an older and better title in the state, as proprietor; not extinct, though lost to its original owners; to be granted out by the state to some one; and the state would not allow redemption of a title inferior to its title because it would thus be let loose to plague the superior title. The statute quoted above gives redemption only to the superior title.

After redemption, Landsburg paid all taxes except for 1895. For that year's taxes the Landsburg land was sold in 1897 in the name of Cameron, then its owner, and purchased by McCormick; and, if the Jackson-Harrison land was not then vested in the state, it went to McCormick by virtue of his tax purchase, as the Jackson-Harrison land was not on the taxbooks for 1895, and McCormick would get not only the title sold, but any other not on the books.

Great complaint is made by the appellants from the fact that a demand for a jury was not granted by the court, which action is said to be error, by reason of section 18, c. 105, Code 1899, which reads thus: "In every such suit brought under the provision of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and

boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein; and the court, in its discretion, may at any time, regardless of evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by jury. And every such issue shall be proceeded in, and the trial thereto shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant new trials therein as in other cases tried by a jury." The language of that section is strong to import that a jury right under it is not matter of right but of sound discretion, merely, like an issue out of chancery. The right to an issue out of chancery is different from the jury right in a court of common law. The former is a matter of discretion only—sound discretion—and it requires a clear case of abuse of discretion to reverse the decree for refusal to direct such issue, because it is only to help the chancellor decide on conflicting evidence, where he plainly needs it. *Setzer v. Beale*, 19 W. Va. 289. But the jury right in common-law procedure is under a guaranty of the Constitution preserving it in certain cases. I understand the jury right accorded by this statute to be the common-law jury right. It is true that it is in a chancery suit, and in matters purely of equity cognizance and jurisdiction the jury right does not exist; and this presents the question of the character of a suit by the state to sell its forfeited lands under chapter 105, Code 1899. Many parties are before the court, with their various titles. Is such a suit in its nature so far an equity suit as to make the jury given by the statute in question a mere discretionary issue out of chancery, or is it a chancery suit born first of this statute, not of purely equitable jurisdiction? It was unknown to equity jurisdiction before the statute. Can we call it a chancery suit to enforce a lien for taxes? No. It is not a lien which the state enforces. After forfeiture she has no lien for taxes, but owns the very land. It is a suit originated by the statute as a process adopted by the state for disposal of such land. Therefore the principle applies that, if a matter involved in the suit is of such nature as by common law would entitle the party to a jury, the Legislature cannot, by merely making it triable in equity, rob the party of his jury right. To make such an act constitutional, that right must be in some way preserved. If, when such matter is first brought within the jurisdiction of a court of equity, the Constitution gives a jury in such matter this rule prevails. *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557 (point 6); *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216 (point 2); *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801; 6 Am. & Eng. Ency. L. (2d Ed.) 974-976. Any suit by

which legal rights are settled upon matters of fact are within this rule, whatever its form. *Barlow v. Daniels*, 25 W. Va. 515. An inspection of Code 1899, c. 105, §§ 6, 8, 18, will tell us that the procedure in suits under it tries contesting adversary titles to land, to the extent necessary to reach the decree contemplated by the chapter. No instance of litigation can be suggested that is more distinctly of a legal nature, proper for a jury, than trial of competing titles to land. The party is, by the Constitution, entitled to it. When the statute originating suits of this character was enacted, the jury right was already in the Constitution. It will not do to say that, when equity has jurisdiction for one purpose, it will try all matters to give full relief. It will, if it have jurisdiction of a matter of purely equity cognizance; but this is not such a suit. It is a suit born of the statute—a new function given to an equity court, involving trial of land titles. I think, in passing, that this jury right is satisfied by an issue out of chancery, and that a proper practice would be to direct such an issue and proceed in it as in other cases. The statute says so. We therefore hold that the jury right under this statute is mandatory, because, if we do not so construe the statute, it would likely be unconstitutional. We must so construe it as to harmonize it with the Constitution. But this jury right is not an arbitrary one. It does not apply where there is no matter proper for a jury, no issue of fact. We must here remember the primary rule discriminating the functions of court and jury, which tests the jury right, expressed by the maxim, "*Ad questionem facti non respondent iudices; ad questionem legis non respondent juratores*" (to a question of fact the judges do not answer; to a question of law the jurors do not answer). There must be an issue, and that of fact, for a jury trial. There is no issue or controversy of fact calling for a jury in this case. The whole case depends on documentary evidence, raising questions of law, not on oral evidence. The answers, in a sense, contest the Morris grant, and that Ritter was connected with it. That depends on written evidence. The answer averred the sale of the Morris title to the state for taxes in 1869, and omission thereafter. Ritter's petition did not deny this. It was not an issue in the case. If it had been an issue, it was triable by documents. The answer of Thompson and Pritchard does not deny Landsburg's redemption, but asserts that it was of only a part of the 50,000 acres. This raised no issue of fact on oral evidence, but depended on a record—a matter for the court. The answers do aver that the Jackson-Harrison land was assessed from 1865 to 1870, inclusive, with taxes, and that they were paid. This was in controversy and proper for a jury, but it is settled by documents. Suppose, however, that this is not a good answer as to this point; then I say that an issue as to that

matter would have been immaterial. If decided for appellants, it would not have called for a decree for them, but a decree must have gone for Ritter, on the same principle that calls for judgment for the other party, regardless of a verdict for his opponent, under the rule that, when a verdict rests on an immaterial plea, judgment goes non obstante veredicto. The verdict has no effect. *Duval v. Malone*, 14 Grat. 24; 4 Minor's Inst. 1140. That allegation of the answer, by its own showing, was without force, if true, as it was not one calling for a jury, for the reason that the answer admits that one half the Jackson-Harrison land became forfeited in 1875 for omission, and the other in 1884; so that, even if the taxes from 1865 to 1870 had been paid, the title would have later gone to Landsburg, because of such forfeiture. Is possession relied on for any purpose under the Jackson-Harrison title? The appellants make no pretense of possession for longer than nine years, just before the suit. What could that avail? It would not give title under the first class, taking forfeited title under section 3, art. 13, of the Constitution, requiring ten years' possession and payment of five years' taxes, nor under the third class, requiring possession for five years and payment of taxes for five years. That title paid no taxes. Possession is immaterial in this case. It was not in controversy in the case. It did not continue long enough, even as claimed by the appellants, to give good title by the statute of limitations against the state or the owners of the Morris title, and, if it had so continued, the right acquired by possession would be lost because of omission from the taxbooks. A title acquired by possession, like any other, may be lost by omission from the taxbooks and forfeited. *Parkersburg Co. v. Schultz*, 43 W. Va. 470, 27 S. E. 255. Thus possession could not call for the jury.

Estoppel: The question whether that record, which I have called the "record of redemption," in the Auvil proceeding constituted an estoppel against the state, has been much discussed in the case. I have already tried to show that that record is *prima facie* evidence to show that there was a Morris grant, and that title under it was vested in Landsburg, and that it was forfeited, and that it was redeemed by Landsburg, and, I will add, purchased by him, for reasons above given. As to these points no question of estoppel arises. The record is evidence of those things. But the question does arise whether the state of West Virginia is estopped by that record from again selling that land covered by that redemption. A state may be sometimes estopped by record. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216. The state could not, in the face of that record made by her own act, deny that there was a Morris survey, and that it was forfeited, and that it was sold, or that in this case it was redeemed; but this is immaterial, as she is

not denying these facts. But does that record bar her present suit? Does it bar her from again selling under the Jackson-Harrison title the same land which she allowed to be redeemed in that redemption proceeding? Ordinarily she would not be so barred, because she makes no warranty. Her sale is only quitclaim, or even not that. But in this particular case, although that redemption was at its date only a redemption, giving back to Landsburg only his original title, yet by the said act of 1891, as found in chapter 94, p. 289, Acts 1891, and Code 1891, c. 105, § 19, the state made that redemption a purchase, and made it operate to pass "whatever right, title or interest the state may have had in such lands." And in section 6, c. 105, Code 1899, it is provided that, if it appear in a suit to sell forfeited lands, that part of the land in question has been before sold by the state as forfeited, the suit, as to the land before sold, shall be dismissed. Now, clearly, these statutes would bar the state from selling this land under the Jackson-Harrison title, and command the dismissal of the suit. And the Jackson-Harrison land was vested in the state at the date of that redemption and purchase by Landsburg, and under chapter 105, § 12, Code 1887, and the principles stated in *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214, that redemption and sale made the state sell to Landsburg not only the Morris title, but its ownership in the Jackson-Harrison land.

As to the exception that the commissioner failed to state that he had certified all the evidence on which he acted: It is to be presumed that he did so. Documents and some depositions appear. Shall we reverse because he failed to certify that such evidence was all that was before him, when there is not the least showing that he failed to certify some part of the evidence? If such was the fact, the exceptor should have shown it, and asked a rule upon the commissioner to compel its production.

Therefore we conclude that as to the state the court properly dismissed the bill without a sale, and properly refused a redemption of the Jackson-Harrison land, because Ritter owned it, and there was no title in its former owner to warrant a redemption. Therefore we affirm the decree.

(137 N. C. 285)

JUNGE et al. v. McKNIGHT.

(Supreme Court of North Carolina. Dec. 17, 1904.)

DEFAULT JUDGMENT—QUIETING TITLE.

1. Code, § 385, provides that judgment by default final may be had at the return term on failure of defendant to answer, proof of service of summons being made, on a verified complaint alleging a contract to pay a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Section 386 provides that in all other actions except those mentioned in section 385, when defendant shall fail to answer, and on a like proof

judgment by default and inquiry may be had at the return term, an inquiry shall be executed at the next succeeding term. *Held*, that in an action under Laws 1893, p. 37, c. 6, to determine conflicting claims to real property, the failure of defendant to answer at the return term entitled plaintiff to a judgment by default final in accordance with the facts stated in the complaint, without inquiry or proof of such facts.

Clark, C. J., and Douglas, J., dissenting.

On Rehearing. Former opinion (47 S. E. 452) reversed; and superior court affirmed.

CONNOR, J. This cause is before us upon a petition to rehear. After a full and anxious consideration, we are of the opinion that the petition should be allowed, and the judgment of the superior court affirmed; thus reversing the decision of this court. 135 N. C. 105, 47 S. E. 452. We are not inadvertent to the well-settled rule of this court recognized and adhered to in a number of cases which will be found collected in Clark's Code, p. 943, rule 53. We are of the opinion that in respect to a question of practice, especially where, in a matter of which we are compelled to take notice, the almost uniform custom has been followed otherwise than as held by us, we should not hesitate, when convinced of error, to reverse our judgment. Many titles are dependent upon the validity of judgments rendered as the one before us. The reason and authorities set forth and cited in the several opinions filed at the first hearing render it unnecessary to discuss the question at any length. It will be noted that, as was then said, the plaintiff must be careful to draw his judgment when by default final, according to the right arising upon the case stated by the complaint, because "the defendant is concluded by the decree so far at least as it is supported by the allegations of the bill." If the decree or judgment do not conform to this well-settled principle, if it give relief in excess of, or of a different character from, that to which the plaintiff is entitled upon the allegations of fact in the complaint, the court will promptly set it aside upon application. The practice prevailing in courts of equity, to which in some measure the Code system in this respect may be assimilated, is thus stated by Mr. Beach: "The proceeding which is termed 'taking a bill pro confesso' is the method adopted by the court for rendering its process effectual when the defendant fails to appear and answer by treating the defendant's contumacy as an admission of the complainant's case, and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant according to the equity arising upon the case stated by the complainant." *Mod. Eq. Pr.*, 191; *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754; *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. It thus becomes important that the pleader, when he wishes to take a judgment by default final, set forth clearly the facts upon the

admission of which by failure to answer he bases his right to relief, so that the court may, upon an inspection of his complaint, adjudge his right to correspond with such facts. It also becomes the duty of the judge in such case to cause to be read or to inspect the complaint before signing judgment, so that the right adjudged may be such as, upon the facts stated, the plaintiff is entitled to. In courts of equity, which are always open for the hearing of causes and rendering of decrees upon "rule days," it is usual to take the decree *pro confesso*, and give the defendant an opportunity at the next rule day to show cause against the decree tendered by the plaintiff, when he will be heard for that purpose only, unless he move to set aside the decree *pro confesso*. In our system of holding the courts only at stated terms, with no power in the judge to sign judgments out of term except by consent, it is not practicable to follow the equity rules. It often happens that important judgments involving large property interests are signed at the last moment of the court. The most careful judges find themselves embarrassed by this condition. It might be well to adopt a rule requiring all judgments which are to be taken by default during the term to be presented with the verified complaint not later than Thursday of the term. This, of course, is only suggestive.

The petition to rehear must be allowed, and the judgment below affirmed.

MONTGOMERY, J. (concurring). This case is before us upon the petition of the plaintiff (appellant) for a rehearing. It was first heard at the spring term, 1904, and the opinion of the court is reported in 135 N. C. 105, 47 S. E. 452. The action was commenced for the purpose of determining an adverse claim set up by defendant to certain real estate of the plaintiff, under the provisions of chapter 6, p. 37, of the Laws of 1893. The defendant filed no answer, and, upon the complaint having been fully verified, a judgment by default final in favor of the plaintiff was rendered. Upon appeal to this court the judgment was reversed. There was a divided court, however, two of the judges having dissented. The justice who writes this concurring opinion wrote the opinion in the case when it was here before at the spring term, 1904. Having changed his opinion as to the question involved, and expressed his views in a concurring opinion filed by him in the case of *Eason v. Dortch* (at this term) 48 S. E. 741, the dissenting opinion of the court in the case as originally heard becomes the opinion of the court. It is needless to reiterate what was said in the dissenting opinion in the case and what was said by the writer of this opinion in *Eason v. Dortch*, *supra*, as those opinions can be readily found and examined. Two further matters, however, I wish to add which seem to me to be pertinent:

First. It is not provided in section 386 of the Code that, when the defendant shall fail to answer, judgment by default may be had at the return term, but that judgment by default and inquiry may be had, and the inquiry executed at the next succeeding term. A judgment by default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default; one final, the other interlocutory. In actions sounding in damages the interlocutory judgment which is rendered for want of an answer is an admission or confession of the cause of action, and there follows a writ of inquiry by means of which the damages are to be assessed. There is, it is true, an expression at the end of the opinion in the case of *Osborn v. Leach*, 133 N. C. 432, 45 S. E. 783, that may seem to be inconsistent with the first clause of that proposition, but all the authorities in this state (and they are numerous) are to the effect that a judgment by default and inquiry admits the cause of action, and the plaintiff is only to prove his damages. In *Banks v. Mfg. Co.*, 108 N. C. 282, 12 S. E. 741, the action was for damages on account of an alleged malicious prosecution. No answer having been made, a judgment by default and inquiry was had, and this court held that the court below properly refused to submit an issue offered by the defendant as to whether defendant did prosecute the plaintiff maliciously and without proper cause. The court said: "The issue tendered by the defendant was not raised, as there was no answer, and the matter was settled by the judgment by default." The judge submitted one issue only: "What damages, if any, has plaintiff sustained?" and this court approved of that course, saying, "The only inquiry was as to the quantum of damages." In *Parker v. House*, 66 N. C. 374, the action was against a constable and his bond for a failure to use due diligence in collecting claims put into his hands as an officer. This court said: "The default of the defendant in failing to answer admits the execution of the bond sued on, and that the plaintiffs have good cause of action, and the only question left for determination is the amount of damages." In *Cowles v. Cowles*, 121 N. C. 277, 28 S. E. 477, the court said: "Upon a judgment by default and inquiry the legal liability is fixed by the default, and the inquiry is only to ascertain the amount." In *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577, the action was for the recovery of damages for the conversion and embezzlement of the proceeds of cotton, and upon the defendant's failure to answer there was a judgment that the defendant, while the relationship of principal and agent existed between the parties, unlawfully, willfully, and fraudulently embezzled and converted to his own use 141 bales of cotton, and that the plaintiff recover of the defendant the value of the cotton. The cause was continued until the next term of the court that an issue might be submitted

and tried by a jury as to the value of the cotton. The defendant, in his appeal from the judgment, did not except to the inquiry as to the value of the cotton, but he excepted to that part of the judgment on the question of conversion and embezzlement, as not being authorized by the Code, § 386. This court said: "We think his contention not well founded. The action sounded in damages. The tortious conduct of the defendant was set forth in the complaint as the basis for demanding the damages. The judgment by default and inquiry—the defendant having said nothing in answer to the plaintiff's complaint—was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would have been entitled to nominal damages without any proof. That cause of action was admitted by defendant's failure to answer." Numerous authorities were cited in support. The court further said: "So, in the present case, the defendant, by his failure to answer, admitted the cause of action as set out in the complaint, and the judgment was a proper one." Those decisions are not affected by the cases of *Parker v. Smith*, 64 N. C. 291, and *Lee v. Knapp*, 90 N. C. 171, where the actions were in assumpsit for goods sold and delivered, and the court held that the plaintiff had to prove on the inquiry both the delivery of the goods and their value. In both cases it is expressly stated that the specific articles of merchandise were not set forth in the complaint. In *Witt v. Long*, 93 N. C. 388, where the action was in assumpsit for goods sold and delivered, and the specific articles were set out in the complaint in the shape of an open account, it was held that, the defendant not having stipulated to pay the price charged for the goods, that matter of their value was to be settled by a writ of inquiry. The cause of action then being confessed or admitted in interlocutory judgments by default, there follows a writ of inquiry by means of which the damages are to be assessed. The writ of inquiry is issued in no cases except in actions sounding in damages, and only for the purpose of ascertaining the amount of the plaintiff's damages. A writ of inquiry in common-law practice is defined in *Black's Law Dictionary* to be a writ "which issues after the plaintiff in an action has obtained a judgment by default on an unliquidated claim, directing the sheriff, with the aid of a jury, to inquire into the amount of the plaintiff's demand, and assess his damages." *Bouvier*, in his *Law Dictionary*, defines a writ of inquiry as one "sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the venue is laid, and commands him to inquire, by a jury of 12 men, concerning the amount of damages." The same definition, in very

much the same language, of a writ of inquiry, is given in the law dictionaries of *Rapalje* and *Lawrence*, *Abbott*, *Anderson*, and *Burrill*. "If the action sounds in damages (according to the technical phrase)—that is, be brought not for specific recovery of land, goods, or sums of money (as is the case in real or mixed actions or the personal actions of debt and detinue), but for damages only, as in covenant, trespass, etc.—and if the issue be an issue in law, or any issue in fact not tried by jury, then the judgment is only that the plaintiff ought to recover his damages without specifying their amount, for, as there has been no trial by jury in the case, the amount of damages is not yet ascertained. The judgment is then said to be interlocutory. On such interlocutory judgment the court does not, in general, itself undertake the office of assessing the damages, but issues a writ of inquiry directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, commanding him to inquire into the amount of damages sustained by the oath of 12 good and lawful men of his county, and to return such inquisition, when made, to the court. Upon the return of the inquisition the plaintiff is entitled to another judgment, viz., that he recover the amount of the damages so assessed; and this is called 'final judgment.'" *Stephen on Pleading*, 105. Of course, the damages are assessed under the Code by the jury in the presence of and under the direction of the judge. I conclude, therefore, that judgment by default and inquiry, in section 386 of the Code, has reference only to actions sounding in damages.

The second matter I wish to mention is the argument to be drawn from the prohibition of the recovery of costs by the plaintiff in such actions as the present one, when the defendant suffers judgment to be taken against him without answer. It seems to us that it was the intention of the lawmakers to apply that prohibition only up to and including the appearance or return term. It could hardly have been their intention to declare that in case of a failure of the defendant to answer, then an interlocutory judgment should be entered against him, and at the succeeding term of the court have the whole question of title and alleged aspersion of title gone into, with the entire costs saddled upon the plaintiff even if he should be successful. It seems to me to be clear that a judgment final was intended to be recovered by the plaintiff in actions of this nature by the statute which gives the right of action. Acts 1893, p. 37, c. 6.

CLARK, C. J. (dissenting). The sole point in this case is whether a judgment by default final could be entered. There is nothing in the record which calls in question the effect of a judgment by default and inquiry. The majority of the court do not concur in a review of any part of the unanimous de-

cision lately rendered in *Osborn v. Leach*, 133 N. C. 432, 45 S. E. 783, since cited and approved in same case, 135 N. C. 628, 47 S. E. 811, which makes it therefore unnecessary to discuss it. I concur with Mr. Justice DOUGLAS' dissent upon the question presented by the record, and refer to the views set forth in my concurring opinion on the former hearing of this case. 135 N. C. 107, 47 S. E. 452.

DOUGLAS, J. (dissenting). This case was heard at the last term of this court, and fully considered. In addition to the opinion of the court, two opinions, one concurring and one dissenting, were carefully and ably written. Not a single point was overlooked that seems to me to have any material bearing upon the case. Therefore, under the repeated decisions of this court, the petition to rehear should be denied. In *Watson v. Dodd*, 72 N. C. 240, Chief Justice Pearson, speaking for the court, says: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the court." Does the case at bar come within any of those exceptions? Certainly not, as far as any one has undertaken to advise us. This language of Chief Justice Pearson was quoted with approval in *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312, with the citation of 13 additional cases. The entire headnotes to *Weisel's Case* are as follows: "(1) Rehearings of decisions of cases of this court are granted only in exceptional cases, and, when granted, every presumption is in favor of the judgment already rendered. (2) Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed." That case was decided by a unanimous court, and has been cited in *Capehart v. Burrus*, 124 N. C. 48, 32 S. E. 378, and *Coley v. Railroad*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. It was also the sole authority cited for the per curiam denial by the court of the petition to rehear in *McNeill v. Railroad* (at this term) 49 S. E. 1038. Of course, where the petition comes within the spirit of the rule, it should be granted; but some presumption of law must adhere to the decisions of this court. Aside from this question, I see no reason why the decision should now be changed. I still adhere to my concurrence in the concurring opinion of Clark, C. J., filed at last term (47 S. E. 452), and which I presume will now become a dissenting opinion. If Stephen were still the recognized standard of pleading in this state, and we were still dealing with covenant, trespass, trover, case, assumpsit, debt, or detinue, my opinion might possibly be different; but as our practice

is governed by the Code, we must enforce its provisions. In it the cases are specifically stated in which judgment by default final can be rendered, and it is expressly provided that "in all other actions * * * judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term." The Code, §§ 385, 386. Chapter 6, p. 37, of the Laws of 1898, does not profess to make any change in the Code, and has no relation to the case at bar. The expression, "suffer judgment to be taken against him without answer," could apply just as well to judgments by default and inquiry as to those by default final.

The opinion of the court frankly admits the danger attending the rendering of judgments by default final at the return term, and by its essential reasoning emphasizes the wisdom of the lawmakers in restricting defaults final to a very small class of cases, and providing that "in all other actions" the inquiry shall be held at the succeeding term. It cannot be contended that the opinion of the court follows the letter of the statute. I cannot admit that it follows the spirit of the statute when it construes into it provisions which, in its own opinion, are essentially dangerous. It is true we should all correct our errors when we are convinced that we are wrong, but I am not convinced, and must stand upon the letter of the law and my convictions of its essential spirit.

(70 S. C. 217)

KIMBRELL et al. v. PAGE et al.

(Supreme Court of South Carolina. Nov. 24, 1904.)

PARTITION—DEFENSES—WANT OF TITLE—DISMISSAL.

1. Where, in an action for partition, one defendant sets up title in himself, and the issue of title was submitted to a jury, and they found title in the defendant, and the court refused to disturb the verdict, there was no equitable issue remaining to be determined, the verdict establishing that plaintiff had no equity.

Appeal from Common Pleas Circuit Court of Aiken County; Purdy, Judge.

Action by Benjamin Kimbrell and others against Ophelia Page and others. From circuit order dismissing complaint, plaintiff and defendant F. C. Cummings and Robert Kimbrell appeal. Affirmed.

Jas. F. Izlar, for appellants. Messrs. Hendersons, for respondents.

JONES, J. In this action for partition of real estate in Aiken county the defendant Ophelia L. Page, and other defendants claiming under her, in possession, resisted, setting up title paramount in themselves. The "case" states: "At the October, 1903, term of this court, the case appeared upon calendars 1 and 2, and in the regular trial of the jury cases before his honor Judge Purdy this case was tried on calendar 1, before a jury,

upon the issue of title raised by the pleadings upon the evidence submitted, the arguments by counsel and the charge of the judge; and the jury rendered the following verdict: 'We find for the defendant Ophelia L. Page and those claiming in like interest with her.' Upon the rendition of this verdict by the jury, the attorneys of the said Ophelia L. Page and those of the defendants interested with her moved to have the case called up on calendar No. 2, and there disposed of by dismissing the complaint. This was objected to by the attorneys representing the plaintiffs and those of the defendants having a like interest with them, who stated that they did not consider that the verdict of the jury disposed of the case, and that they had a right to have the matter tried and disposed of on the equity side of the court. Thereupon the plaintiffs' attorneys proceeded to make a motion for a new trial. After the argument of the motion for a new trial the court took the papers and reserved its decision; and the case was not called on calendar No. 2, and the equitable issues involved in the partition suit were not heard and determined by the court at said term. The attorneys for the plaintiffs and those of the defendants having a like interest with them then left the courthouse to await the decision of the said court on the motion for a new trial on the issue submitted to the jury. After the courts for the Second Circuit had been concluded, and the presiding judge, R. O. Purdy, had left said circuit, to wit, on the 24th day of December, 1903, he filed with the clerk of the court of common pleas for the county of Aiken, aforesaid, the following order on the motion for a new trial made as aforesaid: "The jury having tried the issue of title, and having found a verdict for the defendants for the land in dispute, and a motion for a new trial having been made and the same having been heard by me, it is ordered that the motion for a new trial be, and the same is hereby, refused. It is further ordered and adjudged that the complaint be, and the same is, dismissed, with costs." Order dated December 22, 1903, South Carolina, Aiken county.

The exceptions, three in number, raise practically the question whether the court erred in dismissing the complaint under the circumstances stated. We think there was no error. The issue of title having been submitted to the jury, and they having found title in the respondents, and the court having refused to disturb the verdict, there was really no equitable issue remaining to be determined; the verdict conclusively establishing that plaintiffs had no equity. Where some equitable issue would still remain for determination after a verdict on the question of title, the proper practice would be to hear and determine such independent issue on the equity calendar; but where, as in this case, the verdict standing is absolutely conclusive against plaintiffs' alleged equity,

nothing remains to be done except a formal dismissal of the complaint, which has been done. To remand the case merely for the purpose of requiring the court to do what inevitably must be done, and which has already been done, would, indeed, be to "roll an empty barrel."

The judgment of the circuit court is affirmed.

(70 S. C. 211)

STRICKLAND v. CAPITAL CITY MILLS.
(Supreme Court of South Carolina. Nov. 24, 1904.)

CONTRIBUTORY NEGLIGENCE—PLEADING—INSTRUCTIONS—NEW TRIAL.

1. Though, in an action for personal injuries, the evidence shows plaintiff guilty of contributory negligence, defendant is not entitled to a verdict where he does not plead contributory negligence.

2. Where no affirmative defense is set up in an answer, it is error to charge that defendant must establish his defense by a preponderance of the evidence.

3. A new trial is properly refused where there is any evidence to support the judgment and there is no error at law.

Appeal from Common Pleas Circuit Court of Richmond County.

Action by Henry Strickland against the Capital City Mills. From judgment of circuit court, defendant appeals. Reversed.

R. W. Shand, for appellant. Frank G. Tompkins, for respondent.

JONES, J. The plaintiff (respondent) brought this action to recover damages for injuries alleged to have been received by him while at work in defendant's (appellant's) mill. It was alleged that plaintiff was employed to work in the card room, with which he was familiar, but was transferred to work in the picker room, with which he was entirely unfamiliar; that he was not warned of the danger, and was ignorant thereof, and incapable of understanding the danger to which the work exposed him; that the machinery was unsafe without adequate guards; and that through these acts of negligence plaintiff's arm was caught in the machinery and lacerated, to his damage \$3,000. Besides a general denial, defendant answered in this language: "That if plaintiff received any injury, as alleged in the complaint, it was caused by his own carelessness and negligence, and not by any negligence on the part of the defendant." The jury rendered a verdict for \$1,500, and from the judgment thereon comes this appeal on exceptions which we now notice in their order:

"First exception: In charging the jury: 'I charge you, under these pleadings, that if you believe that the master, the defendant in this case, was negligent, and if you believe that the plaintiff was also negligent, both negligent—that both were negligent—then your verdict should be not for the defendant,

¶ 1. See Negligence, vol. 37, Cent. Dig. § 126.

but for the plaintiff, for the reason that the defendant in this case has not pleaded what is known as contributory negligence." It is conceded by appellant that this exception must be overruled, under the authority of *Scott v. Railway*, 67 S. C. 140, 45 S. E. 129.

"Second exception: That his honor erred in charging the jury: 'If employé is a person of manifest incapacity to understand the danger to which his work exposes him, the fact the machinery was left unguarded is competent upon the issue of the master's negligence. You see, it does not mean it controls you, but is a fact for you to take into consideration along with other facts of the case.'" This exception is too general, as it fails to point out the specific error intended to be assigned. We do not know, except as a matter of speculation, which we are not required to make—whether the error claimed was in submitting to the jury any question as to the "manifest incapacity," or was in charging in respect to a matter of fact.

"Third exception: That his honor erred in charging the jury: 'It is also the duty of the defendant to establish the defense by the preponderance of the testimony, and, if he has established the defense by the preponderance of the testimony—that is to say, 'I was not negligent, but this man was injured by reason of his own carelessness and his own negligence'—then you should write your verdict for the defendant.' Thereby improperly putting upon defendant the burden of proving not only that plaintiff was negligent, but also that the defendant was not negligent." This exception is well taken, and must be sustained. The defendant's answer was nothing more, in legal effect, than a general denial. It set up no affirmative defense which defendant was required to establish by a preponderance of the evidence. *Wilson v. O. & S. Ry. Co.*, 51 S. C. 79, 28 S. E. 91. It is true, the language complained of was immediately preceded by these words: "Now, gentlemen, it is the business of the plaintiff to make out his case by the preponderance of the testimony, to satisfy you of the allegations of the complaint by such testimony as you believe; not necessarily by the number of witnesses, but by that testimony which carries conviction to your minds." But the whole charge in this connection was manifestly such as to lead the jury to suppose that defendant was required to establish its defense by the preponderance of the evidence. The case of *State v. McDaniel*, 68 S. C. 318, 47 S. E. 384, is illustrative of the error of improperly shifting the burden of proof.

The fourth exception complains of error in refusing the motion for a new trial, appellant alleging that the refusal was based upon erroneous legal grounds. Considering all that the court said in refusing the motion for a new trial, we are satisfied that his refusal was based upon his views that there was testimony to support the verdict, and in

such case the refusal of new trial is not reviewable.

For the error pointed out in considering the third exception, the judgment of the circuit court is reversed, and the case remanded for a new trial.

(70 S. C. 225)

DIVINE v. MILLER et al.

(Supreme Court of South Carolina. Nov. 24, 1904.)

LIMITATIONS—PAYMENTS—ADMINISTRATOR—RENEWAL OF NOTE.

1. Where a creditor collects proceeds of collateral after the death of the debtor, in pursuance of his instructions, payment of the same on the note of the debtor does not arrest limitations.

2. An administrator by his promise in writing may renew note of intestate before it is barred so as to bind the personalty, but the real estate can only be affected by the promise of an heir to the extent of his interest.

Appeal from Common Pleas Circuit Court of Florence County; Watts, Judge.

Action by Jno. F. Divine against Charles D. Miller and Louisa Miller, as administrators of estate of E. Miller, and other heirs at law of E. Miller. From circuit decree, defendants appeal. Modified.

Clark, Elliott & Clark, for appellants. Barron & Ray, for respondent.

WOODS, J. On August 11, 1894, Dr. E. Miller gave to John F. Divine his promissory note for \$1,676.02, payable one day after date. Miller died intestate on February 17, 1897, and thereafter, on September 16, 1901, the plaintiff filed his complaint against the administrators of Miller's estate and his heirs at law; setting out his own note; alleging that there were other debts outstanding against the estate, and that the entire personal estate had been assigned to the widow as a homestead; and asking that the assets be marshaled, the claims established, and the real estate sold for their satisfaction. The defendants in their answer admit that there is no personal estate in the hands of the administrators, and set up as a defense the statute of limitations. The circuit judge held that this defense could not avail, because of a payment made on the note, and the written promises made by C. D. Miller, one of the administrators, before the expiration of the statutory period. The appeal turns on the correctness of this ruling.

The payment relied on was made under these circumstances: Dr. E. Miller, the intestate, assigned to the plaintiff a bond and mortgage of Mrs. Beulah M. Watson as collateral to his note. Believing that Watson might set up defenses against him which would not avail against Divine, the assignee, Miller, requested Divine to foreclose in his name the Watson mortgage, and apply the proceeds on his own note as a payment. After full conference with Miller, J. T. Barron,

Esq., Divine's attorney, commenced the foreclosure litigation, and conducted it against Mrs. Watson, under the direction of Miller, up to the time of his death. After the death of E. Miller, C. D. Miller, one of the administrators of his estate, who was also his son, corresponded with Mr. Barron on the subject, and in his letters promised in the most explicit manner that the estate would pay the balance of the debt to Divine after the application of the proceeds of the sale of the Watson land. This was in 1898, less than six years from the maturity of the Miller note.

If the suit on the Watson collateral mortgage had continued under Dr. E. Miller's direction to its termination, and the proceeds of the sale had been applied to his note under his express instructions, then the payment would have been his payment, and would have arrested the currency of the statute. *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366. Under the arrangement with Miller, Divine was not merely the holder of a collateral, but he was the agent of Miller, acting under his express direction in the conduct of the suit and the collection of the money. But Dr. Miller having died before the sale of the Watson land, from which the payment was realized, the payment cannot be attributed to him as his act. His death did not affect Divine's interest in the collateral and his right to collect it, but it ended the special agency and the control of Miller over the litigation and the proceeds of the sale. To be effective in arresting the statute, the payment must have been made in the name of Miller, and by his agent, as if he himself were making it. After his death this was impossible. *Johnson v. Johnson*, 27 S. C. 309, 8 S. E. 606, 13 Am. St. Rep. 636; *Hunt v. Rousmanier's Administrators*, 8 Wheat. 205, 5 L. Ed. 589.

The promises made by the administrator, C. D. Miller, before the bar of the statute was complete, are sufficient to defeat the plea of the statute interposed by him. *Reigne v. Executor of Desportes*, Dud. 118; *Johnson v. Ballard*, 11 Rich. Law, 178. But such a promise made as administrator does not bind the heir, or affect his right to the protection of the statute as to real estate descended to him. *Gibson v. Lowndes*, 28 S. C. 301, 5 S. E. 727. On the other hand, a promise made by the

heir alone, to which the administrator is not a party, will not bind the estate. *Bolt v. Dawkins*, 16 S. C. 211. In this case, therefore, the promise of Charles D. Miller, the administrator, could not bind the heirs other than himself, so as to affect their interest in the real estate. For while his letters indicate that he regarded himself as representing the interests and wishes of the family, there is no proof of his authority to act for the others as to the real property. But in making promises to pay, and in all his efforts to secure indulgence, as the letters clearly show, he treated with the plaintiff in the dual capacity of administrator and heir. By these promises as administrator he renewed the debt against the estate as to the personality, and as heir against the real estate, to the extent of the interest he inherited, and the statute of limitations cannot avail him. When the facts of the case of *Gibson v. Lowndes*, supra, are considered, it will not be found to conflict with this view. It is true, the payments in that case were alleged to have been made by Mrs. Lowndes, who was a devisee, and also named in the will as executrix; but she had not qualified as executrix, and, therefore was not the personal representative of the testator. In this case when the promises were made the debt was not barred. C. D. Miller was an heir, and also administrator; and, as we have seen, when he promised to see the debt paid he was acting in both capacities. It will hardly be contended that a debt cannot be renewed at all by a new promise, so as to defeat the plea of the statute of limitations interposed to protect the real estate of the intestate. Surely, if it can be done at all, it can be done by one who is both heir and administrator. The real estate of the intestate, E. Miller, is therefore liable for the plaintiff's debt to the extent of the interest of C. D. Miller, but no further.

As the action is on behalf of the plaintiff and "all other creditors of E. Miller who may come in and seek relief by, and contribute to the expenses of, this action," and no other creditors have proved their demands, we express no opinions as to their rights.

The judgment of this court is that the judgment of the circuit court be modified as herein indicated.

(850)

HARVEY v. COMMONWEALTH.

me Court of Appeals of Virginia. Jan. 12, 1905.)

—CONVICTION—EVIDENCE—SUFFICIENCY.
 a prosecution for rape, evidence held
 sient to sustain a conviction.

sal from Circuit Court, Charlotte County.
 Harvey was convicted of rape, and he
 s. Reversed.

C. Franklin and W. C. Carrington, for
 ant. Wm. Anderson, Atty. Gen., for
 ommonwealth.

RRISON, J. In November, 1904, the
 iff in error was indicted, tried, and
 ted of the crime of rape, and now asks
 ourt to review the judgment of the cir-
 ourt of Charlotte county, sentencing
 n accordance with the verdict of the
 to penal servitude for five years.

the view we take of the case, it is
 necessary to notice the fourth and last
 ment of error, which is to the action
 court in refusing to set aside the ver-
 f the jury as contrary to the law and
 idence.

record shows that the prisoner was
 ried man, about 70 years of age, and
 he prosecutrix was a widow woman,
 was the mother of two children. The
 ment of the prosecutrix is that on the
 y of October, 1903, the prisoner called
 home in his buggy, and told her that
 d a note from her attorney at Pam-
 saying that he desired to see her on
 ss; that she got in the buggy with
 and that he drove her to Pamplins and
 er out at the home of her friend, Mrs.
 on, where she spent the night; that
 xt day the prisoner called for her, and
 drove home together; that on the way

Just as they were reaching "Cub"
 he made an improper proposition to
 hich she rejected, and started to jump
 f the buggy, when he caught her by
 rm, drove into the creek, and there
 his knife, saying that if she did not
 t to him he would cut her throat; that
 ereupon put her feet upon the spatter
 of the buggy, laid her back on the back
 : buggy, and accomplished his purpose;
 he made no outcry at the time for fear
 ould kill her; that none of her clothing
 njured, and no marks of violence upon
 erson; that it was about half past 11
 k, and they did not stay in the creek
 very short time.

evidence of the prosecutrix shows that
 oint where the road crosses Cub creek
 ry public. The uncontradicted testi-
 of others is that it is one of the most
 : places on the road; that there are
 ail boxes within 50 or 75 yards of the
 and that it was about the time of day
 ail carrier was due there; that there
 gristmill, sawmill, and a number of

homes in the vicinity, at distances ranging
 from a half to one mile; that there are sev-
 eral other roads that come into the Pamplins
 road at that point, making the latter a very
 much traveled thoroughfare; and that the
 land around is clear, except a small piece on
 one side of the creek below the road.

That a married man 70 years of age could
 have committed the crime alleged upon a ma-
 ture woman, under the circumstances nar-
 rated, about noon, in a buggy in the public
 road at a point unusually exposed, where
 they might have been seen at any instant,
 challenges human belief. The prosecutrix
 further testifies that they proceeded on their
 way until they reached the home of Mr. Hun-
 ter, whom the prisoner desired to see about
 seed wheat; they were at Mr. Hunter's in
 less than a half hour after leaving the creek;
 that just before reaching the house the pris-
 oner said, "If you tell Mr. Hunter about my
 treatment, I will kill you, and put you be-
 hind a log;" that she asked him to let her go
 in the house for a drink of water, and he re-
 fused; that the prisoner got out, and went
 to the gate; that Mr. Hunter came to the
 buggy, and shook hands with her, and asked
 them in to dinner, but they did not go. The
 uncontradicted testimony of Mr. Hunter is
 that he went to the buggy, and shook hands
 with her, and invited her to get out and
 take dinner, but she declined; that he no-
 ticed nothing at all unusual about her, and
 saw no signs of excitement about her.

It is unnatural and difficult to believe that
 an innocent and helpless woman could, in
 less than a half hour after such an experi-
 ence as is here described, be, in the presence
 of another, calm, and without the slightest
 evidence of distress or excitement of any
 kind. It is also hard to imagine any one so
 destitute of prudence as to take the victim
 of such a diabolical crime immediately into
 the presence of another man, to whom she
 could and ought to have at once appealed
 for protection. It is equally incredible that
 a virtuous woman, upon whom such an out-
 rage had been perpetrated, within less than
 a half hour could be in the presence of a
 strong man, and not appeal to that man to
 shield her from the demon who was threaten-
 ing her life.

The further testimony of the prosecutrix is
 that they drove on, without incident, to her
 home, where she was turned over to her fa-
 ther and sisters, with whom she lived, with
 the home of her brother and his wife in
 sight, and that of her brother-in-law close
 by. In the midst of this array of friends,
 not one of whom saw anything to sugges-
 that she had been ill-treated, she remained,
 and not until after the 21st day of the fol-
 lowing June, when she gave birth to a child
 did she intimate to a human being that the
 outrage now charged had been perpetrated:
 giving as her reason for this suspicious—this
 amazing—silence that the prisoner had said
 that, if she told, he would kill her on the sly

and that she was ashamed to tell any one about it.

The prosecutrix was surrounded by friends amply able to protect her. She was not in the power of or in any way under the control or dominion of the prisoner. Her own evidence shows this, for she says that in the spring following the alleged outrage the prisoner came to her home when she was there alone, and that she said to him, "Look here, and see the fix you have put me in." He told me to lay the child to some one else, and he would give me as much money as I wanted. I replied that 'I was not that sort of a woman; I have nothing but my character.'" This interview does not suggest fear, but a decided independence, of the prisoner. Further, the inquiry naturally arises, why did all of her alleged fear vanish as soon as she could no longer conceal her shame, divulging, for the first time, as she says, this heinous crime to her doctor shortly after the birth of her child?

Notwithstanding the revolting circumstances attending the crime here charged, and the natural indignation and condemnation that it excites, still it is necessary to inquire and consider, under the law, whether that charge is sustained by the proofs. In such a case the inducements to falsehood are powerful. The account given by the prosecutrix bears the impress of falsehood on its face, and we are constrained to believe that the natural horror of this particular crime diverted the attention of the jury from a proper consideration of the evidence.

Viewing the case, as we have done, from the standpoint of a demurrer to the evidence, we find the proof wholly wanting to sustain the verdict, and upon that ground the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had in conformity with the views herein expressed.

(103 Va. 320)

CITY OF RICHMOND v. GAY'S ADM'X.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

GAS—DEFECTIVE PIPES—ACTION FOR WRONGFUL DEATH—CONTRIBUTORY NEGLIGENCE—DEFENSES.

1. A declaration in an action against a city for wrongful death caused by gas escaping from one of defendant's mains to decedent's house, which otherwise states a cause of action, is not defective because it does not state what particular main was defective.

2. In an action against a city for wrongful death resulting from gas escaping from some of defendant's gas pipes, where there was evidence that gas had previously escaped into other parts of the house in which decedent lived, and defendant had made some effort to remedy the defect, whether, having knowledge of these facts and of the fact that illuminating gas is dangerous to life, decedent was guilty of want of ordinary care in remaining in the house, or in not taking other precautions for her safety, was a question for the jury.

3. It is no defense to an action against a city for wrongful death from gas escaping from a

main that the gas escaped from the main into an abandoned sewer, and from the sewer to decedent's house through a private pipe, instead of from a leak in the main to the house, as alleged.

Error to Law and Equity Court of City of Richmond.

Action by the administratrix of Fetnah D. Gay, deceased, against the city of Richmond. There was judgment for plaintiff, and defendant brings error. **Affirmed.**

H. R. Pollard, for plaintiff in error. R. L. Montague, P. A. Smith, and Meredith & Cocke, for defendant in error.

BUCHANAN, J. This action was instituted against the city of Richmond by the personal representative of Mrs. Fetnah D. Gay, deceased, to recover damages for the asphyxiation and death therefrom of the plaintiff's intestate, caused by the alleged negligence of the defendant city in permitting illuminating gas (which it manufactured and furnished to its residents for gain) to escape from its gas mains into the room in which Mrs. Gay was sleeping. Upon the trial of the cause there was a verdict and judgment for the plaintiff, and to that judgment this writ of error was awarded.

The first error assigned is the action of the court in overruling the demurrer to the declaration.

The first ground of demurrer, which was to the declaration and each count thereof, was "that the statute under which the action was brought (sections 2902, 2903, Code 1887 [Ann. Code 1904, pp. 1526, 1527]) for the wrongful act, neglect, or default of any person or corporation has no application to an action against a municipal corporation by the personal representative of one who died from a cause superinduced by neglect to take sanitary precautions on the part of the public authorities in the construction or maintenance of its gas mains, as alleged in the declaration." That ground of demurrer is abandoned here by the counsel of the city in his oral argument.

The other ground of demurrer was that the third count to the declaration did not "allege with sufficient certainty what particular mains of the city of Richmond the defendant had failed to examine for the purpose of ascertaining whether such mains were in an improper and unsafe condition."

The Franklin House, in which the plaintiff's intestate was asphyxiated, was situated on Franklin street, and was very near Governor street of the defendant city. In the first count in the declaration it is charged that the gas escaped from the main in Franklin street. In the second count it is charged that it escaped from the main in Governor street. The plaintiff could not know with certainty from what mains the gas escaped, as they were laid underground, and she had no right to disturb the streets so that she could inspect them and ascertain where the leak was. That was a fact peculiarly within

the knowledge of the defendant. Having charged in the first and second counts of the declaration that the gas had escaped from certain mains—those nearest to the Franklin House—the plaintiff, no doubt out of abundant caution, not knowing precisely what the evidence would be, added the third count. While it is general, it states sufficient facts to enable the court to say on demurrer that, if the facts stated are proved, the plaintiff is entitled to recover, and therefore states a good cause of action. *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996. For if the defendant did negligently allow the gas to escape from any of its mains, and injury resulted to the plaintiff's intestate therefrom, without fault on her part, it was liable in damages therefor.

The action of the court in refusing to give instruction "d" asked for by the defendant city is assigned as error. By that instruction the court was asked to tell the jury that, if Mrs. Gay knew, or ought to have known, prior to the accident, that illuminating gas was escaping into the house occupied by her, and that such gas was dangerous to life, it was her duty to have withdrawn from the premises, or to have taken other precautions for her safety, and her failure to do so was contributory negligence as a matter of law.

The evidence shows that gas had been escaping from time to time into the printing office on the first floor of the Franklin House, and also into some of the rooms on the other floors, for some three weeks prior to the asphyxiation of Mrs. Gay, and that the city authorities had been notified of that fact, and that they had made some efforts, though not very promptly nor energetically, to remedy the trouble, but had not succeeded in doing so. There was evidence tending to show that no gas had escaped into the room occupied by Mrs. Gay; that on the night she was asphyxiated her daughter visited her room twice after her mother had retired—once as late as midnight—and that upon neither occasion was gas escaping into the room. Whether or not, with knowledge of these facts and of the further fact that illuminating gas was dangerous to life, Mrs. Gay was guilty of a manifest want of ordinary care and prudence in remaining in the house, or in not taking other precautions for her safety, was clearly a matter for the jury (2 *Shear. & Red. on Neg.* § 696; *Holly v. Boston, etc., Co.*, 8 Gray, 123, 132, 133, 69 Am. Dec. 233), and the court properly refused to give the instruction under consideration. The question of contributory negligence was fairly submitted to the jury by the defendant's instruction "c."

The next and remaining error assigned in the petition is to the action of the court in refusing to give instruction "g" asked for by the city. "That instruction was intended," as the city insists, "to lay down the proposition that, if the evidence showed that

the abandoned sewer in Franklin street was not a city sewer, and that gas escaped into it, and from it, through a private connecting pipe, into the building, then the city was not responsible for its alleged failure properly to maintain its gas mains, for the reason that its failure was not the proximate cause of the injury complained of."

The fact that the escaping gas reached Mrs. Gay's chamber in the manner indicated in the instruction, instead of directly from the city's gas mains, does not render its negligence any the less the proximate cause of her death, unless there was some cause intervening between the defendant's negligence and her death. And in order to excuse the defendant's negligence, this intervening cause must be either a superseding or responsible cause. To be a superseding cause, whether intelligent or not, it must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's contributing negligence thereto in the slightest degree, produces the injury. To be a responsible cause, it must be the culpable act of a human being, who is legally responsible for his act. *Shear. & Red. on Neg.* § 32; *Standard Oil Co. v. Wakefield's Adm'r*, 102 Va. 824, 832, 47 S. E. 830.

There was clearly no such intervening cause in this case, and the defendant's negligence was the proximate cause of the injury complained of.

Neither were the facts hypothetically stated in the instruction evidence of contributory negligence. Mrs. Gay was in no wise responsible for the condition of the old sewer, and, if she had been, she could not anticipate that the city would allow its illuminating gas to escape from its gas mains into the sewers of the city, whether they belonged to the city or to private individuals.

This question of contributory negligence was relied on in *Kibele v. City of Philadelphia*, 105 Pa. 41, in a somewhat similar case. In dealing with that question the Supreme Court of Pennsylvania used the following language: "A good deal has been said in the argument of this case about the defectiveness and untrapped condition of the plaintiff's sewer, and an endeavor has been made through it to charge him with contributory negligence. But this matter has nothing at all to do with the case. If he had a bad or imperfect branch sewer, he must run the risk of the deleterious effects of sewer gas, for that must be expected in a common sewer; but he had no right to expect that it would become a conduit for illuminating gas. As well might he expect that it would be made a storehouse for gunpowder."

The instruction was properly refused.

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

KEITH, P., absent.

(103 Va. 423)

SAVAGE v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

RAILROADS—INJURY TO ONE WALKING ON TRACK—DUTY TO LOOK AND LISTEN—DISCOVERED PERIL—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. One walking on a railroad track is bound to listen and keep a lookout in each direction for approaching trains.

2. A locomotive engineer who sees a person walking on the track is required to stop the train only after seeing that the pedestrian is taking no measures for his own protection.

3. In an action against a railroad company for injuries from being struck by a locomotive while plaintiff was walking on the track, evidence held to show plaintiff guilty of contributory negligence.

Appeal from Circuit Court of City of Richmond.

Action by John Savage against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wyndham R. Meredith, for appellant. Munford, Hunton, Williams & Anderson, for appellee.

KEITH, P. The accident which is the subject of this suit occurred upon that portion of the main line of the Southern Railway Company between Richmond and West Point, Va., which passes through the yards of the Trigg Shipbuilding Company, in the city of Richmond. At the point of the accident the railway company was not the owner in fee of its roadbed, but occupied it and operated its road under a perpetual license derived from the Chesapeake & Ohio Railway Company. Its right of way was over a strip of land about 40 feet in width, wide enough for three tracks, but upon which only one track had been constructed. It permitted the Trigg Company to cover this space with racks and cribs for storing iron plates, rods, and other wares used in its business, leaving a space between the rail and the racks on either side of about 5 or 6 feet.

On the 13th of March, 1902, John Savage, a young colored man in the employment of the Trigg Company, was run over by a shifting engine which was moving over this track in an easterly direction, and suffered injuries which rendered it necessary to amputate both of his legs. He brought suit, evidence was introduced before the jury, a demurrer to the evidence was interposed by the defendant, a verdict was rendered in his favor for \$8,000, judgment given for the defendant, and the case is here upon a writ of error.

The only question which we shall consider is whether the evidence was sufficient to require the court to leave the case with the jury.

The testimony tended to prove the following facts: That Savage was on that day, for the first time, in the employment of the Trigg Company. That he was unacquainted

with the locality, and knew nothing of the number of trains, or with respect to their operation, over this line of railway. That he was under the impression that it was a switch track and not a main line. That the material used by the Trigg Shipyard in and about its business was stored in racks which occupied the right of way of the railroad to within 5 or 5½ feet of the rail on either side. That at noon on the day of the accident Savage took his seat upon a platform near the railroad to eat his luncheon. That, having eaten, he went to a small house near the track, where he had left his overalls, took a cigarette out of the pocket of his overall jacket, returned to the railroad, and started down the track to the east. That before going upon the track he looked and listened, but saw no train. That, going upon the track in an easterly direction, he had walked but a short distance—some of his witnesses say only about 8 or 10 feet—when he was struck by the tender attached to an engine of the Southern Railway. A short distance west of the point at which he stepped upon the railroad track there is a slight curve, which, together with the obstructions upon the right of way, hindered in some degree a view of the track in that direction. That an engine of the defendant company, moving, with its tender in front, at a rate of about 20 miles an hour, struck him and inflicted the injuries for which he sues. There is much conflict of testimony as to whether or not the bell was rung and the whistle sounded. The negative testimony is that no warning, either by bell or whistle, was given. The positive testimony of the employees upon the train is that the bell was being rung; that it operated automatically, and the machinery for ringing the bell was set in motion when the engine started. It further appears that as many, perhaps, as 1,800 hands were employed at the Trigg Shipyard, and that, with the knowledge of the railroad company, they were in the habit of using the railroad track through the shipyard as a pass-way.

Conceding that, under these circumstances, the defendant was guilty of negligence, it remains for us to inquire whether the plaintiff was guilty of contributory negligence.

We have said that the tracks of a railroad are of themselves a warning of danger, and that a person going upon the tracks is bound to listen and keep a lookout in each direction for approaching trains. *C. & O. Ry. Co. v. Rogers' Adm'x*, 100 Va. 324, 41 S. E. 732; *Humphreys' Adm'x v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882.

It is difficult to get a clear-cut conception of the situation at the moment when the train came into contact with Savage; but, taking his own statement of the circumstances attending the accident, and it appears that he looked up and down the track before getting upon it, and then neither looked nor listened afterwards. He could not be

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1205, 1207.

ght to say how long he had been upon track, nor his precise position upon the t, nor how far he had walked after getting upon the track before he was struck. Uses with respect to all these circumstances vague and indefinite terms. Some of his essses say that he had moved only eight n feet when he was struck, and that imately upon his stepping upon the track saw that the accident was inevitable. ay be that, had the engineer applied the es at the moment he came in sight of ge upon the track, the accident could been avoided. But such was not his . Seeing a man upon the track in the rent possession of all his faculties, the eer had a right to presume that he d exercise reasonable care for his own action. A step or two would have placed ge in a position of safety. The duty ded upon the engineer to stop the train when he saw that Savage was in dan- that is to say, when he saw, or ought ave seen, that Savage was himself uncious of his peril, and would take no sures for his own protection. This propo- has been decided in numerous cases his court.

N. & W. R. Co. v. Harman's Adm'r, 83 554, 8 S. E. 251, it is said that: "If the on seen upon the track is an adult, and rently in the possession of his or her ties, the company has a right to pre- that he will exercise his senses and re- himself from his dangerous position; if he fails to do so, and is injured, the is his own, and there is, in the absence illful negligence on its part, no remedy ist the company for the results of an y brought upon him by his own reck- ess." Tyler, Rec'r, v. Sites, 90 Va. 539, E. 174.

Rangeley v. Southern Ry. Co., 95 Va. 30 S. E. 386, it is held that a railroad any has the right to assume that a n person seen on its track would get f the way of an approaching train, and ompany is not liable unless it is shown after the company, in the exercise of ary care, could have discovered that he not going to get off the track, it could avoided the injury.

this case Savage looked and listened e he went upon the track, and gave no er heed to the possible peril he incurred alking upon the track. Indeed, the e tends to show that his attention was ted, and given not to caring for his safety, as a reasonably prudent per- in his situation should have done, but at the moment directed to some boys n he saw playing in the vicinity. This certainly negligence upon his part, and is no evidence tending to show that the discovery by the railroad company, of his position, but of his peril, it omit- o do anything within its power to avert accident. Under these circumstances,

we are bound to hold, upon the authority of the cases cited, that this unfortunate boy was the author of his own injuries.

The judgment of the circuit court must be affirmed.

(108 Va. 333)

HARRISON v. THOMAS.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

TAX SALE—RIGHT TO DEED—NOTICE TO PERSON ENTITLED TO REDEEM.

1. Under Acts 1901-02, p. 779, c. 658 [Ann. Code 1904, p. 320], re-enacting Code 1887, § 655, providing that after the two years from sale of land for taxes allowed for redemption, the purchaser of the land not redeemed shall obtain from the clerk of court a deed, and amending it by providing that a deed shall not be made to any such purchaser till after he has given to the person in whose name the land stood at the time of the sale, and to certain other persons, four months' notice of his said purchase, and that the person entitled to redeem the land shall have the right to redeem it before expiration of the four months, though such time extend beyond the two years, the notice is not required to be given in a case where the two years for redemption had expired before the amendment came into effect.

Appeal from Chancery Court of Richmond.

Suit by one Harrison against one Thomas. Decree for defendant. Complainant appeals. Affirmed.

S. S. P. Patteson, for appellant. W. H. Werth, for appellee.

WHITTLE, J. This case involves the construction of an act of the General Assembly approved April 2, 1902 (Acts 1901-02, p. 779, c. 658 [Ann. Code 1904; p. 320]), amending and re-enacting section 655 of the Code of Virginia of 1887, requiring the purchaser of real estate at a tax sale to give four months' notice of his purchase to the persons enumerated in the statute before he shall be entitled to a deed.

Appellant, who was the former owner of two lots, located in the city of Richmond, which were sold for taxes March 19, 1900, filed a bill in the chancery court of that city against appellee, the purchaser, to set aside the deeds to the property executed April 7, 1902, on the ground that they were void because of the failure of appellee to give the four months' notice of his purchase, prescribed by the amended statute.

The act provides, as did the original section, that "after the expiration of the said two years, the purchaser of any real estate so sold and not redeemed * * * shall obtain from the clerk * * * a deed conveying the same." The amendment declares, "but in no case shall a deed be made to any such purchaser of any such real estate until after such purchaser has given to the person in whose name the real estate stands at the time of said sale * * * four months' notice of his said purchase;" and, also, that "the person entitled to redeem said real es-

tate shall have the right to redeem the same at any time before the expiration of four months, although such time extend beyond the two years first mentioned herein." Acts 1901-02, p. 779, c. 658 [Ann. Code 1904, p. 320].

This court, upon a similar state of facts, recently had occasion to construe this statute in the case of *Nuckols v. Waddill*, Clerk (no opinion filed), which was a petition by the purchaser of real estate at a tax sale for a mandamus to compel the clerk to execute the deed required by statute. The defense interposed was that the purchaser had not given the prescribed notice, and was therefore not entitled to demand a deed. But the court, after mature deliberation, reached the conclusion that the amended act had no application to a case in which the two years allowed for the redemption of the land had expired before it came into effect.

It will be observed that the amendment in terms applies only to persons entitled to redeem, and appellant was clearly not of that class, since her right to redeem had already ceased by lapse of time. While it is true the statute comprises sales made before as well as those made after its passage, nevertheless, with respect to the former, it only includes those wherein the right to redeem was in force when the new law took effect. If only the last day of the two years remained at that time, the right to the four months' notice accrued, although it would have the effect of extending the right of redemption beyond the original limit of two years. But it was not the purpose of the Legislature to revive a right of redemption already barred, if, indeed, it possessed the constitutional power to do so.

In the leading case of *Curtis v. Whitney*, 13 Wall. 70, 20 L. Ed. 513, and other cases relied on by appellant, the right of redemption under the prior law was a subsisting right at the date of the amendment, and the court properly held that a mere change of procedure requiring notice, and enabling the former owner the more certainly to exercise his right of redemption, did not impair the obligation of the purchaser's contract. In that case the period of redemption had not expired, at the date of the amendment requiring notice, by more than 13 months. The opinion of Justice Miller is in entire accord with the distinction which this court observes between an existent and a nonexistent right of redemption where the amendment attaches.

If, however, the import of the act under consideration were doubtful, the case would call for the application of the familiar rule that, where a statute is susceptible of two constructions, one of which is plainly within, and the other without, the legislative power, the courts must adopt the former construction. *Martin v. South Salem Land Co.*, 97 Va. 349, 33 S. E. 600.

With respect to the remaining suggestion,

that the proceedings are void because appellant's name did not occur in alphabetical order in the treasurer's original report of sales, it is sufficient to remark that the statute does not require the observance of such alphabetical arrangement. Code 1887, § 642 [Ann. Code 1904, p. 314].

Upon the whole case, the court is of opinion that the decree complained of is without error, and it must be affirmed.

(108 Va. 409)

RICHMOND PASSENGER & POWER CO. v. STEGER.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

APPEAL—FINDINGS OF FACT.

1. The finding of the jury as to contributory negligence, depending on questions of fact as to which there is conflicting evidence, will not be disturbed on appeal.

Error from Law and Equity Court of City of Richmond.

Action by one Steger against the Richmond Passenger & Power Company. Judgment for plaintiff. Defendant brings error. Affirmed.

H. Taylor, Jr., for plaintiff in error.
Wyndham R. Meredith and B. O. James, for defendant in error.

HARRISON, J. This is the second appearance of this case upon our docket. 101 Va. 319, 43 S. E. 612. Now, as formerly, there was a verdict in favor of the plaintiff, which the lower court refused to set aside.

When the case was here before, error was found in the instructions, for which reason the judgment was reversed, the verdict of the jury set aside, and the case remanded for a new trial. The plaintiff in error now concedes that the instructions are free from objection, and assigns as its only ground of error that the verdict is against the evidence and the instructions.

The injuries of the plaintiff for which he has twice recovered damages were caused, as alleged, by the negligent running of one of the defendant's cars upon him when he was crossing the track at the intersection of Third and Broad streets, in the city of Richmond. It is admitted that the defendant company was guilty of negligence in running its car beyond the lawful rate of speed, but it is contended that the plaintiff was guilty of contributory negligence, proximately concurring with the negligence of the defendant company, which defeats his right to recover.

This contention cannot be sustained. The case is before us as upon a demurrer to the evidence, and in the light of that rule, conceding that there was some evidence tending to show contributory negligence, a careful examination of the testimony satisfies us that we would not be warranted in holding, as a matter of law, that the plaintiff was guilty of negligence which contributed to his injury. In view of all the evidence bearing upon the

sition of contributory negligence, we are of opinion that the case involved questions of which were for the exclusive consideration of the jury, and, upon principles too well settled to require citation of authority, their finding cannot be disturbed.

he judgment must therefore be affirmed.

EITH, P., absent.

Va. 326)

CHESAPEAKE & O. RY. CO. v. SMITH.

Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

RRIERS—INJURIES TO PASSENGERS—ALIGHTING FROM CARS—WAYS TO STATION—CONTRIBUTORY NEGLIGENCE—ACTIONS—TRIAL—JURORS—BIAS.

Where members of a jury on their voir dire stated that they were friends of the plaintiff and that he was their family physician, but such relation would have no influence on their verdict, they were not disqualified on the ground of implied bias.

Plaintiff returned to his home at night. As train approached plaintiff's station, the conductor opened the door of the rear car, in which plaintiff was riding, and called the station, and plaintiff and the other passengers got on the ground, not knowing that they were yards from the depot. The night was dark, plaintiff, after the train left, in walking along the unlighted track toward the depot, fell on an unguarded cattle guard, and was injured. *Held*, that the railway company was guilty of negligence.

Plaintiff was not guilty of contributory negligence in not going through the cars between him and the station platform before getting off, or in not finding the conductor, who was at the front end of the train, and requesting to move the train until the rear car reached the platform.

Error from Circuit Court, Fluvanna County.

Action by O. M. Smith against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant assigns error. Affirmed.

Chesapeake & Leake, for plaintiff in error. Gray & Gray, for defendant in error.

BUCHANAN, J. O. M. Smith instituted an action against the Chesapeake & Ohio Railway Company to recover damages for injuries received by him, resulting from the alleged negligence of the railway company.

Upon the trial of the cause there was a judgment in his favor, and to that judgment a writ of error was awarded.

The first error assigned in the petition is the action of the circuit court in overruling the demurrer to the declaration, and each count thereof. This assignment of error was abandoned in the oral argument, properly so, as each count sets out a good cause of action.

The second assignment of error is to the refusal of the court to sustain the railway company's objection to certain members of the jury who were sworn to try the case.

The objection made to these jurors is that they were friends of the plaintiff, and that he was their family physician.

The bill of exceptions shows that when examined on their voir dire they "stated that they were friends of the plaintiff, and that he was their family physician, but that such relation to the plaintiff would have no influence upon their verdict." A juror is not disqualified from sitting in a case because he is a friend of one of the litigants (*Reg. v. Geach*, 38 E. C. L. 195), nor where there is great intimacy between their families, unless it appears that such relations will interfere with his impartiality of action (*Montague's Case*, 10 Grat. 767, 774).

There are certain relations in life from which the law conclusively presumes bias, such as affinity or consanguinity within certain degrees; and when a juror is examined upon his voir dire, and it appears that such relationship exists, that alone is sufficient to exclude him from the jury, although in fact he may be free from all bias. There are other relations existing between juror and litigant from which the law raises no presumption of bias, yet, if upon his examination it appears that the juror is not impartial, the law excludes him. In such a case the trial court must determine the juror's competency from all the facts before it. The juror may state and honestly believe that he is free from all bias, and yet it may appear from his own or from extraneous evidence, or both, that such may not be the fact. The object of the law in all cases is to obtain an intelligent as well as impartial jury. In order to do this, it is neither necessary nor wise to determine the juror's impartiality by extending and applying arbitrary or technical presumptions which may have the effect of excluding the most competent man on the list from the jury. Sustaining challenges for favor on slight grounds, as was said by the General Court in *Moran's Case*, 9 Leigh, 651, 658, tends to place the administration of justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard; and we are therefore not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided. We have been cited to no case, nor have we found one in our investigation, which holds that, where the relation of physician and patron exists, the law conclusively presumes such bias that neither is competent to act as juror in a case to which the other is a party. The contrary has been held in the case of attorney and client (*Reg. v. Geach*, supra), who in many respects occupy similar relations. The examination of the jurors in question—and that was the only evidence before the court—could leave no doubt in the mind of the court as to their competency, and it did not err in accepting them as jurors.

The third assignment of error is to the action of the court in overruling the railway company's demurrer to the evidence.

The facts, as they appear upon the demurrer to the evidence, are substantially as follows: The plaintiff, with his wife, mother, and sister, had on the morning of the accident gone from Columbia, a station on the railway company's line, to Richmond, on an excursion train, consisting of 12 coaches, carrying about 1,000 passengers. The train returned that evening, reaching Columbia behind time and after dark. As the train approached the station, and immediately before it stopped, a brakeman opened the front door of the rear car, in which the plaintiff was riding, called out "Columbia," and passed into the car ahead. As soon as the train stopped, all passengers on that car got off on the side next to the canal. The plaintiff, with his party, alighted with some difficulty, on account of the height of the car steps from the ground, and the bundles they were carrying. They waited until the train pulled out, which was about four minutes from the time it stopped. After the train left, the plaintiff and his party went upon the railway track and started towards the depot, which was some 80 yards distant. Between him and the depot, after getting off the train, about 20 or 25 yards off, and unknown to him, there was a cattle guard, 4 feet deep, into which the plaintiff, who was in advance of his party, fell, and suffered the injury complained of. The night was very dark—so dark that the plaintiff and the ladies who were with him could not see each other after the train left; and he saw no light until after he had fallen and was getting out of the cattle guard, when he saw two men, with lanterns, about 50 yards away between him and the depot. When the plaintiff got off the car, he did not know exactly where it was. None of the railway employes aided him or his party in getting off the car, nor furnished light, nor gave him any information as to the cattle guard, which he would be compelled to pass in going from where he alighted to the depot.

When the train stopped, the plaintiff did not know how far his car was from the station platform, but thought that it was his duty to get off as he did. Upon cross-examination he stated that he knew that, if he had asked the conductor to pull up to the station, he would have been obliged to do so; and the conductor testified that, if requested, he would have done so, but stated that it was his duty to be at the platform when passengers were getting off the train, and that he was standing there, assisting them in getting off. The plaintiff testified that the car ahead of his was crowded, and that he and his party could not have gotten through the crowded cars (some six in number) to the platform before the train pulled out. The station platform was sufficiently long to enable passengers to get on and off the

trains of the length usually run upon the road.

It is the duty of a railway company, for the protection of passengers carried or to be carried on its trains, to provide and maintain at its stations reasonably safe and adequate ways for approaching and leaving its trains, and at night to have such ways reasonably lighted a sufficient time before and after the arrival and departure of each train to enable passengers to avoid danger. See 6 Cyc. L. & P. 605-610; *Alex. & Fred. R. Co. v. Herndon*, 87 Va. 193, 199, 200, 12 S. E. 289; *Richmond & Danv. R. Co. v. Morris*, 31 Grat. 200; *Reed v. Axtell, etc.*, 84 Va. 231, 4 S. E. 587.

And where passengers are invited, expressly or impliedly, to get off a train at a place other than that at which they usually alight, and there is any special danger attending their approach to the station, it is the duty of the railway company to warn them of such danger, and to aid them in reaching the station in safety; and especially is this true in the nighttime. See same authorities cited above.

The action of the railway company in announcing the approach of its train to the plaintiff's station, in leaving his car door open, and in stopping the train, was clearly an invitation to the plaintiff to alight. It was so understood by him and all the other passengers on that car, as appears from their action in getting off. It was so intended by the railway company, since it gave no other opportunity for them to get off. It knew that passengers, getting off the car in which the plaintiff was, could not reach the station without passing over the cattle guard. Yet it neither warned the plaintiff of this danger, nor lighted up the way, nor gave him any assistance whatever in reaching the station, but moved its train off, leaving him and his party to grope their way to the station in darkness so great that they could not see each other.

It is not often (and to the credit of the railways of the state) that we are called upon to consider a case of such culpable negligence on the part of a railway company to its passengers as this record discloses. The railway company's negligence was clearly the proximate cause of the plaintiff's injury. It knew that, in reaching the station from where it had invited him to leave its train, he would have to pass over the cattle guard. His falling into it, under the circumstances disclosed by the record, was one of the probable injurious consequences which were to be anticipated from its negligence; and that fact, and not the number of subsequent events or agencies which intervened, is the legal as well as the practical and common-sense test of whether or not its negligence was the proximate cause of the plaintiff's injury. *Standard Oil Co. v. Wakefield, etc.*, 102 Va. 824, 832-834, 47 S. E. 830, and authorities cited.

The contention that the plaintiff was guilty of contributory negligence in not going through the cars between him and the station platform before getting off, or in not hunting up the conductor, who was at the front end of the train, and requesting him to move the train until the rear car reached the platform, so that the passengers in it could get off in safety, is without merit. The plaintiff, as we have seen, was invited to get off where he did; and he cannot be held guilty of negligence for doing what he was asked to do, or for failing to do what is not usual, and what ordinary prudence would not have suggested, and what, if it was necessary or proper for him to do for his safety, the railway company ought to have informed him of when it announced his station and stopped its train.

The judgment of the circuit court is, in our opinion, plainly right, and must be affirmed.

CARDWELL, J., absent.

(108 Va. 356)

NORFOLK & W. RY. CO. v. CHEATWOOD'S ADM'X.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

MASTER AND SERVANT—RAILROADS—DEATH BY WRONGFUL ACT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGEROUS APPLIANCE—CONSTITUTIONAL PROVISION—CONSTRUCTION—INSTRUCTIONS.

1. In an action against a railroad company for the death of a "hostler," injured while riding on a tender in a switchyard, evidence held to justify submission to the jury of the question whether deceased was at his post of duty at the time of the injury.

2. Where a railroad company maintained a building in its switchyard at such distance from the track that a person riding on a step at the side of the tenders ordinarily used in the yard could pass in safety, the use of a tender so large that a person riding as usual would be crushed against the building was negligence.

3. In an action for death by wrongful act, an instruction that plaintiff is entitled to a sum equal to the probable earnings of deceased considering his age, business capacity, experience, habits, health, energy, and perseverance, is correct as to the element of damage referred to.

4. Where a constitutional provision of another state is incorporated in the Constitution of this state, the construction placed upon the provision by the courts of such other state before its adoption here must be adopted in this state.

5. Const. § 162 [Va. Code 1904, p. cclix], and Acts 1901-02, p. 335, c. 322 [Va. Code 1904, p. 707, § 1294k], providing that a railroad employee's knowledge of defects in appliances shall not bar a recovery for injuries caused by such defects, does not do away with the defense of contributory negligence, or render knowledge of defects unimportant in determining the question of contributory negligence, but merely renders knowledge alone insufficient to defeat recovery.

6. Under these provisions the servant's knowledge of defects is to be considered in connection with all the other evidence in determining whether the servant used due care, but, as such knowledge will not alone defeat a recovery, an

instruction that the defense of contributory negligence is unaffected by the statutes is too broad.

7. Instructions that defendant is entitled to make the defense of contributory negligence, and defining what constitutes contributory negligence, are sufficient to preserve defendant's right to this defense.

8. Where a railroad employee had ridden on the side of tenders past a building so close to the track that there was barely room for his body, he was not guilty of contributory negligence in trying to ride past on the side of a larger tender, unless he knew it was larger.

9. In an action against a railroad company for the death of a roundhouse "hostler" crushed to death between a building near the track and a tender on which he was riding in the usual way, but which was larger than any tender previously used in the yards, evidence held to justify submission to the jury of the issue of defendant's negligence.

Error from Corporation Court of City of Radford.

Action by the administratrix of W. J. Cheatwood against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant brings error. **Affirmed.**

A. A. Phlegar and John R. Johnson, for plaintiff in error. Longley & Jordan, for defendant in error.

CARDWELL, J. The administratrix of W. J. Cheatwood, deceased, brought this action in the corporation court of the city of Radford, alleging that the death of her intestate was due to negligence of the defendant, the Norfolk & Western Railway Company, and recovered a judgment for \$6,250, to which the defendant obtained this writ of error.

Viewed as upon a demurrer to the evidence, the case before us is as follows:

Cheatwood, the deceased, was on the 10th day of July, 1903, and had been for at least 12 years prior, in the employ of the plaintiff in error on its yard at Radford as assistant "hostler." Upon the yard, among other things, were a roundhouse, watertank, sandhouse, and coal wharf. The duties of the deceased, among others, were to assist the hostler in taking engines over the yard, getting coal, water, and sand, and running them back to the roundhouse. In doing this he opened and closed the switches, and gave signals to the hostler for starting and stopping at the proper places. There was no rule of the company prescribing the place where he should ride on the engine, and when the engine was moving forward the usual place occupied by him and other employees performing the same duties was on the step on the right-hand side of the pilot at the front of the engine; and, when moving backward, on a step on the same side of the tender at the rear end, which, when moving backward, was in front, and which positions were the most convenient for the assistant hostler, and the usual position occupied by the assistant hostler for the transaction of his business.

A number of years prior to the accident resulting in the death of Cheatwood, a sandhouse was built on the north side of one of

¶ 4. See Constitutional Law, vol. 10, Cent. Dig. § 17.

the tracks in the yard, and at a distance from the track which was free from danger to employes riding on the outside of the engines and tenders which were then in use; the plaintiff in error then using tenders holding only 4,000 gallons of water. There were four steps on each tender, one at each corner, all alike, and the steps projected from the sides of the tender to about $9\frac{1}{2}$ inches from the sandhouse when passing it. Afterwards, and perhaps a year or more (just when does not appear) before the accident to Cheatwood, plaintiff in error increased the size of its tenders so that they would hold 5,000 gallons of water, which was accomplished by extending the sides of the tenders until they were flush with the inside of the steps, the steps being $7\frac{1}{2}$ inches wide, but the distance of the steps from the center of the track, and consequently from the sandhouse, was not changed. Later plaintiff in error increased the size of some of its tenders so as to hold 6,000 gallons of water, this being accomplished by again extending the sides until they became flush with the outside of the steps, which still remained $9\frac{1}{2}$ inches from the sandhouse, but practically under the tender, as the outside of the tender was flush with the outer edge of the steps. On the rear end of the tender was a cross-beam $8\frac{3}{4}$ inches wide, extending the width of the tender. This was reached by a handhold on the corner of the tender, extending from the sill to within 12 or 14 inches of the top of the tender, and by catching this handhold a person could get up on the steps, and from there could step to the cross-beam, and when standing there could hold by this handhold or to the top of the tender, which was about as high as an ordinary man's head.

Prior to the accident to Cheatwood on July 10, 1903, he and others in the same employment repeatedly rode by the sandhouse on the steps of the engines and tenders then in use on the yard, though, in order to do so, they had to stand very close to the side of the tender, there being, if it was a 5,000-gallon tender, but one or two inches between the body and the sandhouse; and this had been without accident to him or any one, and with full knowledge on the part of plaintiff in error that it was the custom of such employes to so ride on the tenders in performing the duties of assistant hostler. Between the 1st and 10th of July, 1903, a 6,000-gallon tender appeared upon the yard at Radford; just at what time does not appear, but it is certain that Cheatwood was not called on to handle it until the night of the 10th, and on that night engine No. 771, having a 6,000-gallon tank (tender) was taken to the coal wharf, with Cheatwood as assistant hostler. Returning from the wharf, with the tender in front, he was riding upon the step of the tender, where he had been in the habit of riding when performing his duties, the step being under the tender, as stated, differing in this respect only from the tenders former-

ly run over the yard; and this change made it impossible for a man to pass the sandhouse standing on that step, as the side of the tender was only $9\frac{1}{2}$ inches from the sandhouse. As a necessary consequence, Cheatwood was mashed between the tender and the sandhouse, and received injuries from which he died the next day.

At the trial, and after the introduction of all the evidence, the court, at the instance of the defendant in error (plaintiff below), gave six instructions to the jury, all of which were objected to by plaintiff in error except No. 6; and the plaintiff in error (defendant below) asked for five instructions, to each of which defendant in error objected, and Nos. 1 and 2 were refused, and Nos. 3, 4, and 5 amended. The court also, of its own motion, gave two instructions, to the first of which plaintiff in error excepted; and after this ruling plaintiff in error asked for instructions Nos. 6 and 7, to which no objection was made, and they were also given.

Instructions Nos. 1 and 2, asked by defendant in error, are as follows:

"Instruction No. 1.

"If the jury believe from the evidence that W. J. Cheatwood came to his death by being crushed between the tender of an engine and the sandhouse of the N. & W. Railway Co. located dangerously near the coal wharf track of said railway, if they believe from the evidence it was so located, on its yard at East Radford, and at the time of the injury he was riding on said tender in the course of his employment at his post of duty, and was injured without fault on his part, they must find for the plaintiff, and assess her damages accordingly, although they may believe from the evidence that plaintiff knew of the location of said sandhouse with reference to said track.

"Instruction No. 2.

"The jury are further instructed that it was the duty of the defendant company to use reasonable care to furnish to plaintiff's intestate a reasonably safe place in which to work, and reasonably safe appliances, machinery, ways, and structures; and the knowledge by said intestate, W. J. Cheatwood, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures, shall be no defense to an action for an injury caused thereby—such as an injury resulting from a sandhouse being located too near to its railway track when running engines and tenders of the size of engine and tender No. 771, should the jury believe from the evidence that the said sandhouse was located too near the said track, and was for that reason unsafe."

The chief objection urged to No. 1 is that there was no evidence on which to found the second proposition contained therein, to wit, that Cheatwood at the time of his injury was at his post of duty.

We do not think that this is a valid objection to the instruction, as there was abundant evidence, as we shall see when we come review it, tending to show that Cheatwood was at his post of duty, and certainly enough to submit the question to the jury, which is in fact the purport and effect of the instruction. The term in the instruction, "dangerously near the track," was to be considered in the light of the evidence; and, while there was in fact no defect in the construction of the tender or sandhouse, the question submitted to the jury was whether or not the situation had been made dangerous by the enlargement of the tender upon which Cheatwood was riding, known to plaintiff in error, but not to Cheatwood, and when the instruction was read in connection with the other instructions, it was not open to the objections which plaintiff in error makes to it.

It is conceded that the first part of instruction No. 2 correctly defines a master's duty in furnishing appliances and structures. It then states that the servant's knowledge of the defects is no defense to an action for injuries caused thereby, and it is as clearly the purpose of the instruction to tell the jury that it was negligence to run such an engine as No. 771 by the sandhouse if they believed from the evidence that the sandhouse was located too near the track, and was for that reason unsafe. Here again the instruction was to be interpreted in the light of the evidence, which tended to show the negligence of plaintiff in error in placing on its yard, to be handled by its employes, an engine of so much larger size than that which Cheatwood and other employes had been in the habit of handling that it rendered the situation unsafe, while without this knowledge of the size of the tender which Cheatwood was called upon to handle on the night of the 10th of July the sandhouse was not dangerously near the track. The evidence was as all-sufficient to justify the giving of the instruction.

The court is further of opinion that there was no error in the giving of the third and fourth instructions asked for by defendant in error, which are as follows:

"Instruction No. 3.

"If the jury believe from the evidence that plaintiff's intestate, in the proper discharge of his duty, was accustomed to ride engines and tenders through the space between the sandhouse and track in question with safety, and that the defendant company, without notice to him, caused him to ride, on the night he was injured, an engine with a tender broader than engines and tenders he had been accustomed to handle, and which increased the danger, and thereby made it unsafe to ride said engine by said sandhouse on him when so riding, and that this was the proximate cause of his death, without

fault upon his part, then the jury must find and assess damages for the plaintiff.

"Instruction No. 4.

"If the jury believe from the evidence that for years the switching or assistant hostler, Cheatwood, of the Norfolk & Western Railway Company, all the years at Radford, had been safely riding engines and tenders by this sandhouse, moving and headed in the same direction as was the engine and tender on the night of July 10, 1903, W. J. Cheatwood received the injuries which caused his death, and believe from the evidence that said Cheatwood had had no instructions not to ride on the step of the tender when passing said sandhouse, and that he had no instructions where to ride, and that there was no rule of the company applicable to his position in the performance of his duties, and that standing in that position he could most conveniently and with greatest dispatch for said railroad company perform the duties pertaining to his position; and further believe from the evidence that he was at his proper place for the performance of his duties; and without notice to said Cheatwood said company widened some of its tenders so that a man standing in the position on said step at the side of said tender, where said Cheatwood had been accustomed to stand, could not pass said sandhouse without being injured or killed; and that in the due and proper performance of his duties, using ordinary care therein, he attempted to ride said tender by said sandhouse on the night in question, and in doing so received the injuries which caused his death—then they must find for the plaintiff, although they may believe from the evidence he had knowledge of the distance and location of said sandhouse with reference to said track."

Instruction No. 5 given for the defendant in error is as follows:

"Instruction No. 5.

"The jury are instructed that, if they find damages for the plaintiff, in ascertaining such damages they should find the same with reference—First. To the pecuniary loss sustained by Sallie Cheatwood, his wife, and the three children of W. J. Cheatwood by the death of said Cheatwood, fixing the same at such sum as would be equal to the probable earnings of the said Cheatwood, taking into consideration the age, business capacity, experience, habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed. Second. In ascertaining the probability of life the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third. By adding thereto compensation for the loss of his care, attention, and society to his wife and children. Fourth. By adding such further sum

as they may deem fair and just by way of solace and comfort to said wife and children for the sorrow, suffering, and mental anguish occasioned to them by his death."

The instruction is in a form which has been repeatedly passed upon by this court, as is conceded by plaintiff in error, and the objection made to it is that it told the jury that they should give the probable earnings of the deceased during what would have probably been his lifetime but for the accident, and states as the rule that they should find, as the capital to be invested, all that a man would probably earn in a lifetime, without deducting for his expenditures, and with only guesswork as to his health. The instruction is practically the same as an instruction approved by this court in *B. & O. R. Co. v. Weightman's Adm'r*, 29 Grat. 431, 26 Am. Rep. 384, and again sanctioned in *B. & O. R. Co. v. Noel*, 32 Grat. 394, and *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 602, 47 S. E. 850; and in addition to this sanction of the instruction we do not feel warranted in holding that it was not a proper instruction when it is not claimed in this case that the verdict found by the jury is excessive.

This brings us to a consideration of the instructions of plaintiff in error refused by the trial court, or modified, and given as modified.

Instruction No. 1 involves a construction of section 162 of the Constitution of Virginia [Va. Code 1904, p. cclix] and the act of Assembly approved March 27, 1902 (Acts 1901-02, p. 335, c. 322 [Va. Code 1904, p. 707, § 1294k]), which provide that "knowledge by any railroad employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures shall be no defense to an action for injury caused thereby." Instruction No. 1 was to the effect that nothing contained in this constitutional provision or in the act of Assembly prevented plaintiff in error from making the defense of contributory negligence in the same manner and to the same effect as it could have done if such section and act had not been adopted; and, if Cheatwood's death was caused by his own neglect, they must find for the defendant.

This provision of the Constitution was taken verbatim from the Constitution of the state of Mississippi, and when adopted by our late constitutional convention it had been construed by the Supreme Court of Mississippi in the case of *Buckner v. R. & D. R. R. Co.*, 72 Miss. 873, 18 South. 449, in which case a servant was injured by defective machinery and his contributory negligence. It was in that case claimed that the Constitution of Mississippi abrogated the defense of contributory negligence, but the court held otherwise, and, after quoting the constitutional provision, said: "The effect of this is not to destroy the defense of contributory negligence by a railroad company, but merely to abrogate the previously existing rule that

knowledge by an employé of the defective or unsafe character or condition of the machinery, ways, or appliances shall not, of itself, bar a recovery. The law was that knowledge by an employé of defective appliances which he voluntarily used precluded his recovery for an injury thus received. The Constitution destroys that rule, and the mere fact that the employé knew of the defect is not a bar to recovery; but knowledge by an employé of defects is still an element or factor, and a very important one, in determining whether, with the knowledge he had, he used that degree of caution required in his situation with reference to the appliances causing his injury. The Constitution did not have the effect to free employes of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employes, must not be guilty of contributory negligence, if they would secure a right of action for injuries."

Under the rule laid down by this court in *N. & W. Ry. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722, the construction placed on that clause in our Constitution by the Mississippi court must be adopted by this court.

Practically the same words occur in the Constitution of South Carolina, which were construed by the Supreme Court of that state in *Bodie v. C. & W. O. Ry. Co.*, 39 S. E. 715, and *Carson v. Southern Ry. Co.*, 46 S. E. 525. In the first named of these cases, the court expressly recognized that contributory negligence was a good defense notwithstanding the constitutional provision; and as to the second case it is sufficient to say that it can have no bearing here, as it was not rendered until after the adoption of our present Constitution.

We are of opinion that, independently of the rule laid down in *N. & W. Ry. Co. v. Old Dom. Baggage Co.*, supra, the construction put upon the language of the constitutional provision under consideration by the Supreme Court of Mississippi is a correct construction.

But we are further of opinion that the instruction No. 1 asked for by plaintiff in error was properly refused. In addition to the fact that there were other instructions given which clearly stated to the jury that the plaintiff in error had the right to rely upon the defense of contributory negligence, instruction No. 1, refused, was too broad, and was therefore calculated to confuse and mislead the jury.

While the right to make the defense of contributory negligence is not abrogated by the constitutional provision and the statute under consideration, the defense cannot rest alone upon the knowledge of an injured employé of the defective or unsafe character or condition of any machinery, ways, appliances, or

structures which may have been instrumental in causing the injury for which he sues, but such knowledge is rightly to be considered by the jury along with all the evidence in the case in determining whether the employee injured used that caution required in the situation he was placed in when the injury was received. Before the adoption of the constitutional provision and the statute, knowledge by any employee of the defective or unsafe character or condition of any machinery, ways, appliances, or structures which were instrumental in causing the injury sued for, upon the doctrine of assumed risk based on knowledge, actual or imputed, arising from the contract between the parties, the law implied that the servant assumed the risk of all danger of which he had knowledge, or by the use of proper diligence would have had knowledge, and therefore did not permit a recovery for an injury arising from defective machinery, ways, appliances, etc., where the defect was known to him. But not so now. The difference between assumed risk, actual or imputed, and contributory negligence arising from matters *ex delicto*, and consisting of wrongdoing, has been aptly expressed as "using a known defective appliance carefully and using a good appliance carelessly." An interesting and an exhaustive discussion of the cases on this subject, both where the distinction was made and where it was lost sight of, may be found in the case of *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, and they are also fully discussed in *Bodle v. R. R.*, *supra*. So, as we have said, an instruction which tells the jury that the defense of contributory negligence could be made in the same manner and with the same effect as if the constitutional provision and act under consideration had never been adopted, which is, in effect, to say that the defense is unaffected, is too broad, and therefore well calculated to confuse and mislead the jury.

In the case at bar the court, at the instance of the plaintiff in error, by instructions Nos. 6 and 7, told the jury that plaintiff in error had the right to make the defense of contributory negligence, although they might believe from the evidence that the location and construction of the sandhouse and tender rendered the place defective and dangerous, and that a party is guilty of contributory negligence when he does something he ought not to have done, or omits to take some precaution which he ought to have taken under the circumstances. These instructions fully preserved to plaintiff in error the right to make the defense of contributory negligence.

Plaintiff in error's instruction No. 2, refused, was as follows:

"The defendant company was not bound to move the structures on the side of its tracks merely because it widened its engines or tenders, so long as there was space for

them to pass in safety, and reasonable means existed or were provided for its employees to pass such structures in safety while performing their duties, although it may have been more inconvenient for them to use such means as they did use before the widening of the engines or tenders."

The fatal objection to this instruction is that in directing the jury to consider whether the plaintiff in error had provided other safe places where Cheatwood might have in safety ridden upon the engine on the occasion of the accident to him, it ignored all consideration of the question whether such other safe places were known to Cheatwood. Cheatwood could not be held guilty of knowingly riding in an unsafe place instead of in a safe place provided for him by his employer, unless conscious at the time of the danger of the position he was taking and of the safe position provided for him; and where that is the situation the rule of law laid down in 2 *Thomp. on Neg.* 1059, C. & O. Ry. Co. v. *Sparrow's Adm'r*, 98 Va. 644, 37 S. E. 202, *Street's Adm'r v. N. & W. Ry. Co.*, 101 Va. 746, 45 S. E. 284, that where there are two ways to do a thing, one dangerous and the other safe, both open to the servant, it is his duty to use the safe way, although it is not as convenient as the other way—and which rule is invoked by plaintiff in error—has no application.

Plaintiff in error's instructions Nos. 3 and 4, as presented, told the jury that the fact (if it was proved) that Cheatwood had ridden safely on the steps of tenders through a space so narrow they could barely pass through, and of which he had been warned because of the danger, did not justify him in assuming that he could do so on another tender, which was larger, and of different construction; but they fail to preserve for the consideration of the jury the question whether or not Cheatwood knew that the tender in question was larger and different, or could, by ordinary care, have known it. This fatal defect in the instructions was obviated by the amendments thereto made by the court, which were entirely proper.

These instructions Nos. 3 and 4, as amended by the court (the amendments appearing in italics) are as follows:

"No. 3.

"The jury are instructed, if they believe from the evidence that William Cheatwood had ridden safely by the sandhouse while standing on the steps of the tenders of smaller size and different construction from the one on which he was riding when injured, and believe that on the smaller tenders there was barely sufficient room for him to pass by being careful to stand close to the side of the tender and that he had been warned that it was dangerous for him to do so, the fact that he had so ridden did not justify or excuse him for undertaking to ride by the sandhouse on the step of a larger tender of

different construction, *if he knew that it was larger*; and if they believe that he attempted to do so and was killed in such attempt they must find for the defendant."

"No. 4.

"A person who has been accustomed to ride through a narrow place when there is just enough room for him to get through on tenders or engines which he was accustomed to cannot attempt to ride through the same space upon a new and different engine or tender of different construction, on the supposition that it is no wider than those he has been using, and throw the loss on his employer in case he is injured by reason of its being wider, *unless he knew it was wider and different, or by reasonable and ordinary care might have known of it*; and if the jury believe that William Cheatwood made such attempt, and was killed while doing so, they must find for the defendant; and this rule is not changed although they may believe that he did so because he was not thinking what he was doing."

The court also very properly amended plaintiff in error's instruction No. 5 in the same respect, and this instruction, as amended, is as follows:

"If the jury believe from the evidence that there were places on the engine or tender provided for that purpose, known to him, where William Cheatwood could have stood and performed his duties in safety, and believe that he had been warned against riding on the tender next to the sandhouse because it was dangerous to do so, and that he was killed while attempting to ride by the sandhouse on a tender, they must find for the defendant, although the position taken by him was the most convenient one."

The instructions given by the court, *ex mero motu*, are as follows:

Court's Instruction No. 1.

"The court instructs the jury that knowledge by any railroad employé injured of any defective or unsafe character or condition of any machinery, ways, appliances, or structures shall be no defense to an action for injury caused thereby; and if the jury believe from the evidence that Cheatwood was so injured by reason of the unsafe condition or character of defendant company's appliances and structures, *viz.*, that the sandhouse in question was situated dangerously near the track, and was thereby rendered unsafe to the plaintiff in the performance of his duties as assistant hostler, and if they believe that deceased, Cheatwood, was attending to his accustomed duties, using ordinary care therein, at the time he received the injury which caused his death, they must find for the plaintiff, notwithstanding they may believe from the evidence that he had knowledge of said unsafe condition or character of the sandhouse."

Court's Instruction No. 2.

"The court instructs the jury that these instructions are to be read together, and construed in the light of each other."

The instructions in the case have been set out above, and the court is of opinion that they fully and fairly presented the legal propositions contended for by the counsel on each side.

This brings us to the consideration of the remaining assignment of error, which is the refusal of the court to set aside the verdict and award a new trial on the ground that it was contrary to the law and the evidence.

The defendant in error rested her claim for a recovery of damages upon the grounds (1) that Cheatwood was without fault; (2) that he was at his post of duty, in the only position he could assume to properly and expeditiously perform his duties; (3) that the master knew the place he occupied; (4) that he had safely occupied it for 12 years; (5) that the position on the step of a tender was absolutely safe until the 6,000-gallon tenders were put on; and (6) that he had no notice of the danger or of the change in the size of the tenders.

On the other hand, it was contended by plaintiff in error: (1) that there was no defect or unsafe condition in its tender, sandhouse, or track; that each and all, severally and collectively, were reasonably safe for the performance of all requirements of Cheatwood, if he had made a reasonably and ordinarily careful use of them. (2) That neither his instructions nor duty required him to ride on the step where he was killed, as the selection of the step as his riding place was his own choice. (3) That he had been warned not to occupy that position because it was dangerous; that the warning showed that it was unnecessary to be on the step at that place; and that, independently of the warning, his observation must have shown him the danger. And (4) that, with knowledge of the danger in riding on tenders he was accustomed to, he increased the risk by riding a tender of different construction, without attempting to ascertain whether or not it increased the danger, and was killed because the danger of doing so was materially increased.

With the very full statement of the case made at the outset of this opinion, it is unnecessary to go very fully into a review of the evidence. It unmistakably appears—and by this the negligence of the plaintiff in error is fully established—that the company had no rule specifying where the assistant hostler should ride on its engines when performing the duties performed by Cheatwood on the occasion of his injuries; that it was known to plaintiff in error that Cheatwood and others doing a like service were riding on the engines in use on its yard at Radford in the manner and at the places stated

above; that in riding upon the engines in use prior to the day of this accident there was barely room for the assistant hostler to ride upon the step of a tender in safety by the sandhouse situated near the track; that with full knowledge of these facts a 6,000-gallon tender was brought upon the yard in the nighttime, and Cheatwood was called upon to handle it as he had handled other engines, without any notice whatever to him of the change in the size of the tender, and without any opportunity on his part to have known this fact. The engineer who was running the engine to which this 6,000-gallon tank was annexed testifies that he did not know that he had a larger tank until after Cheatwood had been injured; that it would have required a very close inspection to have discovered the change which had been made; and, in effect, it was impossible for Cheatwood, in the nighttime, and under the circumstances, to have known of the increase in the size of the tender and the necessarily increased danger brought to him by the change of tenders. Upon the question whether or not Cheatwood was at his post of duty, the evidence, briefly stated, is as follows: That it was his duty to adjust the switches for the hostler, the hostler being the man in charge of the engine; that he was at the place most convenient for him and the engineer; that he was, at the time of the accident, at the post that he and other assistant hostlers had been assuming to perform their duties, which was on the steps at both ends—on the head when going west, and on the tank or tender coming east, backing; that Cheatwood had for 12 years been performing this duty, passing by the sandhouse upon the engines or tenders for 12 years without injury; that the post he occupied was where he could best discharge the duty immediately in hand, with due regard to his own safety and the business of the company. Three witnesses, experienced in the work on the yard at Radford, all of them employes of the plaintiff in error, and one of them (McGee) who was running the engine No. 771 on the occasion of this accident, testify that the duties performed by Cheatwood could best be done when backing with the tender in front, by standing on the step of the tender on the side of the engineer. In answer to the question, "Was there another place on this tender provided for him to ride, that you know of?" one of the three witnesses referred to answered: "No, sir; not that I know of. I never saw any one ride anywhere else except on the tender. Q. Except on the tender, you mean? A. Yes, sir." This witness, who states that he had been on that yard for 13 years, was asked if the place occupied by Cheatwood on the occasion of this accident to him was the best place for him to perform his duties, and answered, "Yes, sir; according to my judgment." Another of the three witnesses referred to was asked, "In the proper performance of his duties,

due regard being had to facilitating the business of the company as well as to the safety of the man to discharge those duties, where was the best place for a man to stand to perform them—I mean as assistant hostler?" to which he answered: "Well, both for his own advantage and that of the man he was working with, it was best to stand on the step. It was in a manner to push the business along, and as much to their interest (meaning the company) as to that of the man." The same witness states: "That was the post they had been assuming to perform that duty; that was on the step at both ends—on the head when going west, and on the tank coming east backing."

According to these and other witnesses, to sum up, the following facts appear: (1) That the position occupied by the deceased, Cheatwood, was the necessary, usual, and proper position occupied by the assistant hostler; (2) that he could, in that position, best perform the duties required of him by the master; (3) that employes always rode in that position, unless it was storming; (4) that he could not properly attend to his duties in any other position which was as safe as that one; (5) that the position occupied by him was well known to the master; (6) that he had safely ridden in that position for from 12 to 20 years on all tenders known or handled by him prior to the 10th of July, 1903, when he received his fatal injuries; (7) that it was the first time an engine with a tender of that size, and headed as that one was, was taken by Cheatwood, the deceased, to the coal wharf by the sandhouse; (8) that Cheatwood was called to assist with this engine in the nighttime, and that he did not know, nor by the exercise of ordinary care could he have known, that he was handling an engine with a tender larger than those he was accustomed to riding; (9) that he was given no notice of the change in the size of the tender, or the altered condition of the ways; (10) that he had no instructions as to the position he should occupy on a tender and engine; (11) that on the tender upon which he was sent on the night of July 10th a man standing in the position he was accustomed to occupy could not, with ever so great care, possibly pass by the sandhouse without receiving fatal injuries; (12) that it was difficult to get upon the end sill at the end of the tender, that when there it was a dangerous position, more so than that on the step, and difficult to maintain, and that one in that position could not well perform the duties required of him; and (13) that the steps were the safer place for him to occupy as compared with the sill at the end of the tender, where it is claimed that he could have ridden with greater safety; in fact, until the introduction on the night of July 10th, for the first time, of the 6,000-gallon tender, the step upon which Cheatwood was riding was a perfectly safe place.

The situation, then, was this: The plain-

tiff in error had no rules prescribing where its servants should ride on its engines and tenders when performing the duties of an assistant hostler on the yard at Radford. It knew that its servants performing these duties had for years been in the habit of riding upon the engines and tenders run over the yard in the manner and places heretofore stated. It knew that it was impossible for an assistant hostler to ride upon the step of a 6,000-gallon tender, running backwards, over the yard, by the sandhouse situated near the track over which the engine and tender must necessarily pass, without certain injury or death to the assistant hostler; yet it permitted a tender of that size to be run over the yard in the nighttime on July 10, 1903, without any warning to those whose duty it was to handle it, and in consequence of this negligence on its part Cheatwood received injuries resulting in his death. Bearing in mind, as is conceded in the argument here, that the evidence does not show that Cheatwood and others repeatedly rode past the sandhouse on the steps of 5,000-gallon tenders, and in fact does not show that Cheatwood ever rode on the step of a tender of that size by the sandhouse, can it be said, in the face of the testimony of the hostler in charge of engine No. 771 on the night of July 10th, and with whom Cheatwood had worked for five years preceding, to the effect that it would have taken very close inspection to have discovered the fact that the tender attached to the engine on that occasion was larger than those formerly handled on the yard, that Cheatwood knew, or by the exercise of ordinary care and prudence could have known, that it was a larger tender than those he had formerly been handling, and that he could not with safety ride on its steps by the sandhouse, when in fact the hostler himself did not know the tender was larger until after Cheatwood had been mashed at the sandhouse? We think, as did the jury, that the question must be answered in the negative.

"No servant is presumptively chargeable with notice of a peculiar and unusual state of things. Reasonable time must be allowed to a new servant to become acquainted with his surroundings, and to an old servant to learn of changes in the situation. Servants are presumed to be aware of defects which are perfectly obvious to their sight, and the danger of which is obvious to any person of their mental capacity. But, to charge them with notice on this ground, the defect and danger must be unquestionably plain and clear, so that, if they did not see it, they must necessarily have been in fault." 1 Shearman & Red. on Neg. § 216.

The warning which it is claimed that Cheatwood had consisted merely in McGee, the hostler with whom he was working, saying to Cheatwood, "maybe a year or two before he was killed: * * * 'If I was in your place, I would not ride the tanks

through there,' and I told him I thought it was dangerous." In view of the fact that it does not appear when these remarks were made to Cheatwood, and that the same witness (McGee), as well as others, testify that they never saw Cheatwood ride a 5,000-gallon tank by the sandhouse, but knew that he, as well as others, had been riding the smaller tanks by there regularly for years previous, no importance is to be attached to this so-called "warning." Nor do we concur in the view of counsel for plaintiff in error that the answer to the question asked Cheatwood the morning after his injuries, "Why on earth did you ride that big engine through there?" to which Cheatwood replied, "I don't know why; I had been riding those hogs; wasn't thinking what I was doing"—should be taken as an admission by Cheatwood that he knew that the tender which he was called upon to handle on the night of July 10th was larger than the tenders that he had theretofore been handling on the yard. When saying, "I had been riding those hogs," he must have had reference to the 4,000-gallon tenders upon which he had ridden with safety for a great number of years previous, as neither of the witnesses who testified on this point, and who were employes on the yard with Cheatwood, could say that they ever saw him ride on the steps of a 5,000-gallon tender by the sandhouse. Nor can any importance whatever, as it seems to us, be attached, under all the circumstances, to that part of Cheatwood's answer to the same witness, viz., "I wasn't thinking what I was doing."

Upon the whole case, we are of opinion that the judgment of the corporation court of Radford should be affirmed.

(103 Va. 456)

RICHMOND, F. & P. R. CO. v. JOHNSTON et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

HIGHWAYS—POWER TO CONDEMN RAILROAD PROPERTY.

1. The general power to condemn land, conferred by Code 1887, §§ 1095, 1096, which authorizes the crossing of railroad tracks by a highway, is insufficient to authorize the condemnation for highway purposes of property purchased and used by a railroad company for station grounds and yards.

Error from Circuit Court, Henrico County.

Condemnation proceedings by one Johnston and others against the Richmond, Fredericksburg & Potomac Railroad Company. From a judgment for petitioners, defendant brings error. Reversed.

Leake & Carter, for plaintiff in error.
Sands & Sands, for defendants in error.

KEITH, P. The Richmond, Fredericksburg & Potomac Railroad Company and the Chesapeake & Ohio Railway Company operate lines of railroad from the city of Rich-

mond, in a northerly direction, into and beyond the county of Henrico. A short distance beyond the city limits a public thoroughfare was constructed between the two roads, and it became desirable, with a view to its extension, to cross the tracks of the Richmond, Fredericksburg & Potomac Railroad. This company had purchased a parcel of ground from Lewis Ginter, containing about nine acres, for which it paid the sum of \$6,714.75, and received a deed dated November, 1891, which was admitted to record on the 1st day of February, 1892. This plat of ground is 120 feet in width and 3,250 feet in length, and is adjacent to the original right of way upon which the principal tracks of the railroad company are laid, and the purpose was to lay down upon it switches and other conveniences for the storing of cars and making up and shifting of trains.

Johnston, Beattie, and others filed their petition in the county court of Henrico county in September, 1900, asking the appointment of a commission to open a road "from the termination of Laburnum avenue, in Brookland township, at its intersection with the R. F. & P. Railroad, just west of Acca, also located in said magisterial district." It is stated in the petition that the road has become a necessity to the petitioners and to the public generally, in view of the fact that the Richmond, Fredericksburg & Potomac Railroad has blocked up a private road which had been used by the public generally for a long period of years as a convenient outlet between the travel of Broad street road and the Hermitage and Brook roads and the section of the county lying between the same.

As a result of the litigation following upon the filing of this petition, such proceedings were had that on the 21st day of September, 1901, the county court of Henrico entered an order opening the road, and fixing \$125 as the compensation to be paid the railroad company. This order was affirmed by the circuit court, and is now before us for review upon a writ of error to that court.

It satisfactorily appears that the railroad company purchased this land for the object stated, in good faith, and without notice of any rights attaching to it upon the part of the defendants in error.

Two questions are presented for decision, the first, as to the propriety of the condemnation of the railroad property under the circumstances disclosed in this record, and, secondly, as to the adequacy of the compensation awarded.

Section 1095 of the Code of 1887 provides that: "Every railroad hereafter constructed across a county road, street or other highway; and every county road, street, or other highway hereafter constructed across a railroad shall, as far as practicable, pass at surface grade, or pass beneath or above any existing structure at a sufficient depression or elevation, as the case may be, with easy

grades, so as to admit of safe and speedy travel over each."

Section 1096: "At every existing crossing such as is mentioned in the preceding section, the grade of the work last constructed, to the full width of the railroad land, shall be made sufficiently smooth and level to admit of safe and speedy travel over such crossing. Where such improvement is to be made in a railroad, it shall be made by the corporation, company, or person operating the same. Where it is to be made in a county road, street, or other highway, it shall be made by the authorities having the control of such county road, street, or other highway and charged with the duty of keeping the same in order."

Acting under the authority conferred by these sections, the county authorities of Henrico seek to construct a public thoroughfare across the land of the railroad company, purchased for and devoted to the uses of a railroad yard, through which numerous trains engaged in freight and passenger traffic are passing, and in which engines are to be constantly employed in shifting cars and in making up trains. Under such conditions it would be well-nigh impossible to construct a crossing at surface grade so as to admit of safe and speedy travel, and it was therefore urged with much force that this consideration alone should defeat the petition for opening the road, as being inconsistent with proper regard for the safety of the traveling public, whether upon the proposed highway or along the railroad tracks.

We shall not, however, rest the decision of the case upon that point. We do not question the power of the state, in the exercise of its right of eminent domain, to condemn land already condemned and appropriated to a public use. The general statute which we have quoted is ample authority for crossing a railway with a public highway, or a public highway with a railway, the safety of the public being carefully protected. But the better opinion seems to be that a general power of condemnation, such as is found in sections 1095 and 1096 of the Code of 1887, which authorizes the crossing of the tracks of a railway company by a highway, or of a highway by the tracks of a railway company, is insufficient to authorize the condemnation of property purchased and used by a railroad company for depots, stations, and railroad yards. The power to condemn any and all such property is recognized, but the authorities seem uniformly to hold that it must be exercised in obedience to a statute which specifically authorizes its condemnation, and that general language, such as is used in the sections we have quoted, is insufficient to that end.

In *Lewis on Eminent Domain* (2d Ed.) § 266, it is said: "A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of

a railroad. It makes no difference that the railroad company owns its right of way in fee. An authority to lay out a highway across the track of a railroad company is authority to cross all the tracks at any place. But under a general authority to lay out highways, a part of the right of way of a railroad cannot be taken longitudinally, nor can the way be laid through depot buildings, and grounds, shops, and the like, which are devoted to special uses in connection with the road, and necessary to its operation and in constant use in connection therewith, and which would be materially impaired or destroyed by the taking. But the rule must receive a reasonable application, and a slight interference with the platform of a depot will not prevent the establishment of a highway."

In *Elliott on Roads and Streets* (2d Ed.) at section 218, it is said: "The power to take property for public use is not restricted to property upon which the right has not been exercised, but it extends to property previously appropriated. Land which has been seized for one public purpose may be taken for another whenever the public necessity requires. A street may be laid upon a turnpike or on a railroad, or a canal may be seized for that purpose. The Legislature has supreme power over the subject, limited only by the constitutional provisions, and, when it exercises this authority, the presumption is that the former use has become less beneficial to the public, and that the necessity of the public demands the appropriation of the property to the new use."

Section 219: "The right of eminent domain is a dominant legislative power, only called into exercise by the enactment of a valid statute, and, when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the Legislature intended to again seize property which had been once appropriated. The authority to take property seized and appropriated to another public use may be implied from the language of the statute, but this can only be so where the words employed and the evident intent of the statute make it clearly the duty of the courts to give force to the implication. The intent of the Legislature to destroy the rights granted by former statutes must unequivocally appear. A grant of authority to appropriate land seized under former statutes, or previously seized for public use, cannot ordinarily be inferred from a mere general grant. The general rule is that if the two uses are not inconsistent, and both may stand together without material impairment of the first, authority for the second use may be implied from a general grant; but if they cannot co-exist without material impairment of the first, authority to take for the second cannot

be implied from a mere general grant of authority to condemn."

See, also, *Dillon on Mun. Corp.* § 688.

In this case it seems to be plain that the uses are inconsistent, and that they cannot stand together without a material impairment of the rights of the railroad company. The trains engaged in the transportation of passengers and freight over a great through line are of themselves so numerous as to render a crossing at grade extremely perilous. It is a matter of common knowledge that grade crossings are the cause of a large portion of the accidents which put life and property in jeopardy. How much more dangerous would be the passage along a broad thoroughfare or boulevard intended especially as a pleasure drive, which crosses at grade not only the ordinary business tracks of the railroad, but the numerous switches covering the yard of a railroad company used for storing and shifting its cars and making up its trains? It does not require the testimony of expert witnesses, for it is a matter of common knowledge that the use of the thoroughfare and of the railroad under such conditions would each be attended with constant and inevitable danger.

In *Prospect Park & Coney Island R. R. Co. v. Williamson*, 91 N. Y. 552, it is said: "Lands once taken for a public use, pursuant to law, under the right of eminent domain, cannot, under general laws, and without special authority from the Legislature, be appropriated by proceedings in invitum to a different public use."

Where a railroad corporation, by proceedings under the general railroad law, acquired title to lands belonging to a town for depot purposes, in which proceedings the town appeared and contested, putting in issue the necessity of the taking of all the lands sought to be condemned, it was held that it was not open for the officials of the town to question collaterally the propriety of the condemnation, and they could not, without special legislative authority, appropriate a portion of the land so taken for a public highway.

To the same effect, see *Matter of City of Buffalo*, 68 N. Y. 167, where Justice Folger says: "The Legislature may interfere with property held by a corporation for one public use and apply it to another, and may delegate the power so to do to another corporation, but such delegation must be in express terms, or must arise from necessary implication." In *re Boston & Albany R. Co.*, 53 N. Y. 574; *Boston Water Power Co. v. Boston & Worcester R. Co.*, 23 Pick. 360.

In *Boston & Albany R. Co. v. President & Trustees of Village of Greenbush*, 52 N. Y. 510, almost the identical question under consideration was decided. That eminent judge, Chief Justice Church, delivered the opinion of the court, in which it was held that the provision of the act regulating the construction of roads and streets across

railroad tracks, which authorizes the laying out of streets and highways across the track of any railroad without compensation, etc., has reference only to tracks used for public traffic, and for turn-outs and switches, and that the term "track" therein used does not include grounds upon which tracks are laid for storing cars or exclusively for making up trains.

In *Milwaukee & St. Paul Ry. Co. v. City of Faribault*, 23 Minn. 167, it is held that, under a general power to lay out and open streets in a city, the city council has no authority to lay out and open a street through the depot grounds of a railroad company in such manner as to destroy or essentially impair the value of the company's easement therein, theretofore acquired under and in pursuance of an express legislative grant for that purpose. See, also, *Wellington, and Others, Petitioners*, 16 Pick. 89, 26 Am. Dec. 631.

In *St. Paul Depot Co. v. City of St. Paul*, 30 Minn. 359, 15 N. W. 684, it was held that the land, having been set apart for a specific public use, cannot be devoted to another public purpose except the power be expressly conferred by legislative grant or arises from a necessary implication. And there can ordinarily be no necessary implication of the existence of such authority when the public necessity for the specific appropriation of the particular tract is not made to appear, and where the general power may be beneficially exercised without such taking, or where the two public uses are necessarily inconsistent; and that, when the land appropriated by such corporation is lawfully acquired pursuant to its charter, and is actually used and needed for a public purpose authorized thereby, it is not material that it was acquired by purchase instead of by regular condemnation proceedings. *Rochester Water Commissioners*, 66 N. Y. 413; *Yates v. Van de Bogert*, 56 N. Y. 526.

The language employed in the sections of the Code relied upon as conferring authority to condemn the property in controversy is of a most general description. They obviously contemplate the crossing of tracks devoted to railway traffic, and not to property which railroads may lawfully, and must of necessity, acquire, such as depots, warehouses, yards for the shifting and making up of trains, and other like purposes incident to their duties. We repeat that we do not question the power of the Legislature to authorize the condemnation of the property in question for the purposes set forth in this record, but we are of opinion that no such power now exists, either by the express authority of the Legislature, or by necessary implication from any general power of condemnation for the construction of highways, and we think it may with much propriety be left with the Legislature to say whether or not Laburnum avenue should be permitted to cross the tracks and yard of the plaintiff in

error at the point indicated, and, if so, under what limitations, restrictions, and conditions, in order that the public safety and convenience in the use of the avenue and of the railroad may be guarded and protected.

Having reached the conclusion that there was no power to condemn in the case before us, it is, of course, unnecessary to discuss the question of compensation.

The judgment of the circuit court must be reversed, and the case remanded.

(103 Va. 391)

WARNER MOORE & CO. v. WESTERN ASSUR. CO.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

REFORMATION OF INSTRUMENT—INSURANCE POLICY—SUFFICIENCY OF EVIDENCE.

1. Evidence in a suit to reform a policy of insurance on a stock of goods, which described the goods as being in a building other than where situated, considered, and held sufficient to show that the error was made by mutual mistake, and to require reformation of the policy.

Appeal from Chancery Court of Richmond.

Bill in equity by Warner Moore & Co. against the Western Assurance Company. From a decree for defendant, plaintiffs appeal. Reversed.

Shelton & Moore, for appellant. Wm. Ellyson and A. L. Holaday, for appellee.

CARDWELL, J. This appeal is from a decree of the chancery court of the city of Richmond denying the relief sought in a bill filed by appellants against appellee to reform and enforce a certain fire insurance policy, issued on the 15th day of December, 1901, by appellee, through its agents, Julius Straus & Son, to appellants, insuring to the amount of \$1,000 certain personal property mentioned and described in the policy, so that the policy would carry out and conform, and be paid according to, the true contract and intention of appellants and their agents, J. B. Moore & Co., on the one part, and the appellee and its agents aforesaid, on the other part; it being alleged that at the time of the execution of the policy a mutual mistake was made in describing the building in which the property insured was situated.

It appears that appellants owned considerable property in the city of Richmond, both real and personal, requiring them to take out a large amount of insurance for protection against fire, from time to time. Among those owned by them are three buildings adjoining each other, situated on the south side of Richmond Dock, near the foot of Seventeenth street, and running back towards James river. These buildings are generally described as the "easternmost," the "middle," and the "westernmost." Each

of the buildings has a separate insurance rating, both upon themselves and stock contained in them, and has each its own peculiar and different description; all insurance policies using practically the same descriptive language.

It appears that appellants had a policy of insurance on the easternmost or corner building, as we shall call it in this opinion, with the Virginia Fire & Marine Insurance Company, for \$1,000, and a like policy issued by the same company upon the contents of the building, each to expire on the 15th day of December, 1901, which policies the Virginia Fire & Marine Insurance Company refused to renew, whereupon appellants, through J. B. Moore & Co., their agents, applied to Julius Straus & Son, insurance agents, of the city of Richmond, on the 13th day of December, 1901, for policies of insurance to take the place of those which the Virginia Fire & Marine Insurance Company declined to renew; the one being, as above stated, for \$1,000 on the corner building at the foot of Seventeenth street, and the other on the contents of that building. Upon this application being made, Milton J. Straus, one of the firm of Julius Straus & Son, called at the office of J. B. Moore & Co., and inquired whether the insurance applied for was intended to cover the old sumac mill or warehouse—that is, the middle building—stating that, if so, the Western Assurance Company (appellee) would not furnish the insurance, as it had already declined to do so; and upon being informed by J. B. Moore & Co. that it was not the middle building, wherein the sumac mill had formerly run, but the corner building, Straus took the typewritten slips which had been left with his firm when application for insurance was made, back to his office, and issued the two policies hereinbefore mentioned—the one on the corner building, and the other on personal property; but in the policy here in question (No. 1,864,265), the policy on the personalty, the same is described as being located in “a brick and iron building,” etc., which description applied only to the middle building, spoken of also in the record as the sumac mill or warehouse. The typewritten slips spoken of were made out by J. B. Moore & Co.’s clerk, and left at the office of Julius Straus & Son by him, and in these slips the error was begun in describing the location of the personal property, that is, the stock intended to be insured.

Upon issuing the policy upon the stock, etc., Straus made an entry on an insurance map which he kept in his office to the effect that the property insured was located in the middle or sumac warehouse building.

On December 31, 1901, the corner building was burned, as was also the stock therein, and appellee’s agents, Straus & Son, reported both losses to appellee, and the insurance on the building was promptly paid; but payment of the insurance on the stock

was denied upon the ground solely that the policy described the location of the property insured as being in the “brick and iron building,” which description applied to the “middle building,” where there had been no loss.

The law applicable to the controversy here is too well settled to admit of discussion. In fact, there is practically no contention between counsel as to the law of the case, viz., that, while a court of equity has jurisdiction to reform and enforce contracts of insurance on the ground of fraud or mistake, relief will not be granted in any case except where there is a plain mistake, clearly made out by satisfactory and unquestionable proof, or the fraud relied on is established by the same degree of proof. *Shenandoah Valley R. Co. v. Dunlap*, 86 Va. 346, 10 S. E. 239, and authorities there cited.

There is no question of fraud presented in the case under consideration, but purely a question of fact, namely, whether or not, at the time the policy in question was issued, J. B. Moore & Co., agents for appellants, and Straus & Son, agents for appellee, understood and intended that the policy should cover the stock situated in the corner building, which was destroyed by fire on December 31, 1901.

That this was the intention of J. B. Moore & Co. is not at all questioned, and therefore a consideration of the evidence only requires that we ascertain whether or not Straus & Son understood that they were to insure the stock in that building, and intended to do so when they issued the policy.

As has been observed, the corner building and its stock had been previously insured in the Virginia Fire & Marine Insurance Company by two separate policies, of \$1,000 each—one on the stock, and the other on the building. That these policies expired on the 15th day of December, 1901, and in both of them this building was described as “the two-story brick, tin roof building situated on the south side of Richmond dock, corner 17th Street, used as a warehouse.” Straus & Son were informed of these facts, and of the further fact that the policies desired by J. B. Moore & Co. on December 13th were to take the place of the two policies in the Virginia Fire & Marine Insurance Company, which that company had declined to renew. It further clearly appears that on that day the location of the building (that is, the corner building, upon which the policies desired were to be placed, the one on the building and the other on its contents) was explained to Milton Straus, who called at the office of J. B. Moore & Co. to ascertain definitely the location of the property upon which insurance was desired, and, in making the explanation, reference was made to what is known among insurance people as the “City Insurance Map.” At this interview between Milton Straus and J. B. Moore, the rates of

Insurance were fully discussed; and it appears that there was a book or tariff of rates governing insurance in the city of Richmond, in which every insured building was rated. Straus & Son are shown to be about the best informed insurance agents in the city of Richmond. The book or tariff of rates shows that the rate on this corner building was $1\frac{1}{4}$ per cent.; that the rate on the contents or stock was 1.60 per cent.; while the rate on the middle or sumac building prior to the removal of the sumac mill was 2.50 per cent. and subsequent to its removal, and at the time of the writing of the two policies hereinbefore spoken of, it was 1.50 per cent. The rate charged upon the policy here in question was 1.60 per cent.; thus showing that Straus understood the location of the building, and that the stock, etc., to be insured, was in that building, and fixed the rate, which was the proper rate only for the stock contained therein. There is no question made that the rate charged upon the stock, etc., intended to be insured, was the proper rate on the property as located in the corner building, and would have been an improper rate to charge if it had been located in the middle building.

It is testified to by J. B. Moore, J. B. Moore, Jr., and G. L. Cook—the latter being the person who wrote the description or form (slips) from which Straus & Son issued the two policies on December 13th—that the understanding and intention on their part was to insure the stock in the corner building. Milton Straus, of the firm of Straus & Son, admits that J. B. Moore informed him that these policies were intended to take the place of two similar policies which would soon expire in the Virginia Fire & Marine Insurance Company, and the only reason given by him for construing the policy here in question as applying to the stock in the middle building is that he was informed by Mr. Moore "that the only mechanical appliance in the middle building was the power from the gristmill, used in hoisting grain." The point made by Straus in his reason for that construction of the policy was that the corn or grist mill, being the westernmost building, was the building from which power would have to be obtained to run the machinery in the middle building, and that the power therefrom would not be likely to be transferred to the easternmost or lime warehouse (corner) building, on account of its distance, and that the clause in the policy granting "permission to hoist grain," etc., could only refer to the middle building—the brick and iron building—it being contiguous to the gristmill. This contention of Straus loses its force entirely by reason of the fact that the clause granting "permission to hoist grain," etc., is found in the policy issued by appellee through Straus, at the same time, on the easternmost (corner) building, which policy it never disputed, but promptly paid after the fire occurred. No

controversy arose as to the location of the property covered by the policy here in question until W. B. Robins, a general insurance adjuster of Richmond, was sent to adjust the loss sustained by reason of the fire on the 31st of December, when, in examining the policies issued by the companies he represented, including appellee, he discovered that, by using the words "and iron" between the words "brick" and "building" in the policy here in question, the description applied to the middle building instead of the corner building, as he construed it; and Milton Straus frankly admits in his testimony in the case that up to the time that he received this information from Robins, which was about 10 days after the fire, he had supposed that the policy applied to the contents of the corner building, and that he had made a mistake in mapping the risk. He could not have supposed that the policy applied to the contents of the corner building if he had not intended that the policy, when issued, on the 13th of December, was to cover the contents of that building. He therefore practically admits that he, as did J. B. Moore, intended and understood that the policies issued to appellants on December 13th—one on the corner building, and the other on its contents—applied to that building and its contents. Robins is wholly unable to explain, nor does Straus attempt to explain, why Straus & Son should have charged the rate applicable only to the contents of the corner building, if it was intended that the policy should apply, and did in fact apply, to the contents of the middle building, except to suggest that at that time there was some confusion of rates by reason of legislation on the subject of insurance.

The facts, upon which appellee greatly relies, that the description of the building in the two policies was dissimilar, and that the application for insurance and the policy on the stock, etc., referred more clearly to the middle than to the corner building, covered by the other policy, are not a sufficient reply to appellant's contention that there was a mutual mistake, in the face of the evidence that appellee's agent, Straus, knew (which he admits) that "both policies, taken together, were intended to protect a building, and the stock in it"; that the application and policy on the building contained some expressions descriptive of the corner building, and some descriptive of the middle building; that the policies were not issued till the applications therefor had been taken by Straus to J. B. Moore & Co., who explained to him that the insurance was desired on the corner building and its contents, and not the middle building, upon which appellee had already declined to place insurance; and that Straus supposed that the policy here in question applied to the stock in the corner building, and thought he "had made a mistake in mapping the risk," until informed differently by Robins about

10 days after the fire. After stating on cross-examination, "I thought the building and the stock were the same location," Straus was asked: "You understood, then, that the stock was contained in the building which was insured under the other policy?" Ans. Yes, sir. Q. Was it not your intention, in issuing these two policies, that the policy on the stock should cover that stock which was then contained in the building which was covered by the other policy? Ans. I understood so from the interview I had with Messrs. J. B. Moore & Co."

Under these circumstances, we are of opinion that there was a mutual mistake, which should be corrected, and the policy in question reformed. The decree appealed from will therefore be reversed, and the cause remanded to the chancery court of the city of Richmond, to be further proceeded with in accordance with this opinion.

(108 Va. 379)

NORFOLK RY. & LIGHT CO. v. SPRATLEY.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

ELECTRICITY—INJURY FROM LIVE WIRE—PRESUMPTION OF NEGLIGENCE—REBUTTAL OF PRESUMPTION—EVIDENCE—SUFFICIENCY—PROXIMATE CAUSE—HARMLESS ERROR—EXPERT TESTIMONY—INSTRUCTIONS—DAMAGES.

1. Electric companies are not insurers against accidents, but they are held to a high degree of care in the construction and maintenance of their dangerous appliances.

2. The fact that a child was injured by picking up a live electric wire which had fallen to the sidewalk created a presumption of negligence on the part of the corporation owning and maintaining the wire.

3. In an action for injuries sustained by a child by picking up a live electric wire that had fallen to the sidewalk, the testimony of a lineman that he looked over the wires every day, and that between 6 and 7 o'clock in the morning of the day of the accident he had looked over the wire in question, and had found it all right, was not sufficient to remove the presumption of negligence on the part of the corporation owning and maintaining the wire.

4. The presumption of negligence which arises from an injury to a pedestrian in a public street from a broken electric wire is not overcome by testimony of employees of the one owning and maintaining the wire that the wire was properly constructed and put up.

5. Though a question asked a witness and his answer thereto are improper, if the propounder's case has been completely made out otherwise the error is harmless.

6. Though exception to the testimony of a witness is well taken, if the same fact is proved by other witnesses without objection the error is harmless.

7. In an action for injuries to a child caused by his having picked up a live electric wire that had fallen to the sidewalk, a witness testified that two women were struck in the face by the wire, but not injured, and that the child grasped it at a point where it was not insulated, and that he thought he (the witness) took hold of it at a place where it was insulated without being hurt. *Held*, that such evidence did not show that a lack of insulation, and not the falling of the wire, was the proximate cause of the injury.

8. In an action for personal injuries, it was proper to permit the physician who attended plaintiff to testify as to the probable future effects of the injuries.

9. In an action for personal injuries, the jury may consider, in addition to the expense and pain and loss already incurred and suffered, such as will reasonably and probably result as a consequence.

10. On appeal in an action for personal injuries suffered by a child, the question whether there was error in permitting his mother to testify that she had spent \$7 for medicines was precluded by the maxim, "De minimis non curat lex."

11. Where no exception was taken to certain testimony when the question was asked the witness, and no bill of exceptions subsequently asked for, and there was no mention of such an assignment of error in the petition to the Supreme Court for a writ of error, the admissibility of the testimony could not be considered on appeal.

12. The verdict of the jury in an action for personal injuries could not be disturbed on appeal where there was nothing to show that the jury were actuated by prejudice or partiality.

Error to Law and Chancery Court of City of Norfolk.

Action by Herbert Wesley Spratley, by his next friend, J. W. Spratley, against the Norfolk Railway & Light Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

Richard B. Tunstall, for plaintiff in error. Miller & Coleman, for defendant in error.

HARRISON, J. On the 14th day of June, 1903—a clear, bright day—Herbert Wesley Spratley, an infant seven years of age, in company with his little sister and their little companion, Mabel Blair, were en route to the cemetery in Berkley, a suburb of the city of Norfolk. While passing along Liberty street, Herbert was injured by coming in contact with a charged electric wire owned by the plaintiff in error, which had fallen across the sidewalk about two hours before the accident. He was playing with his sister, and, thinking the wire was a switch, picked it up to hit her, with the result that he was severely shocked and burned about his head, hand, and leg, and was rendered unconscious. These injuries confined him to the bed for four weeks, and to the house for six weeks or more.

This suit was brought by the injured child, in the name of J. W. Spratley, as next friend, against the defendant company, to recover damages for the injuries mentioned; and, upon a demurrer to the evidence, judgment was rendered in favor of the plaintiff for the sum of \$2,000, the amount ascertained by the verdict of the jury. A writ of error was awarded, which brings the case to this court for review of errors alleged to have been committed at the trial.

It is contended that the demurrer to the evidence should have been sustained, because the defendant company was not shown to have been guilty of negligence.

This is a clear case for the application of the common sense rule of evidence express-

¶ 1. See *Electricity*, vol. 13, Cent. Dig. §§ 7, 8.

ed in the maxim *res ipsa loquitur*. While electric companies are not held to be insurers against accident, still it is due to the citizen that such companies, permitted as they are to use for their own purposes the streets of a city or town, should be held to the exercise of a high degree of care in the construction and maintenance of the dangerous appliances employed by them, to the end that travelers along the highway may not be injured. The danger is great, and care and watchfulness must be commensurate with it. *Haynes v. Raleigh Gas Co.*, 114 N. C. 208, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *City Elec. St. R. Co. v. Conery* (Ark.) 33 S. W. 426, 31 L. R. A. 570, and note page 578; *Joyce on Electricity*, §§ 438, 606. A consequence of this rule as to the high degree of care required in the use of a dangerous current of electricity is the presumption of negligence that is raised by the fact that a dangerous wire has broken and fallen into the street. But it is insisted that the testimony of the witness Wiggins Fuller, introduced by the plaintiff, showed that the defendant company had exercised due care, and that this proof did away with the presumption afforded by the accident itself, and rendered some other evidence of negligence essential to the plaintiff's case. The testimony mentioned is that of an adverse witness, called, as such, by the plaintiff to prove the ownership of the wire in question, and that the witness had repaired it. Upon cross-examination by the defendant company, the witness testified that he was not the inspector, but was a line-man; that he looked over the wires every day; and that between 6 and 7 o'clock in the morning of the day of the accident he had looked over this wire and found it all right.

This evidence was not sufficient to remove the presumption of negligence arising from the accident itself. Upon the whole evidence, the question was one for the jury.

In *Ugla v. West End St. R. Co.*, 180 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, the plaintiff was struck by part of an iron ear used to clasp a trolley wire to keep it in place around a curve over the defendant's track. There was no evidence of fault on the part of the defendant, other than that afforded by the accident itself. There was, however, evidence introduced by the defendant that it was not negligent, tending to show that the break was a clean one, bright in color and appearance; that the iron was sound all through, with no flaw or defect in it; that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant employed a corps of competent superintendents, foremen, and inspectors, who inspected the whole line weekly, including the cars and their attachments; and that this particular part of the line had been inspected within a week prior to the accident.

Notwithstanding this evidence of due care on the part of the defendant, the plaintiff was not called upon to introduce other evidence of negligence than the accident itself; the court holding that upon the whole evidence the question was for the jury, and sustaining their verdict in favor of the plaintiff.

The presumption of negligence arising from an injury to a passer-by in a public street from a broken electric wire is not overcome, so as to require the case to be taken from the jury, by testimony of defendant's employees that the wire was properly constructed and put up. *Boyd v. Portland General Cement Co.* (Or.) 66 Pac. 576, 57 L. R. A. 619.

The declaration in the case at bar, after setting out the duty of the defendant company to so operate, control, and maintain its wires that they would not fall upon or come in contact with pedestrians lawfully upon and passing along a public street and highway, avers that the defendant, in disregard of its duty in that behalf, so carelessly and negligently maintained, controlled, and operated its wire that it was broken, and negligently permitted to fall from the poles, and negligently permitted to remain upon the street, charged with an electric current, and that by reason of this negligence the wire came in contact with the plaintiff, and he was thereby severely shocked, burned, etc. At the conclusion of the testimony of George W. Wiggins, a witness for the plaintiff, he was asked the following question: "Did you notice the condition of that wire—whether it was an old or new wire, or whether the insulation was on or off?" The witness answered that the insulation was off in a great many places, but that he did not know whether the wire was old or new. A motion to strike out this answer was overruled, and this action of the court is assigned as error.

It is contended that the declaration did not aver imperfect insulation as a ground of negligence, and that evidence tending to show lack of insulation could not, therefore, be introduced. On the other hand, it is most earnestly and with much force insisted that such evidence was admissible under the averment that the defendant negligently maintained its wire.

To properly maintain this electric wire would seem to include proper insulation, but it is insisted that the declaration limits the negligence in maintaining to preventing the wire from falling. In our view, a consideration of this question is not necessary. Under the rule *res ipsa loquitur*, the plaintiff's case was made out. The wire was down and across the sidewalk, and the child grasped it in the palm of his hand, and was injured. When the plaintiff has established the fact of ownership and control of the wire, and its dangerous condition, in a public street or highway, coupled with the accident, he has made out a *prima facie* case of negligence, and cast the burden upon the defendant to show that the wire was broken, and remain

ed in such condition until the accident, without its fault. *Haynes v. Raleigh Gas Co.*, supra; *Western Union Tel. Co. v. State*, for, etc., 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Willey v. Boston Elec. Co.*, 168 Mass. 40, 46 N. E. 395, 37 L. R. A. 723; *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.) 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Richmond Ry., etc., Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736.

The question and answer objected to were not essential to the plaintiff's case. His case was completely made out without it.

In *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 28 S. E. 850, it is held that although a question asked the witness, and his answer thereto, are illegal and improper, yet, if the propounder's case has been completely made out without such question and answer, and the admission of the answer did not and could not affect the result, it is harmless error, and the appellate court will not for this cause reverse the judgment of the lower court.

Further, the question and answer under consideration were without prejudice to the defendant company, because its own evidence tended just as strongly to show that the wire was not properly insulated.

In *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472, it is held that, although an exception to the testimony of a witness may be well taken, if the same fact is subsequently proved by other witnesses without objection the error will be deemed to be harmless. See, also, *Va. & S. W. Ry. Co. v. Bailey*, 103 Va. —, 49 S. E. 33.

The defendant further contends that its demurrer to the evidence should have been sustained because the proximate cause of the injury was the lack of insulation, and the declaration did not contain a specific allegation that the wire was not insulated. In support of this contention the defendant company relies upon its witness T. F. Newberry, who testified that two colored women passing along the sidewalk were struck in the face by the wire, and flirited it out of the way without being injured. This witness also testified that he saw the little boy, while standing on the lot by the sidewalk, take hold of the wire, and that he grasped it at a point where it was not insulated. The witness further says that he thinks that he (the witness) took hold of the wire at a point where it was insulated without being hurt. The clear inference from this evidence introduced by the defendant is that the wire was not maintained as to its insulation; that the insulation was off at some points, and on at others; and consequently that the two colored women were not injured, because they were struck by the wire at a point where it was insulated, while the child, as shown by the witness, grasped the wire at a point where it was not insulated. We see nothing in this evidence to establish the contention that the lack of insulation

was the proximate cause of the accident. The want of insulation would have been harmless had not the wire fallen. It was the negligence of the defendant company in allowing the wire to fall and remain across the sidewalk, and not the lack of insulation, that was the proximate cause of the accident. Had not the wire fallen, it could have remained on the pole in the air, uninsulated, indefinitely, without injury to any one. So that it was the falling of the wire that brought about the injury sustained by the plaintiff.

It is further contended by the plaintiff in error that the court below erred in allowing Dr. Lankford to testify as to the probable future effects of the injuries sustained by the plaintiff, and in not striking out evidence as to such future effects.

In *Watson on Personal Injuries*, § 604, p. 720, it is said: "An exception to the rule excluding opinion evidence exists where it is desired to show by properly qualified experts the nature or extent of the plaintiff's injuries, and their probable permanency or the reverse. 'There is,' indeed, it has been said, 'no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future.' It is competent, therefore, for the physician who attended the plaintiff during the period of treatment for the injuries received to give his opinion as to the effect of the injuries received by the plaintiff upon his future condition, or to state from his experience and medical knowledge the probability of the recurrence of inflammation in an injured muscle. And a physician may also testify, in a general way, that there is a probability that certain conditions caused by the injuries, and shown to exist at the time of the trial, will produce still more serious results in the future, or may be requested to express his opinion as to the probable effect of the injuries on the plaintiff's general health, or may be asked whether, in his opinion, on the facts shown, if certain conditions exist two years after the accident, they will probably be permanent."

In *Toledo Ry. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71, it was held to be proper for qualified experts to testify as to the probable effect of the injuries received by the plaintiff upon his future condition.

Any evidence tending to show the character and extent of the injury, and its probable results, and the probability of an injury leaving permanent effects of an injurious nature, is competent. A question, therefore, to a physician, asking him to state, from his experience and medical knowledge, the future effects likely to result from an injury, is proper. *Filer v. N. Y. R. Co.*, 49 N. Y. 42.

This court, in the case of *Richmond P. & Power Co. v. Robinson*, 100 Va. 394-400, 41

2. 719, in discussing the measure of damages, said the amount in question could not be considered as unreasonable compensation for such physical pain and suffering as the plaintiff experienced, or was likely to experience. Such inconvenience, discomfort, mental suffering as might have been inflicted upon him by the injuries and consequent disability were also to be considered. In the light of these authorities, we are of opinion that there was no error in permitting the witness Dr. Lankford to testify as to the probable future effects likely to result from the injuries sustained by the plaintiff.

It is further asserted that the court erred in its instruction to the jury touching the measure of damages. The objection urged on this instruction is that it told the jury they should take into consideration, in addition to the expenses and pain and loss already incurred and suffered, such as would naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries.

The objection made to this instruction has been practically disposed of by what has been said in dealing with the last-mentioned assignment of error, in regard to the introduction of expert evidence as to the probable future effects of the injuries sustained by the plaintiff.

In *Watson on Personal Injuries*, § 384, p. 18, the learned author, in discussing the propriety of an instruction embodying the element of damage here objected to, says: "but it is not perceived why the probability, likelihood or reasonable expectation of the future suffering does not satisfy the rule of reasonable certainty, and such is believed to be the weight of the best considered cases. An instruction so worded, indeed, would seem to be preferable to one simply stating the requirement to be reasonable certainty, because in the former case the jury would be advised in some measure as to what constitutes reasonable certainty. It has been held, accordingly, that a jury may be properly instructed to give damages for such future suffering as the plaintiff will probably endure, or 'in any reasonable probability will hereafter sustain.' And in an action for personal injuries, where proof of future effects with certainty was impossible, and reasonable probabilities were necessarily the basis of the medical opinions, it was held proper to charge that damages could be awarded for 'such consequences as are reasonably likely to ensue,' and all pain and suffering which the plaintiff, 'in reasonable probability, will hereafter sustain.' In the Supreme Court of Arkansas the following instruction was approved in an action for assault and battery: 'If the jury find for the plaintiff, it will be their duty to consider whether or not the plaintiff is likely to suffer in the future from the effects of the wound received at the hands of defendant;

* * * and, if they find in the affirmative, it will be their duty to assess a sum equivalent to the injuries and sufferings, as they find from the evidence, he is likely to suffer in the future."

We are of opinion that in the case at bar the court committed no error in telling the jury that they could take into consideration, in assessing damages, "such as will naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries."

Mrs. Rosa Spratley, the mother of the plaintiff, introduced on his behalf, was asked, "Has any money been expended for medicine?" and answered, "I spent, I think, in the neighborhood of seven dollars. I don't know whether it was that much, or any more. I did not keep a strict account." It is contended in the oral argument before this court that the admission of this question and answer was error, for which the judgment should be reversed, because the plaintiff could not recover except for such expenses as he had himself incurred, whereas the answer showed that the mother had expended the sum mentioned.

If consideration of this question were not precluded by the maxim, "*De minimis non curat lex*," the contention would not be tenable, in view of the instruction given, which expressly limits the consideration of the jury to such necessary expenses as the plaintiff himself incurred for medicine. But apart from these considerations, this question cannot be raised for the first time in oral argument before this court. No exception was taken to the evidence at the time the question was asked. No bill of exception was subsequently asked for on the subject, and there is no mention of such an assignment of error in the petition to this court for a writ of error. It is well settled that under such circumstances it is too late to now make the introduction of this evidence a ground for setting aside the verdict of the jury.

It is further assigned as error that the damages allowed by the verdict of the jury are excessive.

There is not a suggestion in the record that the jury were actuated by prejudice or partiality, and therefore, upon well-settled principles, their verdict cannot be disturbed. *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Richmond Ry. & Elec. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839. In the last-named case it is said, "No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be"; that, unless the finding of the jury is so great as to furnish ground for believing that they were actuated by partiality or prejudice, the court should not, under the well-settled rule in this state, disturb the verdict.

Upon the whole case, we are of opinion that the judgment complained of must be affirmed.

CARDWELL, J., absent.

(103 Va. 337)

**LAKE DRUMMOND CANAL & WATER CO.
v. COMMONWEALTH.**

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

**FORECLOSURE OF CORPORATE MORTGAGE —
RIGHTS CONVEYED — IMMUNITY FROM TAXA-
TION — CONSTRUCTION OF STATUTES — CONSTITUTIONAL PROVISIONS.**

1. Code 1887, § 1233 [Ann. Code 1904, p. 623], provides that a sale under a mortgage or trust deed executed by a corporation on all its works and property shall pass to the purchaser all the property of the corporation other than debts due to it, and on such conveyance "the said company shall ipso facto be dissolved," etc. Section 1234 [page 623] provides that the corporation created by or in consequence of such sale and conveyance shall succeed to "all such franchise rights and privileges and perform all such duties as would have been had or should have been performed by the first company but for such sale and conveyance." *Held*, that a sale on foreclosure of a deed of trust of all the property and franchise of the corporation did not pass to the purchaser the immunity from taxation granted by the state to the original corporation, its successors and assigns.

2. Under Const. 1851, art. 10, § 1 [Ann. Code 1904, p. cclxi], providing that taxation shall be equal and uniform throughout the commonwealth, and all property shall be taxed in proportion to its value, etc., a corporation created under Code 1887, § 1234 [Ann. Code 1904, p. 623], on the purchase of the property and franchise of another corporation on foreclosure of a deed of trust pursuant to section 1233 [page 623] cannot claim the right to immunity from taxation granted to the original corporation prior to the adoption of such constitutional provision.

Appeal from State Corporation Commission.

Proceedings by the commonwealth against the Lake Drummond Canal & Water Company to recover a fine for failing to make a report of property to the Corporation Commission. From an order imposing a fine, defendant appeals. *Affirmed*.

W. H. White and T. S. Garnett, for appellant. The Attorney General, for the Commonwealth.

KEITH, P. On December 1, 1787, the General Assembly of Virginia granted a charter to the Dismal Swamp Canal Company, which, among other things, recites: "That for and in consideration of the expenses the said proprietors will be at, not only in cutting the said canal, erecting locks, making causeways and performing other works necessary for this navigation, but in maintaining and keeping the same in repair, the said canal, locks, causeways, and other works, with all their profits, shall be and the same are hereby vested in the said proprietors, their heirs and assigns forever, as tenants in common in proportion to their respective shares, and the same shall be deemed real estate, and be forever exempt

from the payment of any tax imposition or assessment whatever, and it shall and may be lawful for the said president and directors at all times for ever hereafter to demand and receive at some convenient place near one of the extremities of the canal, for all commodities transported through it or over the causeways, tolls, according to the following table and rates which shall be in Spanish milled dollars, to-wit:"

In the concluding section of the charter it is provided that the act creating the corporation should be in effect from and after the passage of a like act by the General Assembly of North Carolina, and such an act was passed in the year 1790, and the internal improvement contemplated in the charter was undertaken, completed, and put into operation.

In the year 1867 a deed of trust was executed upon all the property of the company, which was foreclosed in 1880, and conveyance made to certain purchasers, who assumed the corporate name of the Dismal Swamp Canal Company. This company in turn executed a deed of trust upon all the property of the canal of every character to certain trustees, which was foreclosed and conveyance made in 1889 to certain purchasers, who assumed the corporate name of the Norfolk & North Carolina Canal Company. The corporation thus created also executed a deed of trust, which was foreclosed in the year 1892, and conveyance of the property made to purchasers who assumed the name of the Lake Drummond Canal & Water Company, the style under which the canal is now operated.

The Lake Drummond Company now owns the canal and all its property and appurtenances, and on the 29th of February, 1904, the State Corporation Commission issued a summons requiring it to appear and show cause why a fine should not be imposed upon it for failing to make report to the commission, as provided by section 27 of an act of the General Assembly of Virginia approved April 16, 1903, of all its real and personal property of every description and of its receipts for transportation. In obedience to this summons, the company appeared and answered, claiming that all the franchises, rights, and privileges conferred upon the Dismal Swamp Canal Company by the act of 1787, whereby an irrepealable immunity from taxation was granted by the state, have, by virtue of the foreclosures under the several deeds of trust before mentioned, devolved upon and vested in the present Lake Drummond Canal & Water Company.

The State Corporation Commission was of opinion that the answer was insufficient, and imposed a fine upon the defendant for failure to make report as required by law, and from this order the canal company appealed.

It would be a fruitless task to inquire into the power of a state Legislature to enter into

a contract granting a perpetual immunity from taxation so as to bind succeeding Legislatures. The power is too thoroughly established by authority to be any longer open to question.

In *State of New Jersey v. Wilson*, 7 Cranch, 165, 3 L. Ed. 303, the Supreme Court held, Judge Marshall delivering the opinion, that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax constituted a contract which could not be rescinded by a subsequent legislative act, and the principle thus established has been followed in cases almost without number.

The case under consideration possesses all the elements of a contract. The act of 1787 recites: "That for and in consideration of the expenses the said proprietors will be at, not only in cutting the said canal, erecting locks, making causeways, and performing other works necessary for this navigation, but in maintaining and keeping the same in repair, the said canal, locks, causeways, and other works * * * shall be * * * forever exempt from the payment of any tax, imposition or assessment whatever," and there can be no doubt that, in the language of the Corporation Commission, there was a contract between the state and the corporation, which could not be violated by the state by any attempt in the future to repeal the immunity from taxation granted to this corporation. It remains, then, to consider whether or not this immunity has passed to the present corporation.

In the petition for appeal it is claimed that the charter of the Dismal Swamp Canal Company contains a perpetual exemption from taxation of "all the property, rights and franchises of the company, its successors and assigns," and this exemption accrues to the benefit of the petitioner by force of sections 1233 and 1234 of the Code of Virginia of 1887 [Ann. Code 1904, p. 623], by which it became such successor and assignee by the name of the Lake Drummond Canal & Water Company; and, secondly, that the exemption being a contract with the state of Virginia and a compact between the state of Virginia and the state of North Carolina, expressly declared by the concurrent acts of said states, the act of Assembly of April 15, 1903, p. 144, § 27 [Ann. Code 1904, p. 723, § 1313a], under which this proceeding is taken by the State Corporation Commission, if enforced, is a violation of the Constitution of the United States, which prohibits the impairment of the obligations of contracts, and is therefore unconstitutional and void.

Sections 1233 and 1234 of the Code of 1887 [Ann. Code 1904, p. 623] are as follows:

"Sec. 1233. Sale of company's property under deed of trust; what it passes; dissolution of company; purchaser, a corporation.—If a sale be made under a deed of trust or mortgage executed by a company on all its

works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall ipso facto be dissolved. And the said purchaser shall forthwith be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded.

"Sec. 1234. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties as would have been had, or should have been performed, by the first company, but for such sale and conveyance, including the duty of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale, and of transporting freight and passengers therein save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company which may not be expressly assumed in the contract of purchase, and the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in the book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two successive weeks in a newspaper."

Without undertaking to trace the history of these sections beyond the Code of 1849, it is enough to say that they have undergone little change since that time. To those sections the Lake Drummond Company must look for its corporate franchises, rights, and privileges. By force of section 1233 the foreclosure of the deed of trust and conveyance to the purchaser under it by the Dismal Swamp Canal Company operated ipso facto to dissolve that company, and so with the successive sales, purchases, and conveyances under subsequent deeds of trust. By section 1234 the new corporation thus created succeeds to "all such franchises, rights and privileges, and perform all such duties as

would have been had, or should have been performed by the first company, but for such sale and conveyance."

It follows from what has been said that the existing company, by virtue of the conveyance to it, and as a corporation having its origin and existence only under and by force of section 1234, succeeds to only such franchises, rights, and privileges as pass by force of the language employed in that section, and not by virtue of the assignability of the original contract of exemption from taxation granted to the Dismal Swamp Canal Company, its successors and assigns.

The case is different from that of *New Jersey v. Wilson*, supra. In that case the exemption was held to pass with the land. The purchaser of the Indian title was a natural person. He did not derive his capacity to receive from the state of New Jersey. "The privilege," says the opinion in that case, "though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because in the event of a sale, on which alone the question could become material, the value would be enhanced by it. It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands with respect to this land in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

The case of an artificial person—of a corporation deriving its existence, its capacities, and its franchises from the state—is wholly different from that of a natural person. In the Indian land case all that was enjoyed by the Indians passed to the purchaser from them; in the absence of objection by the state, its assent in such case being presumed. In the case of a corporation its capacity to take is to be measured by the expressed will of the state.

What force, then, is to be given to the words "franchises, rights, and privileges" in this section?

There are numerous cases decided by the Supreme Court of the United States upon the subject, and it is a matter of regret that they appear not to be entirely harmonious. There is, however, a principle upon which they seem to be agreed.

In *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939, Chief Justice Marshall thus states the law: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm.

They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." This may be regarded as the controlling canon of interpretation in such cases.

In *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805, the principle is maintained that the taxing power may be restrained by contract in special cases for the public good, but such a contract "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require."

In *Chicago, Burlington, etc., R. R. Co. v. State of Missouri*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732, Justice Harlan said: "It is a settled doctrine of this court that an immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken."

In *Pickard v. East Tenn., etc., R. Co.*, 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051, Justice Field says: "It has been held, and the doctrine has been so often repeated that it is no longer an open question, that the Legislature of a state may exempt the property of particular persons or corporations from taxation, either for a limited period or perpetually; but to justify the conclusion that such exemption is granted it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the Legislature. The power of taxation is one of the highest attributes of sovereignty, and the suspension of its exercise as to any persons or property is not a matter to be presumed or inferred. It must be declared, or it will not be deemed to exist. If the Legislature can lay aside a power devolved upon it for the good of the whole people of the state for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any reasonable construction consistent with the reservation of the power. Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company

may hold its property exempt from taxation."

Can it be said that section 1234 in clear and unambiguous language justifies the conclusion that the Legislature intended that the original immunity from taxation granted to the Dismal Swamp Canal Company should pass to and vest in the Lake Drummond Canal & Water Company? Upon this point, as we have said, the authorities are not easy to be reconciled.

In *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326, it appears that the Cheraw & Darlington Railroad Company was chartered by the General Assembly of South Carolina, which provided that for the purpose of organizing and forming the company all the powers conferred by the charter of the Wilmington & Manchester Railroad Company on the commissioners therein named should be vested in the town of Cheraw, and all the powers, rights, and privileges granted to that company shall be and are hereby granted to the Cheraw Railroad Company, and subject to the conditions therein contained, and the question was, what passed under the terms "powers, rights, and privileges." Mr. Justice Hunt, in his opinion, said: "All the 'privileges,' as well as powers and rights, of the prior company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage as a special exemption from a burden falling upon others." And the immunity from taxation was upheld.

In *Morgan v. State of Louisiana*, 93 U. S. 217, 23 L. Ed. 860, Mr. Justice Field uses the following language: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with 'rights,' 'privileges,' and 'immunities,' though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to the purchaser of the road as part of the property of the company; the latter is personal, and inca-

pable of transfer without express statutory direction." *Railroad Co. v. Hamblen County*, 102 U. S. 273, 26 L. Ed. 152; *Pickard v. Railroad Co.*, *supra*.

In the latter case it is said upon this point that: "There are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better, opinion is that, unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Phoenix Fire & Marine Ins. Co. v. State of Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 680, Mr. Justice Peckham says: "It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450, where, under the laws of Missouri, there was a provision that the consolidated companies should be 'subject to all the liabilities and bound by all the obligations of the companies within this state,' and 'be entitled to the same franchises and privileges under the laws of this state as if the consolidation had not taken place.' The question was said to admit of doubt whether under the name 'franchises and privileges' an immunity from taxation passed to the new company. Various cases are cited in the opinion, which was delivered by Mr. Justice Brown, showing the grounds taken by this court in such cases." The learned judge then discusses the decisions upon this subject, and reaches this conclusion: "If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach." The exemption was denied, and the general principle reaffirmed, that there is no inference in favor of an exemption from taxation if the Legislature did not affirmatively grant the right. "To assert," said he, "that there is an inference in favor of an exemption from taxation is a complete overturning of the universal rule in regard to taxation. The power and the right to tax

are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption."

In the *Gulf & Ship Island Ry. Co. v. Hewes*, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86, speaking of the construction to be given to language such as is used in section 1234, the court says that the better opinion is that a subrogation to the rights and privileges of a former corporation does not include an immunity from taxation; citing *Phoenix Fire & Marine Ins. Co. v. Tennessee*, supra.

We come now to a case in which the Supreme Court has construed a statute identical with that found in our Code.

The state of West Virginia, by a charter granted to the Covington & Ohio Railroad Company, provided that "no taxation upon the property of the said company shall be imposed by the state until the profits of said company shall amount to ten per cent. on the capital of the company." Subsequently the Legislature of that state passed an act which authorized a consolidation of the Covington & Ohio Railroad Company when organized under the act of March 1, 1866 (Acts 1866, p. 127, c. 131), with one or more railroad companies, including the West Virginia Central Railway Company, the consolidated company to be known as the Chesapeake & Ohio Railroad Company, and to be vested with "all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation." By an act of the Legislature passed January 26, 1870 (Acts 1870, p. 5, c. 3), it was, among other things, provided that the Chesapeake & Ohio Railroad Company might borrow such sums of money as might be necessary, and secure the payment of such loans; and the railroad company was thereby declared to be entitled to all the benefits of the charter of the Covington & Ohio Railroad, and to all the rights, interests, benefits, and privileges, and be subject to all the duties and responsibilities provided and declared in the said contract and in the statutes therein referred to. The Chesapeake & Ohio Railroad Company completed its line of railroad, and put the same into operation, and in order to do so issued a large amount of bonds, secured by deed of trust, and in default of payment proceedings of foreclosure and sale of the property were prosecuted to final decrees in the courts of Virginia and West Virginia; so that all the railroad property in West Virginia was sold, and conveyed to purchasers, who, in pursuance of the statute then in force applicable thereto, became a corporation under the name of the Chesapeake & Ohio Railway Company. The statute here referred to, as appears from the opinion, is identical with, and is, indeed, taken from, the Code of Virginia. In 1879 (Acts 1879, p. 104, c. 73) the Legislature of West Virginia passed an act subjecting the property of the Chesapeake & Ohio Railway Company to taxation. The question was ultimately

brought before the Supreme Court of the United States in *Chesapeake & Ohio Railway Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121. Mr. Justice Matthews delivered an elaborate opinion, from which we think it clearly appears (1) that the words somewhat relied upon by the plaintiff in error in this case, that the grant of immunity from taxation was not only to the original company, but to "their heirs and assigns, forever," does not affect the result, the question being, not whether the immunity was capable of assignment, but whether there is a clear expression of legislative intention that this immunity should pass to and vest in the new corporation created by force of section 1234. Says the court: "There is no claim that the exemption passed to the trustees in the trust deeds or mortgages given to secure the payment of the bonds of the company; and none can be made that it passed to the purchasers by the judicial sale made under the decree for foreclosure and sale by force of the statute declaring what such a sale should pass. The language of the act upon this subject is that 'such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed and all other property of which it may be possessed at the time of the sale, other than debts due to it.' So far nothing is said of what rights, privileges, franchises, and immunities shall vest in the purchaser in respect to the property, the title to which is thus conveyed. The act, however, proceeds to say that 'upon such conveyance to the purchaser, the said company shall ipso facto be dissolved.' From this it necessarily follows that all privileges which by the terms of its charter were personal to it ceased with its dissolution. But the statute adds: 'And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance or in any writing signed by him or them and recorded in the recorder's office of any county wherein the property so sold, or any part thereof, is situated, or where said conveyance is recorded.' Thus is formed a new corporate body, succeeding to the title of the property sold and conveyed to it, but deriving its existence from this law, and not from the original act of incorporation, which constituted the charter of its predecessor, and with such powers, rights, privileges, franchises, and immunities only as are conferred upon it by the law which has brought it into being.

"These are defined in the next succeeding section. So far as material to the question, its language is: 'The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had, or should

have been performed, by the first company, but for such sale and conveyance,' etc.

"It is earnestly contended on behalf of the plaintiff in error that by virtue of this language it is entitled to enjoy the property formerly belonging to the Chesapeake & Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But broad, general, and comprehensive as the language is, we cannot, in reference to the subject-matter now in hand, apply it with that force and meaning. The words used are, it will be observed, 'franchises, rights and privileges * * * as would have been had, * * * by the first company, but for such sale,' etc. There is no express reference to a grant of any exemption or immunity. Nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption." Then follows a citation of *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860, which already appears in this opinion.

Continuing, Justice Matthews says: "Here there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor the context, nor the subject-matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the Legislature. The subject-matter of this legislation was, not the original construction of railroads, but the operation of railroads already constructed. The state was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements for the benefit of the state, with the hazard of loss, and perhaps financial ruin, to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally thus incorporated, and who, by reason of insolvency, had been stripped of their property by creditors, and sentenced by the law to dissolution; and the purpose of the statute was simply to provide suitable means of incorporating the purchasers to facilitate their use of the property in operating it for the benefit of the public, as designed from the beginning. These purchasers had not bought the immunity now demanded either from the state or the prior possessor. The contract of the creditors would be fully met, on failure of payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises,

and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have already said, was not necessarily included in that designation. The debtor corporation and its creditors combined could not confer upon the purchasers any rights which were not assignable; and, as no consideration moved to the state for a renewal of the grant, there is no motive for finding, by mere construction and implication, what the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned. We conclude, therefore, that the act from which the plaintiff in error derives its corporate existence and powers in West Virginia does not contain a renewal of the grant by exemption from taxation."

To the same effect is *Norfolk & Western Ry. Co. v. Pendleton*, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. Ed. 574, which also construes statutes of this state.

There is another ground upon which the judgment of the Corporation Commission may be sustained.

The first mortgage upon the property of the Dismal Swamp Canal Company was executed in 1867. When it was foreclosed that company ceased to exist, and a new company came into existence, which derived its vitality from section 1234. Upon this point the authorities which we have considered are conclusive.

By the Constitution adopted in 1851 it is provided that taxation shall be equal and uniform throughout the commonwealth, and all property shall be taxed in proportion to its value, which shall be ascertained in such manner as shall be prescribed by law. Const. art. 10, § 1 [Ann. Code 1904, p. cclxi]. This provision, or its equivalent, has been continued in the organic law of this state down to the adoption of the present Constitution. It was beyond the power of the Legislature, in the face of this provision, to have granted a perpetual exemption from taxation to a corporation, either by a special act of incorporation or by force of a general law. This position seems to be incontrovertible in principle, and is abundantly supported by authority.

In *Keokuk R. Co. v. State of Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450, it is said: "When the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing, which required that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria & Bloomfield Railway Company did not pass to the Missouri, Iowa & Nebraska Company. As was said of an Arkansas corporation in *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S.

465, 475, 5 Sup. Ct. 529, 534, 28 L. Ed. 1055: 'It came into existence as a corporation of the state of Arkansas, in pursuance of its Constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that "the property of corporations, now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals." This rendered it impossible for the consolidated corporation to receive by transfer from the Cairo & Fulton Railroad Company, or otherwise, the exemption sought to be enforced in this suit.'

In Louisville, etc., R. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922, the court said: "But the grant to the Pensacola & Louisville Railroad Company by the act of 1872 and that to the Pensacola Railroad Company by the act of 1877, though in form the renewal or transfers of previously existing grants, were in fact the creation of new ones. In Trask v. Maguire, 18 Wall. 391, 21 L. Ed. 938, it was said, speaking of similar provisions in the Constitution of Missouri: 'The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation.'" Gulf & C. Ry. Co. v. Hewes, supra; Maryland v. Northern Cent. Ry. Co., 44 Md. 131; Bloxham v. F. C. & R. R. Co., 35 Fla. 625, 17 South. 902; Shaw v. Covington, 194 U. S. 593, 24 Sup. Ct. 754, 48 L. Ed. 1131.

If, therefore, the construction contended for by plaintiff in error be given to section 1234, its effect would be to violate that rule of equality and uniformity of taxation imposed by the Constitution of this state in force when the several deeds of trust under which the plaintiff in error claims were executed and foreclosed.

Upon the whole case we are of opinion that there is no error in the judgment of the Corporation Commission.

(103 Va. 399)

RICHMOND & P. ELECTRIC RY. CO. v. SEABOARD AIR LINE RY.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

EMINENT DOMAIN—RAILROADS—RIGHT OF WAY—CONDEMNATION—CONTINUANCE—DAMAGES—ELEMENTS.

1. Code 1887, §§ 1075, 1076, 1079, provide for the condemnation of a railroad right of way; and section 1081 declares that no order or injunction shall be awarded to stay the prosecution of the work, unless the company is transgressing its authority, or such injunction is required to prevent injury which cannot be adequately compensated in damages; and section 1084 provides for a proceeding to ascertain what persons are entitled to the fund awarded for land taken, and in what proportions. *Held* that, under such sections, alleged owners of land sought to be condemned for a railroad right of way were not entitled to have the proceedings stayed pending a suit in equity between such alleged owners, involving the title to the land.

2. Under Code 1887, § 1079, providing that the report of commissioners in railroad condemnation proceedings shall be confirmed, unless good cause is shown to the contrary, and that the amount awarded may be paid into court, or to the persons entitled thereto, the amount awarded to landowners by such report is to be treated as prima facie correct.

3. In a proceeding to condemn land for a railroad right of way, the fact that the land was available for a public park, and that the owners intended to improve the same for that purpose in the future, and use it as a source of revenue in connection with an electric railway, was too speculative, remote, and conjectural to be considered as an element of damage.

Error to Chesterfield County Court.

Proceedings by the Richmond, Petersburg & Carolina Railroad Company, continued by the Seaboard Air Line Railway, its successor, for the condemnation of a right of way. From an award of damages, the Richmond & Petersburg Electric Railway Company brings error. *Affirmed.*

Wm. L. Royall, for plaintiff in error. E. R. Williams and E. H. Wells, for defendant in error.

WHITTLE, J. In April, 1899, the Richmond, Petersburg & Carolina Railroad Company, the predecessor of the defendant in error, the Seaboard Air Line Railway, instituted proceedings under chapter 46 of the Code of Virginia, edition of 1887, in the county court of Chesterfield county, to condemn a right of way through a tract of 435 acres of land situated in said county, on the Manchester & Petersburg Turnpike, about seven miles from the city of Manchester, and known as the "Madill Tract." At the time of the institution of these proceedings, George A. Madill, the proprietor of record of this land, was a nonresident of the state, and James Bellwood, his agent, was tenant of the freehold. Subsequently, it appearing that Bellwood had acquired a conveyance to the property, the former proceedings were abandoned, and new proceedings instituted against him individually.

At the June term, 1899, the county court, over the objection of Bellwood, appointed a commission, composed of five disinterested freeholders, to ascertain what would be a just compensation for the land proposed to be taken, and for damages to the residue.

It appears that Bellwood's farm tract, through which the railroad was also to pass, adjoins the Madill tract, and for damages to both tracts the sum of \$12,348.85 was awarded. With respect to these properties the commissioners, in their report, say: "Of a portion of the land from which the strip or part of land above described, and which is required by the Richmond, Petersburg & Carolina Railroad for its purposes, is carved or taken, James Bellwood appears to be the absolute and unquestioned fee-simple owner. Of another portion, known as the Madill or Drewry's Bluff tract, but recently acquired by the said James Bellwood, it appears from the evidence before us that, while the fee-simple title also stands in the said James

Bellwood, upon the records, he is in fact only trustee of the latter tract; holding the legal title, for the Richmond & Petersburg Electric Railway Company, the equitable or beneficial owner. By consent of parties, this latter company was permitted to appear before your commissioners as the true owner, and show its title and claim to damages occasioned by the taking of said strip, part, or portion from the Madill tract, and for convenience, and to avoid future contest and uncertainty between James Bellwood and the Richmond & Petersburg Electric Railway Company respecting the rightful share or proportion of each of the damages awarded, it was further agreed between the Richmond, Petersburg & Carolina Railroad Company, James Bellwood, and the Richmond & Petersburg Electric Railway Company that your commissioners should make an apportionment of the sum of damages above awarded between the said James Bellwood and the Richmond & Petersburg Electric Railway Company, what portion of said sum should go to each of said parties. Accordingly, in pursuance of this agreement or understanding, of the sum of \$12,348.85 above fixed and awarded by us as damages, we apportioned to James Bellwood the sum of \$11,353.45, and to the Richmond & Petersburg Electric Railway Company the sum of \$995.40, as compensation to them severally for the land actually taken from each, and for the damages to the residue of their respective tracts, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed."

Affixed to the report is the following statement, signed by counsel for Bellwood, the Richmond & Petersburg Electric Railway Company, and the Richmond, Petersburg & Carolina Railroad Company: "We hereby confirm the above in all respects save as to the correctness of the damages awarded, which is not admitted."

The report of the commissioners was returned August 14, 1899, and confirmed by the county court June 13, 1901, as to the James Bellwood farm tract, and leave was given either party to make objection thereafter to the award with respect to the Madill tract.

In December, 1902, upon motion of defendant in error, the Seaboard Air Line Railway, successor of the Richmond, Petersburg & Carolina Railroad Company, the county court, upon the evidence and argument of counsel, confirmed the award as to the Madill tract, no good cause being shown against it. To that order a writ of error was awarded by this court.

There are practically but two assignments of error in the case. It is contended:

First, that the county court erred in overruling the motion of plaintiffs in error for a continuance; and

Second, that the amount of damages

awarded by the commissioners was inadequate—a result, it is said, chiefly owing to the refusal of the commissioners to take into consideration an important and essential element of damages in fixing the amount of their award.

The ground of the motion for a continuance was the pendency of a suit in equity in the law and equity court of the city of Richmond between Bellwood and Beach and others, involving the title to the Madill tract, the termination of which suit, it was insisted, a trial of the condemnation proceedings should await.

Aside from the circumstance that plaintiffs in error were parties to the condemnation proceedings, with the fullest opportunity of introducing testimony in their own behalf, and of being heard by counsel, both before the commissioners and the county court, their contention would plainly contravene the terms and policy of the statute under which these proceedings were had.

Chapter 46 of the Code of 1887 provides for service of notice on the tenant of the freehold, if there be such tenant (section 1075); the appointment of commissioners upon that notice (section 1076); the prompt return and confirmation of the report, unless good cause be shown against it, the payment of the damages assessed into court, and the absolute vesting of the title in the company to the part of the land for which such compensation is allowed (section 1079); the right of the company to enter upon the premises condemned and construct its work, and that no order shall be made nor any injunction awarded to stay the prosecution of the work, unless it be manifest that the company is transcending its authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages (section 1081); and finally, in order that the money paid into court may be properly disposed of, that a reference to a commissioner may be had to ascertain what persons are entitled to the fund, and in what proportions (section 1084).

It is obvious from the foregoing enactments that it was the policy of the Legislature to provide a summary remedy for condemning land for works of internal improvement, where the company and owner could not agree on the terms of purchase, and not to obstruct the company in the acquisition of a good title to the land needed for its purposes, or in the prosecution of its work, by controversies in respect to the title, but to transfer such controversy from the land to the fund which the company is required to pay into court. *Va.-Carolina Co. v. Booker*, 99 Va. 633, 39 S. E. 591; *Ches., etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715, 723, 40 S. E. 20; *Fulkerson v. Taylor*, 102 Va. 314, 321, 46 S. E. 309.

In the case of *Ches. & W. R. Co. v. Washington, etc., R. Co.* the court, at page 724,

99 Va., page 22, 40 S. E., in giving the reason for the rule, says: "If this be not the case, railroad companies would have no assurance that the steps taken by them to procure rights of way or property wanted for their purposes would conclude any one, and they would be constantly subject to vexatious litigation. This view is not only in accordance with the better reason, but is sustained by the weight of authority. See 2 Mills on Em. Domain (2d Ed.) §§ 388, 389, 391; B. & O. R. Co. v. P., W. & Ky. R. Co., 17 W. Va. 844, and cases there cited; St. Joseph R. Co. v. Hannibal, etc., R. Co. (Mo. Sup.) 6 S. W. 691; Secombe v. R. Co., 23 Wall. 109, 119, 23 L. Ed. 67; 1 Red. on Rys. (5th Ed.) 271."

The court is therefore of opinion that the first assignment of error is not well taken.

In considering the second assignment of error, namely, that the amount of damages awarded by the commissioners is inadequate, it must be borne in mind that, by provision of the statute, the report of the commissioners is to be taken as *prima facie* correct. Va. Code 1887, § 1079.

In the very nature of things, the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof. The commissioners are disinterested parties. They act under the solemnity of an oath, and are selected by the court from a conservative class of citizens—freeholders—on account of their peculiar fitness for the service to be rendered. They also possess the advantage of inspecting the property, and of seeing the witnesses and hearing them testify.

In the case of Crawford v. Valley R. Co., 25 Grat. 467, Judge Bouldin, speaking for the court, said: "We hold it to be clear and unquestionable, under the plain mandate as well as the spirit of the statute, that the report of the commissioners, ascertaining the amount of compensation and damages to be paid to the landowner, must be confirmed by the court, and judgment entered for the amount reported, unless, in the words of the statute, 'good cause be shown against it.' This makes the commissioners' report, if no illegality nor irregularity appear on its face, at least *prima facie* evidence of the propriety and correctness of the award of compensation and damages; and that award must therefore stand as the judgment of the court, or, rather, the judgment of the court must accord therewith, unless some sufficient matter be established to vary or arrest it. The landowner must be passive, and the entire onus of showing such sufficient cause is thrown on the objector."

And so, in Cranford Paving Co. v. Baum, 97 Va., at page 501, 24 S. E. 906, Judge Riely, in delivering the opinion of the court, observes: "When it becomes necessary to ascertain what is just compensation for land taken for a public use, as in the present case, the statute directs that the court shall ap-

point five disinterested freeholders as commissioners to perform this duty, and requires that in its performance they shall themselves view the land so taken. The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners. They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself, which is taken, and judging as to its value, and of determining the effect of the opening of the road upon the residue of the tract. They have, as they also had here, after having their attention specially drawn to the element of damage relied upon, the opportunity to apply the evidence produced before them to the subject of the controversy, and to determine the weight to be given to its several parts. We are without the benefit of their opportunities, and of what they saw and were the judges, and it should be a very clear case, indeed, of inadequate compensation, to justify the court in disturbing their sworn, deliberate, and disinterested judgment, as disclosed in their report." *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982; *Richmond, etc., R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750.

In the case of *Shoemaker v. United States*, 147 U. S. 306, 13 Sup. Ct. 393, 37 L. Ed. 170, the court said: "The rule on this subject is so well settled that we shall content ourselves in repeating an apt quotation from *Mills on Eminent Domain*, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners, to correct the amount of damages, except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence, and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions.'"

But it is insisted that it was the purpose of promoters to develop the Madill tract as a public park, to be used in conjunction with the electric railway by the expenditure of thousands of dollars in the erection of a summer hotel, casinos, pleasure buildings, ball-ground, golf links, and other improvements, and that its value for such uses was practically destroyed by the construction of the defendant in error's railroad through the property. That it was therefore the duty of the commissioners, in making up their award, to have treated the property as a park, and not to have based their estimate upon its actual condition at the time the award was made.

This court cannot assent to the soundness of that proposition. In that connection the commissioners, in their supplemental report, say: "This claim, so far as based upon evidence of future indications and investments, the commissioners disallowed and rejected, holding the same as too speculative, remote, or conjectural for them to be able to estimate, and, in making their estimate and award, as above stated, took the said land in its present conditions, with its adaptability as it at present stands to-day."

The above is a correct and succinct exposition of the principle of law which should control commissioners in arriving at a proper award. The reason of the rule is plain, and a departure from it would transfer the inquiry from the field of fact to that of fancy and speculation. It is the present actual value of the land, with all its adaptations to general and special uses, and not its prospective or speculative or possible value, based upon future expenditures and improvements, that is to be considered.

In the case of Schuylkill River, etc., R. Co. v. Stocker, 128 Pa. 233, 18 Atl. 399, it was held that the jury was not to value the tract upon the theory of what it might bring, platted and divided up into building lots; that they were to inquire what a present purchaser would be willing to pay for it in its present condition, and not what a speculator might be able to realize out of a resale in the future. See, also, S. W., etc., R. Co. v. Abell, 18 Mo. App. 637; Pinkham v. Chelmsford, 109 Mass. 228; Penn. R. Co. v. Cleary, 125 Pa. 451, 17 Atl. 468, 11 Am. St. Rep. 913.

"The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown; and, if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, what is its worth in the market." 2 Lewis on Em. Dom. 1056, 1057.

The above is substantially the doctrine enunciated by the Supreme Court of the United States in Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, cited by this court with approval in R. & M. R. Co. v. Humphreys, 90 Va. 425, 436, 18 S. E. 901.

The record shows that, as a matter of law, the award of the commissioners was founded upon correct principles, and, as there was ample evidence to sustain it, the order complained of is without error and must be affirmed.

(54 W. Va. 610)

LISKEY et al. v. SNYDER et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

MORTGAGE—PURCHASE AT JUDICIAL SALE—RE-SALE TO OWNER—RELEASE OF EQUITY—CONSIDERATION—USURY—BILL TO REDEEM.

1. A purchase of real estate at a judicial sale by strangers to the proceeding, and contemporaneous resale thereof by them to the debtor by an executory contract in writing, whereby he is charged with a certain sum in addition to the amount for which it sold at the judicial sale, all in pursuance of a prior verbal contract, though in form a purchase of the land, is regarded in equity as a loan of money on the land as security, and the rights of the parties are determined by the principles governing the relation of mortgagor and mortgagee.

2. Where a mortgagee has obtained from the mortgagor a release of his equity of redemption, the burden is upon him to show that, in obtaining it, his conduct was in all things fair and frank, and that he paid for the property what it was worth.

3. If, in such case, it be shown that the mortgagee induced the act of conveyance or release by any indirection or obliquity of conduct, such as an assurance that it is desired for some purpose other than to bar redemption, and that it shall not do so, and that there was no consideration for it except the original debt, the release will be set aside in equity.

4. Reasonable expenses by the lender in making a loan, such as those incident to inspection of the land offered as security, and examination of the title thereto, incurred at the instance and request of the borrower, and upon his promise and undertaking to pay the same, may, upon full and clear proof, be allowed him, and will not render the debt usurious.

5. Upon a bill by a mortgagor to redeem, the costs of the suit are to be decreed against him, unless he established a prior tender of the amount due on the mortgage.

Brannon, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by Robert Liskey and others against Sampson Snyder and others. Decree for plaintiffs, and defendant Sampson Snyder appeals. Reversed.

Scott, Cobb & Maxwell, Mollohan, McClintic & Mathews, and L. Hansford, for appellant. C. W. Dailey, Erskine & Allison, Winfield Leggett, W. B. Maxwell, and W. S. Lurty, for appellees.

POFFENBARGER, P. Sampson Snyder, being the owner of a large amount of real estate, consisting of several tracts of land situate in Randolph county, and indebted in a sum exceeding \$16,000, for which his lands had been decreed to be sold, applied to Robert Liskey, John W. Liskey, and W. H. Rickard, all of Harrisonburg, Va., for a loan of sufficient money to pay off the debts. This application was made in the latter part of the year 1898, and resulted in an arrangement whereby the land was to be permitted to go to sale, and be purchased by Rickard and the Liskeys, but to remain in the pos-

*Rehearing denied January 2, 1905.

session of Snyder under a contract of purchase from Rickard and the Liskeys at a price \$3,000 in excess of the purchase money under the judicial sale, and to be paid by Snyder in four installments, to become due in 6, 12, 18, and 24 months, respectively. This arrangement was consummated on the 23d day of January, 1899, when the lands were sold to Rickard and the Liskeys under the decree of sale for the sum of \$16,660, of which \$1,666 was paid in cash, and for the residue of which four notes, of \$3,748.50 each, payable in 6, 12, 18, and 24 months from date, were executed. On the same day Rickard and the Liskeys entered into a contract under seal whereby they sold the land to Snyder for the sum of \$19,660, of which \$6,164.50 was to be paid in 6 months from the date of the contract, and the residue in three equal installments, payable in 12, 18, and 24 months from date, all bearing interest. By this contract Snyder bound himself to pay, in addition to these notes, the expenses of Rickard and the Liskeys in coming to and returning from Beverly, and such attorney's fees as they had paid or agreed to pay in connection with the purchase; also to keep the buildings on the real estate fully insured, to commit no waste, and to pay off and discharge the taxes assessed on the land, and keep the taxes paid thereon until the contract of sale should be fully executed. It was further provided that upon the payment of all the purchase money the vendors should execute a deed to Snyder, with special warranty, and that the provision against waste should not prohibit Snyder from making sale of any of the timber on the land with the consent of the vendors, and applying the proceeds on the purchase money. At the same time a deed of trust was executed by Sampson Snyder and one John W. Snyder, conveying a lot of personal property to secure the payment of the notes executed by Sampson Snyder for the purchase money specified in the contract of sale; and in said contract it was agreed that, if Snyder should fail to comply with the terms of the contract of sale and the provisions of the deed of trust, then the vendors should have the right "to enter upon and take possession of the property" mentioned and described in the contract.

The record shows three letters written by Snyder to W. H. Rickard, bearing date December 28, 1898, and January 5 and 11, 1899, representing that \$15,000 or \$16,000 would relieve the land, and appealing to Rickard to obtain a loan of that amount for him, and offering the land as security. On the 11th day of January, 1899, Rickard wrote Snyder, saying he had seen several gentlemen whom he could interest in Snyder's behalf, and that he felt certain that if the property was worth what Snyder had said it was, and \$15,000 would make the title clear, they would buy it at the price of \$15,000, and resell it to him, and give him an extension of time for

such an advance as was reasonable, but they would not go security or lend money out of the state of Virginia. Further on in the letter it is said, "Of course you would have to pay more for the property, say \$3,000." There is no controversy as to the amount of the advance, but it is insisted by Snyder that this transaction, although an absolute sale on its face, was in fact a mere loan of money by Rickard and the Liskeys, and that the papers executed must be regarded as constituting, in equity, a mortgage securing the repayment of the money. Snyder insists that he paid off some debts, and reduced the amount charged upon the land to the sum of \$16,600, for the express purpose of bringing the indebtedness within such limits as would induce the purchasers to take the land as a security for their advancement to him, and also that, in pursuance of an understanding with them, he on the day of sale represented to persons intending to become bidders that the purchase by Rickard and the Liskeys would be made for his benefit. These claims of Snyder's are controverted, but it is not denied that the purchase was made with intent to resell to Snyder at an advance of \$3,000, nor that this intention was effectuated.

Snyder having failed to meet the payments as provided in the contract of sale, an agreement under seal was made on the 6th day of October, 1899, between Rickard and the Liskeys, on one side, and Snyder and his wife, on the other, whereby, in consideration of \$1, and that Rickard and the Liskeys surrender unto Snyder the bonds and deed of trust aforesaid, Snyder and his wife released all their right and title to said real estate, and also all claims and demands against the vendors or said property, as growing out of any transaction whatever, and it was further provided that "neither party hereto shall have any claim or demand against the other as growing out of the transactions of January 23, 1899." On the same day another contract under seal was executed, whereby Rickard and the Liskeys leased the real estate to Snyder for the period of one year; Snyder agreeing to pay them \$600 as balance due on rent for the preceding year, and \$1,200 as rent for the year expiring October 5, 1900, the receipt of all which rent was thereby acknowledged as having been paid by the sale by Snyder to the Liskeys of 20 two year old cattle, and 20 one year old cattle, and 10 steer calves, all on the premises, and stated to be in the possession of the Liskeys, and, in addition thereto, an open expense account of \$78.76. By this contract, Snyder and wife obligated themselves to keep the above-named cattle on the premises free of charge for 12 months; to take care of the property; to pay all back taxes for the years 1897 and 1898, and the taxes for 1899—the latter to be paid by lessors at end of the year; to make such repairs to buildings and fencing, and to cut such brush, etc., as should be agreed

on by the parties, and keep a correct account for final settlement. The final clause this agreement reads as follows: "It is ther agreed by first parties that if second ties will take good care of premises as ve mentioned that they shall on Oct. 5, 1900, by the repayment of \$1,868.76, repur- use the personal property, cattle, herein de- fided as having been sold to first parties t. 5th, 1899." On October 1, 1900, five rs before the expiration of the lease, the lowing receipt and agreement was exe- cuted by Rickard, the Liskeys, and Snyder l his wife; W. H. Rickard signing for bert Liskey, and Sampson Snyder for Mrs. yder: "Received of Sampson Snyder and zabeth Snyder seven hundred and eight, '100 dollars, paid as follows: \$62.95 in pas- sing C. T. Painter's cattle; \$108⁸⁵/₁₀₀, do, C. Reherd; \$60.40, do, J. W. Liskey, and e delivery of eleven cattle for \$476.85, all be applied as a credit upon rent due to t. 6, 1900, or to be credited to Sampson yder and Elizabeth Snyder on their rental ntract, dated Oct. 6, 1899. It is the pur- se and intent of all the parties hereto that e above credits are to be applied toward leeming the cattle as mentioned in the con- tract of rental dated Oct. 6th, 1899, and sign- by Robert Liskey, W. H. Rickard, John skey, Sampson Snyder and Elizabeth Sny- r, and this receipt is to be used in connec- n with said contract." On the 20th day October, 1900, two other papers were ex- cuted. One was a receipt to Snyder for 68 tle at the price of \$1,990.26, to be credited the rental under the contract of October 1899, and on the rent for an extension of e lease to March 1, 1901, which extension as made by another paper, executed on the th day of October, 1900, fixing the rent for e time of the extension at the gross sum of 25. The account between Snyder and the her parties, as stated by Mr. Rickard, who ems to have kept the accounts between the rties, charges Snyder with \$2,225 rent, \$37.77 back taxes, and \$67.76 balance of ex- pence account (total, \$2,730.53), and credits m with \$709.05 as of October 1, 1900, and 1,990.26 as of October 20, 1900 (total, \$2,- 9.31), leaving a balance due from Snyder \$31.22. Snyder files an account against e other parties amounting to \$2,861.57, ost of the items of which are included in e account as stated by Rickard. The state t this account is not important, and need ot be settled here, but it is referred to as owing the relation of the parties and their ansactions with reference to the land form- ing the subject of this controversy, and as ending to cast some light upon the real uestion in the cause.

In some of these transactions, one D. C. eherd participated, although he (Rickard) nd the Liskeys all deny that he had any nterest in them until some time in Decem- er, 1899. For some time prior to the judi- al sale of these lands, Snyder had grazed

stock for Reherd, Rickard, and the Liskeys. One of Snyder's letters asking for aid was addressed to Rickard and Reherd, and the latter was consulted by Rickard in his effort to raise the money. The release of October 6, 1899, was written and signed at Snyder's house, and Reherd was there, and knew that some papers were being prepared, but de- nies that he was in the room, or knew the character of the papers, or what conversa- tions were had. Afterwards, on or about December 20, 1899, according to his state- ment, he purchased a one-fourth interest from Rickard and the Liskeys in whatever title they had to the land.

Early in March, 1901, Reherd and John W. Liskey went to Snyder's home for the purpose of taking possession of the land; taking with them a man whom they expected to occupy the residence and take control of the lands for them. Snyder refused to give them possession, and on the 18th day of March, 1901, Reherd, Rickard, and the Lis- keys presented their bill in equity to the judge of the circuit court of Randolph coun- ty, setting forth their purchase of the lands, and resale thereof to Snyder, Snyder's re- lease, and the two leases executed, under which Snyder was holding as their tenant; alleging the expiration of the leases, Sny- der's refusal to give possession, his insolv- ency, the annual rental value of the land to be not less than \$1,200, their necessity of having immediate possession by reason of their having about 400 head of cattle which they intended to pasture on the land, and the commission of waste by Snyder, in that he had a sawmill on the land, and had cut and manufactured timber from the land into lumber of the value of six or seven hun- dred dollars, and was continuing to take the timber from the land; and praying that Snyder be enjoined from cutting any timber on any of the land, from manufacturing the same into lumber, from removing the same from the land or selling it, from cultivating any of the land, pasturing it, cutting hay upon it, gathering and disposing of the fruit, exercising actual ownership over it, collect- ing or receiving rent from any of the oc- cupants of the land, and from renting or leasing any part of the land, and for general relief. An injunction was awarded.

Snyder answered the bill, setting forth the facts hereinbefore stated, and claiming that, although the transaction of January 23, 1899, was on its face a contract of sale, it was in reality a loan from Rickard and the Liskeys to him; he having agreed to pay them \$3,000 for the use of their money. As to the release executed October 6, 1899, he averred that at the time it was executed it was expressly understood and agreed that it was not to work a relinquishment in any re- spect of his rights as owner of the lands, or to make sale of the timber thereon for the purpose of raising money with which to pay for the land. The principal allega-

tions of the answer in respect to the lease are as follows: "That some time about October 6, 1899, plaintiffs Robert Liskey, John W. Liskey, and W. H. Rickard came to the respondent, at his home, near Harman, far from his counsel, and requested him to give them a statement by which they could more effectually raise money to carry on business enterprises which they had then before them, and claimed that they would stand by the contract as stated in Exhibit E in plaintiffs' bill, and would allow him all the time necessary to repay said loan, and would allow even more time if he would execute the statement than otherwise. They also represented that they wished to take in a partner to strengthen their standing and promote their business. They also represented that they had engaged or were about to engage in some large business enterprises, which would require a great deal of money, and on that account they would be obliged to borrow large sums of money. And they claimed and represented that, while they did not want respondent's property, and did not expect him to pay any faster than he was doing, still the situation of their business with him was such, as they claimed, as to impair their credit, and on that account they demanded a statement from respondent showing that they were the owners of this vast estate, and not the respondent, whereby they might be able to get such credit as they might need for their own purposes, and also to enable them the better to carry the loan held by respondent; and on that day they presented to him, and requested the signature of himself and his wife to, the paper writing referred to in the plaintiffs' bill as Exhibit F, which writing was prepared by them, and was not fully considered or understood by respondent, but respondent was specially and freely informed by all of said parties, and also by the said D. C. Reherd, who was present at the time, and who was taken in by them as a partner in said loan, that said paper writing was not intended to have any effect upon his ownership and rights to said lands, or impair in any way his indulgence in the repayment of the loan, but that such writing would be the means of enabling them to give him all the time he might need for that purpose." It is further alleged in the answer that the plaintiffs had violated that clause of the contract of January 23, 1899, providing for sale of the timber, and the crediting of the proceeds on the purchase money of the lands. In this connection it is averred that in 1899, prior to October 6th, an offer of \$9,000 had been made for the timber on one of the tracts, and that later other parties had offered \$10,000 for it, but that the plaintiffs refused to permit the sale; that prior to October 6, 1899, \$12,000 had been offered for what is called the home place, and the plaintiffs had protested against the sale, and assured the respondent that if he would keep the land

they would give him all the time he wanted on the loan; and that Taylor & Fenderson, of New York, were willing and ready to take the timber off of one of the tracts, and pay \$12,000 for it, but that the plaintiffs had prevented the sale by attempting to impose unreasonable terms and conditions. The answer further avers that Taylor & Fenderson had deposited the money in bank, and filed their bill against the plaintiffs to compel them to perform an agreement made for the sale of the timber to them. The answer prays that the release of October 6, 1899, be canceled; that the plaintiffs be compelled to execute the contract of sale of timber to Taylor & Fenderson; that the proceeds of the timber be credited upon the purchase money of the land; that, if necessary, the cause be referred to a commissioner to ascertain the amount of the loan due and unpaid; and that he be allowed a day in which to pay the same.

To this answer the plaintiffs filed a special replication, the most material features of which are a denial of the charges made in the answer respecting the proposed sales of one of the tracts of land, prior and subsequent to October 6, 1899, and the refusal of the plaintiffs to accept or agree to the offers of sale, and the hindering of the sales. As to the offer of \$12,000 for the home place, they deny having dissuaded the defendant from taking it, and also that they ever had any knowledge of such a proposition, and also the allegations about the sale to Taylor & Fenderson. The replication denies that the plaintiffs purchased the lands in question as agents and trustees of Snyder, that they hold the same in equity for his benefit, and that in executing the notes and paying the expenses, as stated in the contract, the defendant was acting within the premises stated in his answer, and relying upon the promises of the plaintiffs to treat their purchase and payment of money as a loan to be repaid. As to the important paper dated October 6, 1899, purporting to be an absolute release from Snyder of all further interest in the land, this replication says: "The plaintiffs further say that it is not true that the contract in writing dated October 6, 1899 (Exhibit F), was entered into by the defendants with the plaintiffs because of fraudulent misrepresentations, deceit, or fraud made or used by the plaintiffs, and all the allegations which allege any such deception or misrepresentation on the part of the plaintiffs, or either of them, for the purpose of obtaining such contract in writing, or that the same was to be used or held by them for any other purpose than that for which its legal import implies, are not true."

Depositions were taken, and the cause was submitted on the 7th day of May, 1901, when the court entered a decree by which it was "adjudged, ordered, and decreed that the injunction heretofore awarded in this cause be, and the same is hereby, perpetuated;

that the plaintiffs do recover of the defendants the said real estate specifically mentioned and described in their bill in this cause filed; and that a writ of possession do issue, directed to the sheriff of this county, requiring him to place the plaintiffs in possession of said real estate." From this decree, Snyder has appealed.

The pleadings, evidence, and decree must be viewed in the light of the relations which the parties sustained to one another in respect to the transactions and the property involved in the cause. Whether Snyder can have relief from the release executed by him upon the ground set forth in his answer, which prays affirmative relief against the plaintiffs—assuming that the allegations he makes of representations as to the use to be made of the release, and of the promise and assurance on the part of the plaintiffs that it should not interfere with or bar Snyder's right to pay the purchase money and keep the lands—to be sustained by evidence, depends absolutely upon whether their relations were such at the time of the execution of that release as to bring the transaction within equitable principles which do not obtain between strangers dealing with each other at arm's length and on equal footing. As Snyder had failed to pay what he had bound himself to pay within the time specified in the contract, and one of the stipulations of the instrument was that in case of such failure the vendors might re-enter, by the strict letter of the contract, it appears that, in executing this release, Snyder did only that which he was bound to do, namely, yield the land into the possession of the plaintiffs. So viewing the transaction, he lost nothing, was deprived of nothing, is not injured, and has no right to complain. Possession of the land, however, was only one of the elements of Snyder's claim to it. Assuming that the transaction of January 23, 1899, was an absolute sale to the plaintiffs, and a contract of resale by them to the defendant—just what appears on the face of the papers—the defendant, being in possession under the contract, held the equitable title to the land; and, even after eviction, with or without an action for that purpose, a court of equity would still have been open to him for the assertion of his right to pay the purchase money and compel a conveyance of the legal title. Hence, conceding the right of the plaintiffs to re-enter upon the failure of the defendant to pay the first purchase-money note when due, such entry, if made, would not have cut off the defendant's equity of redemption. At law, under a contract of sale, the vendor, in case of failure to pay the purchase money, might have his action of ejectment for the recovery of the possession of the land, or he may sue at law for the purchase money, or in equity for the specific execution of the contract. 2 Lom. Dig. c. 4, §§ 1, 11. The vendee may

also sue in equity for the specific performance of the contract, tendering the purchase money, and praying that the vendor be compelled to convey to him the legal title, although he is in default in respect to the time of payment, unless by the terms of the contract it appears that it was intended that time should be of the essence of the contract. 2 Lom. Dig. c. 4, §§ 11, 43, 44. This is especially true when the vendee has been put in possession under the contract. In such case time of payment is rarely, if ever, regarded as material. "Resting on the equitable estate by a person in possession, without clothing it with a legal title, has never been held to be that sort of laches which prevents relief. Or, as it may be otherwise expressed, where a party, under an agreement to have a conveyance of land, holds the possession of the land, time will be no bar to his claim for specific performance." 2 Lom. Dig. c. 4, § 44, p. 103; *Crofton v. Ormsby*, 2 Scho. & Lefr. 604; *Zane's Devisees v. Zane*, 6 Munf. 406.

In equity, the vendor, under such conditions, is treated and regarded as a trustee holding the legal title to the land for the benefit of the purchaser, and the purchaser is treated as a trustee holding the purchase money for the benefit of the vendor; and, although the pleadings in a suit to compel specific performance of such contract differ from the pleadings in a suit to redeem from a mortgage and enforce an express trust, the purposes sought and results attained by these different bills are substantially the same. The vendee, mortgagor, or beneficiary of the trust, as the case may be, calls upon a court of equity to invest him with the legal title, but is allowed to do so only upon condition that he pay the purchase money or loan, or perform such other duty as he is bound in equity or by his contract to perform. The position that in equity the trust relation is regarded as existing between vendor and vendee under a contract of sale is sustained by numerous authorities. 2 Lom. Dig. c. 4, § 11; 1 Sug. Vend. top. p. 270, bot. p. 175; *Atcherly v. Vernon*, 10 Mod. 518, 527; *Green v. Smith*, 1 Atk. 572, 573; *Moore v. Burrows*, 34 Barb. 173; *Wickman v. Robinson*, 14 Wis. 493, 80 Am. Dec. 789; *Kidd v. Dennison*, 6 Barb. 9; *Swartwout v. Burr*, 1 Barb. 495; *Fonda v. Sparrow*, 46 Barb. 109; *Craig v. Leslie*, 3 Wheat. 563, 578, 4 L. Ed. 460; *Van Wyck v. Alliger*, 6 Barb. 511; *Egerton v. Peckham*, 11 Paige, 359; *Linscott v. Buck*, 33 Me. 530; *Force v. Dutcher*, 17 N. J. Eq. 165; *King v. Ruckman*, 21 N. J. Eq. 599; *Scarlet v. Hunter*, 56 N. C. 84; *Taylor v. Kelly*, 56 N. C. 240; *Toft v. Stephenson*, 1 De G., M. & G. 28; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425; *McKechnie v. Sterling*, 48 Barb. 330; *Sutter's Heirs v. Ling*, 25 Pa. 466; *McCraith v. Foster*, 5 L. R. 612; 2 Story, Eq. Jur. p. 550, § 1212.

Concerning the status of parties to a con-

tract of sale of real estate, Jones on Mortgages, at section 218, says: "There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment. The vendor holds the legal title, and all persons must necessarily take notice of it; and, although the vendee enter into possession, his deed will, of course, convey only his equitable title. Like a mortgagor in possession, he has an equity of redemption, while the vendor holds the title by reservation, rather than by grant, as in the case of an ordinary mortgage." This important equity on the part of the vendee is recognized by statute in this state. "A vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, where there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." Code 1899, c. 90, § 20. Section 21 makes provision for the protection of the equitable titles of mortgagors and grantors in deeds of trust after the accomplishment of the whole purpose for which the mortgage or deed of trust was made. Then section 22 of the same chapter requires the defendant in an action of ejectment to file a notice in writing with his plea, in order to avail himself of his equitable defense, and then says, "Whether he shall or shall not make or attempt such defense, he shall not be precluded from resorting to equity for relief to which he would have been entitled, if the said sections had not been enacted."

Unless time is of the essence of the contract here, the equity of the defendant at the time he signed the release was analogous to that of the mortgagor in default. "In all ordinary cases of contract, equity does not regard time as the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its object, subject-matter, or terms, although a certain period of time is stipulated for its completion or for the execution of any of its terms, equity treats the provision as formal, rather than essential, and permits the party who has suffered the period of lapse to perform such acts after the prescribed date, and to compel the performance by the other party notwithstanding his own delay." Pom. Eq. Jur. § 1408. In the note to this section it is said: "Time may be made essence by express stipulation. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null if the fulfillment is not within the prescribed time." These general propositions are abundantly supported by the decisions. Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Jones v. Robbins, 29 Me. 351, 1 Am. Rep. 593; Johnson v. Evans, 8 Gill (Md.) 155, 50 Am. Dec. 669; Wells v. Smith, 7 Paige, 22, 31 Am. Dec. 274; Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec.

484; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Cleary v. Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; Sowles v. Hall, 62 Vt. 247, 20 Atl. 810, 22 Am. St. Rep. 101. The only provision of this contract from which it might possibly be inferred that it was intended that time should be material is the one giving the right to enter upon and take possession of the property in case of failure to comply with the provisions of the contract and of the deed of trust. This falls far short of the express provisions held to be sufficient in the cases above cited. In them the contracts provided that in case of default they should be void, and the parties thereto should be released from further obligation. The re-entry clause is one of forfeiture only, such as is inserted in mortgages, and is not allowed to be enforced in equity without giving the right of redemption after forfeiture. Hoffman v. Ryan, 21 W. Va. 482.

By the execution of the release of October 6, 1899, Snyder gave up his right to call upon the plaintiffs in a court of equity for the specific execution of their contract—a right somewhat similar to the right of redemption held by a mortgagor, as has been shown. Under such circumstances, equity requires, on the part of him who obtains a release or conveyance of the equity of redemption, the utmost fairness and frankness, especially where he pays nothing or an inadequate price for what he receives. The relation is regarded as in some degree confidential. Therefore, if it be found that in obtaining this release the plaintiffs resorted to any indirection, or held out any delusive hopes or assurances by way of inducement, it cannot stand, and the parties must be placed in statu quo. In speaking of such transactions between mortgagor and mortgagee, 1 Bigelow on Frauds, at page 347, says: "Principles are applied almost as stern as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him." This doctrine is fully supported by the following cases: Villa v. Rodriguez, 12 Wall. 323, 20 L. Ed. 406; Morris v. Nixon, 1 How. 118, 11 L. Ed. 69; Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Holmes v. Grant, 8 Paige, 245; Webb v. Rorke, 2 Scho. & L. 673; Spurgeon v. Collier, 1 Eden, 59; Vernon v. Bethel, 2 Eden, 113; Toombs v. Conset, 3 Atk. 261; Gubbins v. Creed, 2 Scho. & L. 214; McLeod v. Bullard, 86 N. C. 210; Chapman v. Mull, 42 N. C. 292; 4 Kent's Comm. 143. In England it is said that there is no presumption of fraud

in the case of a conveyance by a mortgagor to a mortgagee in consideration of the mortgage debt only, as there the parties are not held to stand in a relation of confidence, but that transactions between them are looked upon with jealousy when the mortgagor, in embarrassed circumstances and under pressure, sells the equity of redemption to the mortgagee for a sum considerably less than its value. *Kerr on Fraud*, 194. In this last-named work, at page 183, it is said: "The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed. In cases where a fiduciary relation does not subsist between the parties, the court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted. The confidence and influence must in such cases be proved extrinsically, but, when they are proved extrinsically, the rules of equity are just as applicable in the one case as in the other." In this country, as has been shown, it is otherwise. There is a presumption against the bona fides of the transaction, for the burden is upon the mortgagee to show that he paid for the property what it was worth, and took no advantage of his superior position in obtaining the conveyance or release. 1 *Big. Fraud*, 347-349. This confidential relation is said to exist between vendor and vendee. *Pom. Eq. Jur.* § 963. From what has been said of the relation between vendor and vendee when the latter is in possession under a contract of sale, it must be apparent that the reason and necessity for jealous scrutiny on the part of courts of equity in passing upon transactions between them are almost as great as in the case of mortgagor and mortgagee. Indeed, the doctrine extends to all persons who occupy positions of trust and confidence, or influence or dependence, in fact although not, perhaps, in law. 2 *Pom. Eq. Jur.* 963; 1 *Story, Eq. Jur.* p. 331, § 323.

Notwithstanding the general rule in this country that the burden is upon the mortgagee to show that, in obtaining a conveyance or release of the equity of redemption, he acted with fairness and took no advantage, it is held that, in order to correct or reform a written instrument, or establish a declaration on the part of the mortgagor at the time he executed the mortgage that the equity of redemption should pass to the mortgagee, or that by a subsequent parol agreement the mortgagor surrendered his rights, the evidence must be plain and convincing beyond reasonable controversy, and, if the proofs are doubtful and unsatisfactory, the writing will be held to express correctly the intention

of the parties. *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Hoffman v. Ryan*, 21 W. Va. 415; *Van Gilder v. Hoffman*, 22 W. Va. 1; *Lawrence v. Du Bois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 246. Here is an apparent, but not a real, contradiction. The burden is on the party claiming the relation of mortgagor to establish it. He must show that he was mortgagor, and the other party mortgagee. Then, if it appears that the latter has acquired the equity of redemption, the burden shifts, and it devolves upon the grantee to show that in procuring the conveyance or release he acted fairly and paid full value.

It is insisted here that the parol evidence offered by the defendant is inadmissible, because in violation of the rule forbidding the contradiction of a written instrument by parol evidence. But it is well settled that, in this and the similar cases above named, such evidence is admissible. It is admitted, not to contradict or vary the terms of such instrument, but to establish a constructive fraud vitiating the instrument, or a superior equity, in the nature of a trust. See the cases last above cited.

Constructive fraud on the part of the plaintiffs, as defined by the foregoing authorities, is abundantly established by the evidence. It is disclosed by surrounding circumstances, conduct of parties, direct testimony, and admissions. As has been shown, it is important to ascertain whether an adequate price was paid for the equity released. Nothing whatever was given for it here. The transaction was on its face a rescission of the contract of sale, pure and simple. The defendant's right to have specific performance was valuable. According to the testimony of the defendant, the land was worth considerably more than the debt, although when first offered at judicial sale the highest bid was less than \$15,000. The quantity of the land was large, amounting to between three and four thousand acres, of which a good deal appears to have been in good condition for grazing, and a large portion covered with valuable timber. It is charged in the answer, and supported by the evidence of the defendant, that the land was purchased by the plaintiffs at a great deal less than its value. The averment of the answer was that it was purchased at a price recognized by the parties to be less than one-third of its actual value. In the replication filed by the plaintiffs this averment is denied, but it is not shown in the replication or by any testimony introduced by the plaintiffs that the value of the land was not greater than the amount for which it was resold to the defendant. It is not specifically denied in the pleadings. In applying to plaintiffs for help, Snyder had represented his property to be worth \$40,000 or \$50,000, and requested them to verify his statement at his expense. Some investigation was made. Rickard wrote him that if his indebtedness was not over \$15,000, and

his property was worth what he claimed it was, the money would be furnished, and the property purchased and resold to him at an advance of \$3,000, and it would then be very cheap. This plan was executed without change, except that Rickard had to join the Liskeys to induce them to undertake it. Beyond Rickard's statement that the Liskeys were not very well satisfied with the result of the investigation, and refused to make the purchase unless he would join them, there is no testimony contradicting that of Snyder to the effect that the property was worth more than the debt.

Prior to the execution of the release the plaintiffs were indulgent. On June 19, 1899, they were notified by letter that Snyder would not be able to meet the first payment when it should become due; and Rickard replied under date of June 24, 1899, saying that his associates were very much surprised at the contents of the letter, and requested Snyder to come over at once and see what could be done. The record shows no other communications between them until October, 1899, when Rickard, the Liskeys, and Reherd all went to Snyder's home and procured the execution of the release. Concerning this transaction, Snyder says they came three or four days or more before the paper was signed, and induced him to sign it by representing that they needed some money in their business, and had been compelled to borrow money, by reason of which their credit had become impaired, and, if he would execute the release, it should not interfere with him, and he should have the land back in the same manner as originally agreed upon. He says they were all there and talked about this release for three or four days before the arrangement was consummated, and that he entered into it by reason of the fair promise made to him, and some persuasion on the part of his wife, who had the utmost confidence in the plaintiffs, and with the understanding that his rights were not to be impaired, and that he should have longer time in which to pay the money. He says they said they would give him a copy of the writing, but that as soon as it was acknowledged they left hurriedly without giving the copy, saying they wanted to get as far as Franklin that day. Elizabeth Snyder, wife of the defendant, says the release was talked about for several days, and that the plaintiffs claimed they needed it on account of some of their business dealings, and that if they got it they could give her husband more time on the money he owed them, and that she heard Rickard say in the presence of the others, in reference to the release, that it should not in any way interfere with the right of her husband to redeem the land, but that they would give him all the time he would ask, and more. Nettie Harman, a daughter of the defendant, says she was not present on the day the release was signed, but that she had stayed at her father's house the night be-

fore it was signed, and when the release was under discussion, and that Reherd told her that they wanted the release of the property in order to obtain money, and that it was not to have any effect against her father's right in the property, but was simply for their benefit, to help them in some way. She further says that on the next morning, before she went away, they were talking about the matter at the house. Her father was objecting to the release, and Reherd then said they were men of their word, and, if they did not carry out their branch of the agreement with her father, and let him have his property back, he would be a witness for him against the rest of them, and would show what the agreement was. M. C. Harman, who took the acknowledgment of the release, says all of the plaintiffs were present while he was writing his certificate of acknowledgment, and one of them said to the defendant: "You need not be uneasy. We have always intended to treat you right, and yet intend to treat you right." This was said in response to an objection made by Snyder to the form of the writing, and it was repeated once or twice, says the witness.

On October 10, 1899, four days after the release was executed, Reherd wrote Snyder a letter in which he said, among other things: "I told you when I was at your place that the Liskeys and W. H. Rickard wanted me to join them in the contract in case they had to raise the money to pay for the land; they were after me again as we were coming home." He then asked what he should do about it, and expressed a willingness to do whatever Snyder should think best. As a witness he admits the truth of the matter set forth in the letter, and adds that he was requested in May, 1899, to join in the contract. Under date of October 30, 1899, Reherd, in reply to Snyder's letter, which does not appear in the record, wrote as follows: "I received your letter of the 25 and was sorry to hear of the terrible fires you have had and hope you have had rain by this time. I saw Mr. John Liskey and W. H. Rickard, and they said I should tell you they would treat you all right about the redemption of your land in a year from now, and that you should not give yourself any uneasiness in the matter." In explanation of this letter, he says, on the witness stand, he should have used the word "resale" instead of "redemption." Being examined about it before its production, and led to believe it contained the word "authorized," he said he should have used the word "knowledge" instead of it, and, further, "I notice in all of my letters—I was looking over some copies—that I used the word 'redemption' when I ought to use the word 'resale,' and that when I use the word 'authorized' it should have been 'knowledge'; and I will just state here that they never authorized me to make a statement for them as their agent." In a letter to Mrs. Harman, dated November 30, 1899, Reherd said: "I

saw a letter your father wrote W. H. Rickard, and he seems to fear they will not let have his farms back; if he makes arrangements to pay for them please tell him for me that he need have no fear of that for I had a long talk with W. H. Rickard and John and Robert Liskey yesterday, and they all said if he could get the money within the twelve months from October, 1899, they would gladly let him have it back, and besides that I would be a witness for your father in case they did not do what they said." As a witness he admits that his associates told him what he, in the letter, represented that they had said, after a labored and unsuccessful effort to convey the idea that his knowledge of the redemption agreement had been imparted by Snyder. Objection is made to the use of these letters of Reherd as evidence on the ground that he was not interested with Rickard and the Liskeys in the lands at the time they were written, nor in any sense their agent. Whether they were admissible or not need not be determined, for Rickard took the stand as a witness for the plaintiffs, and solemnly testified to the truth of the salient statements contained in the letters, and that, too, against his interest, after he had joined the original parties as purchasers.

On the 9th day of October, 1899, three days after the execution of the release, Snyder wrote Rickard and the Liskeys, asking what he should do about sowing grass seed, clearing land, fixing up fences, etc., at their expense, in case he should fail to get the land back, and saying: "I will not go further or faster than I would for myself on expenses, if you leave it to me till I see what I can do; if I fail to redeem it, then the expenses and improvements is all left for you to say." No reply to this appears in the record. On October 30, 1899, Snyder wrote that forest fires had greatly damaged the property, asking what he should do about rebuilding fences and suing the party who put out the fire for damages, and saying: "So it is a big job for you if you should keep the land & if I get it back or redeem myself the same on me." After suggesting what sort of fence should be built, he said: "But you have the say yet, please advise." To this letter, which contained other references to the possibility of redemption, the record shows a reply from Rickard, dated November 1, 1899, saying, for himself and associates, that they were unable to say just what he should do about rebuilding the fencing or suing for damages, but that he, as tenant, might take such action as he might think best; leaving to them, as owners, the adjustment of the permanent damages. In the same letter they declined to authorize him to have clearing done on the land. On the 16th day of November, 1899, Snyder wrote again, saying he had before that time written them concerning an offer from some parties to buy the timber on the upper farm, and that he thought he could get from five to seven thousand dollars cash for

it. He reminded them that he had written upon that subject some 10 days before, but had received no answer, and urged them to permit him to make the sale and apply the proceeds on the purchase money of the land, and said he could raise the balance of the money and pay it all up. This letter concludes as follows: "What do you say? Answer at once. The parties is here wanting to buy will pay spot cash. Gentlemen, I think you ought to do this; give me this opportunity to redeem myself. I think that the \$3,000.00 that I gave you in the start ought to satisfy you all well; answer at once fully what is the reason you did not answer my other letters like this one on the same subject." On November 20, 1899, Rickard wrote, acknowledging the receipt of Snyder's letter, and saying the Liskeys were very much provoked that he had had possession of the property for nearly 12 months since he promised to pay the delinquent taxes, and had finally written that he was unable to do so, and that they wanted some definite answer at once, as the property was threatened with sale. As to the proposed sale of the timber, the letter said: "They say they will sell provided they can get its worth, but the timber is not on the market to be hawked about subject to all kinds of offers. If the parties to whom you refer will submit a proposition to us of purchase, we will reply at once. If the offer is, in our opinion, what the timber is worth we will sell if the terms suit us, otherwise it is not for sale." This letter closed with an expression of the hope that "this is a full answer to your question of sale." This seems to have been very unsatisfactory to Snyder, as well as out of harmony with what he had understood up to that time to be the agreement. In reply he wrote November 22, 1899, saying, among other things: "Yours of the 20th inst., to hand, but nothing in it satisfactory as in answer to my letter or in fact the last two letters. * * * Why do you avoid answering my questions? * * * If you get your \$19,000 and its interest what need you care about the taxes. * * * Now all I ask of you gentlemen is to give me the privilege to sell the timber on that upper farm for \$7,000 Spot cash & you get the money and credit me with it in my \$19,000 or what it is Sum over, & I will pay you the rest in a very short time; in time for you to take up all your other obligations when the next payment falls due or before; I don't look to get one cent till you are fully paid isn't this right? Didn't you say that all you wanted was your money back & the interest and your \$3,000 profits for your favor; didn't you agree to this? I hope you do not intend to take it all and turn me out of house and home. * * * Why do you hesitate & stand back and give me no chance to Redeem myself when opportunity presents its Self? * * * Answer me definitely what I can depend on, & not answer so indefinitely & evade my questions; answer as you mean; if you don't

intend to let me have my land back Say so & don't keep me in the dark or in a Strain." On November 27, 1899, Rickard answered, and said: "We are men of our word and will fulfill any promise we make, and it is of no use to repeat same; we positively refuse to give you an option on the property or otherwise handicap ourselves or 'embarrass' the title of same. We intended visiting you next week and looking over the timber on upper tract and setting a price on it, but since you make a direct offer of \$7,000.00 for the timber in cash we have concluded to take that for it if tendered within a few days; we have another party who wants to look at it, but if we hear from you or your people that they will take it at above price that will settle the matter with the other gentlemen. So let us hear from you at once. Now, as to selling you the property we will sell it to you if you are ready to buy 'now' right along the lines we have always talked and at the same price, but this does not give you or anybody else an option for the future. If you are not ready to buy then this settles the matter for the present; I am sure this is plain enough and ought to be entirely satisfactory to you; we want to be entirely understood; we reserve the right in the future as we have in the past to do just as we do now, viz., consider any proposition made to us to reject or accept same at our pleasure." Snyder seems to have understood from this that he would be permitted to sell the timber and pay for the land as provided in the original contract of January 23, 1899. About two months later he wrote again, saying that he had about consummated a sale of the timber on the upper place at \$7,000, and would be able soon to sell the timber on the lower farm, and, if so, it would enable him to redeem the land.

In connection with this correspondence, Rickard's testimony must be considered. He says that, after the execution of the release, Snyder and his wife seemed to be very much hurt over their failure, and that the former had said that he felt that he could repurchase the land if they would give him the opportunity to do so upon liberal terms, and that in response to this he was advised that in all such efforts he would be the worse off, but that if he should get in shape at any time, and convince them that he could, with his own money, during the year of his rental contract, purchase the property and save a home for himself, they would be willing to enter into an agreement with him upon such terms as might be agreed upon, or liberal terms, but they were not willing to give him an option, or anything that might handicap the title, or give anybody else the privilege to take their place and get the benefit of a profit that they might have in case of a rise in prices, after they had purchased the property in a panic, and carried it through, when nobody else would pay the price. Reherd also narrows his evidence to the extent of

saying that Rickard and the Liskeys had stated, in their conversations with him concerning their agreement with Snyder, that the price at which he was to have the land back had not been fixed. While Rickard does not say at what price he had said Snyder could have the land back, it is to be noted that his language, as given by himself, imported, and was calculated to lead Snyder to believe, that he could have it upon the original terms. They required him to purchase with his own money, denied him the privilege of borrowing money from others, and safeguarded the property from falling into the hands of anybody but Snyder. While he says this agreement was made after the execution of the release, he admits that it was made on the same day and at the same place. Considering his testimony in connection with the evasiveness of his letters to Snyder, written in response to Snyder's appeal for an absolutely frank and definite statement as to whether the plaintiffs would comply with what Snyder said was their agreement, namely, that he might redeem, and in connection with the positive testimony of Snyder and his wife and daughter, and the corroborative testimony of Harman, the conclusion that Snyder was led to believe and did believe that, notwithstanding the release, he still had the right to redeem, is irresistible. But Rickard says the agreement or offer to let Snyder have the land back was made after the release was executed. If so, it could scarcely be said to have been an inducement to the execution of that instrument. In this connection it is to be remembered that Snyder and his wife say the plaintiffs negotiated for this release for a period of at least three or four days, and hastily took their departure after its execution. As to these important facts bearing upon the question, all the plaintiffs are silent. The long pendency of these negotiations is suggestive of persuasion and inducement, and corroborative of the testimony of the witnesses for the defendant. If Harman is to be believed, there was some prior oral agreement which at the moment of acknowledgment the plaintiffs assured the defendant they would comply with. Rickard admits that there was a sort of consolatory agreement or offer on the day of the execution of the release, but the two Liskeys, who were present, are silent as to whether such arrangement was made on that day, even after the execution of the release. Reherd, who undoubtedly had several conversations with these people, and was not only intimate with them, but closely allied with them in business enterprises, and finally joined them in this, testifies to their having told him that Snyder should have the land back if he raised the money within 12 months, and does not say they qualified it to the extent to which Rickard qualifies it in his testimony. He does not say they told him the agreement

was made after the execution of the release, and it is to be remembered that it was discussed between them for the purpose of informing Reherd of the exact conditions, so that he might know whether to join them.

Whether made before or after the execution of the release, the agreement undoubtedly was that Snyder should have the land back upon payment of the price specified in the contract of January 23, 1899. This clearly appears from Rickard's letter of January 27, 1900. What else could he have meant by saying they would sell Snyder the land right along the lines they had always talked, "and at the same price"? His testimony imports that no price had been mentioned, and that it remained to be fixed, as part of the liberal terms, in case Snyder should ever become able to repurchase. The letter of January 27, 1899, flatly stamps this an error, and at the same time supports Snyder's claim that a price was fixed, and there is nothing to indicate that it was different from the original purchase price. As the agreement was, in substance and effect, exactly what Snyder claims it was, namely, that he should have the land at the original price, notwithstanding the release, it is wholly unimportant that they called it a resale, and refused to give an option. Again, what did he mean by saying "right along the lines they had always talked"? Does not "always" go back beyond the date of the release? Can anybody read these letters without concluding that Rickard's was written to reassure Snyder that he might redeem? Can it be doubted that the words "always" and "same price" were used deliberately? What could have been the promise he said it was "of no use to repeat," other than that Snyder might still pay the money and keep the land? In the same letter, and same connection, Rickard said they would sell the timber on the upper farm. This, too, was one of the terms of the original contract. True, he did not say the purchase money of the timber might be credited on the purchase money of the land as provided by the contract, but he said the timber might be sold, and Snyder could have the land back—two of the things asked by him—and evaded a direct answer as to the right of redemption, and this to a man known to him to be illiterate and in a distressed state of mind. It was substantially an admission of the claim of Snyder. To this equivocation and evasion add the flat contradiction and admission on a vital point just referred to, and the evidence adduced by the plaintiffs stands self-discredited, while that of the defendants stands substantially admitted, except on the single question whether the agreement was made before or after the execution of the release.

On this point enough has probably been said to clearly show that the court ought to have found on it for the defendant. But there are other circumstances tending to

prove the contention of Snyder. Although the surrender of the purchase-money notes is stated in the release to be one of the considerations for its execution, and the release was recorded, they were never surrendered, but are still held by the plaintiffs. Rickard says they, together with the deed of trust, were left in his custody to be copied and to be compared by Albert Snyder, who was to come to Harrisonburg and bring some cattle to plaintiffs, and then take the papers back to his father, but he never came. Snyder, however, says the papers to be sent him were copies of the release and rental contract. In a postscript to his letter of November 27, 1899, Rickard said: "Some time ago I had the papers copied to send you but thought you would come over this fall and we could compare copy with original. Is there any one here who could do this for you, or shall I send them to you by mail?" A very natural inquiry here is why should comparison by Snyder be important, if original papers were to be sent to him, and copies retained by Rickard? Could not Rickard see for himself whether the copies he desired to retain were true and correct? What possible interest could Snyder have in seeing that copies to be retained by Rickard were correct? Again, of what practical use could copies of canceled and surrendered papers be to the plaintiffs? Was the withholding of these notes, contrary to the terms of the release, an act intended to lull Snyder into a feeling of security, and in pursuance of the agreement as claimed by him? Did the plaintiffs hurry away as soon as the release was signed, without leaving copies of it and the rental contract, lest Snyder's meditation over the ironclad terms of these papers should create dissatisfaction, and arouse him to a premature demand of his rights under the verbal agreement? This, too, looks probable. Why were these papers not surrendered on October 1, 1900, when Rickard and Snyder appear to have been together, or on October 20, 1900, when Rickard and probably all his associates were at Snyder's house? Is there any reason why they could not have taken them there? Taken in connection with Snyder's pending efforts to sell the timber and raise the money to pay for the land, the further detention of the notes is rather significant, and tends to uphold Snyder's claim and condemn that of the plaintiffs. Moreover, at or about the time the new rental contract of October 20, 1900, was entered into at Snyder's house, another extension of 60 days was given Snyder. On October 7, 1900, Reherd wrote Snyder, saying, "I hope you have arranged your affairs so I can try and get the time extended." This occurred after he became interested in the land, and before the date of the second rental contract. Explaining, he says he does not know why he used the word "extended," but supposes it referred to the refusal given Snyder to repurchase

within one year from October 6, 1899. He further contradicts himself. He says that when the second rental contract was executed they told Snyder that, if he got the money within sixty days, he could buy the place back, but that "there was no price set," so far as he knew. Afterwards, in explaining his use of the word extended, he says, "On October the 6th we had given him the price and terms on the place for 60 days."

Thus it appears that, treating the parties as vendors and vendee, under a contract of sale, the defendant is entitled to specific execution of the contract, notwithstanding the release executed by him. But the theory of the defendant's case is that the original purchase by the plaintiffs, and resale to him, are to be treated in equity as a loan by the plaintiffs to the defendant of money on the faith of the land as security, and that the transaction was intended to be, and was in fact, such loan. Many cases illustrating the principle relied upon have been decided by this court, but none of them stand upon like or strikingly similar facts. It is universally held that the intention of the parties to the transaction, gathered from the circumstances attending it, the conduct of the parties, the face of the written contract, and parol evidence, must control. *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Dabney v. Green*, 4 Hen. & M. 101, 4 Am. Dec. 503; *Lawrence v. Du Bois*, 16 W. Va. 443; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; 2 Min. Ins. 329; *Jones, Mort.* 258. Certain rules have been laid down by this court for guidance in seeking the intention of the parties, but some of them are clearly inapplicable here. It appears that the grantor was hard pressed for money, but not that the grantees were known money lenders. Nor can it be said that the rule of gross inadequacy of price clearly applies here. On the contrary, it is undisputed that Snyder applied to the plaintiffs for a loan or their indorsement for the purpose of enabling him to pay off his indebtedness, and also that the possession of the land remained with Snyder, and without the payment of rent, until October, 1899. For the rules laid down by this court, see *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Lawrence v. Du Bois*, 16 W. Va. 443; *Davis v. Demming*, 12 W. Va. 281; *Vangilder v. Hoffman*, 22 W. Va. 2; *Hoffman v. Ryan*, 21 W. Va. 415; *Mathe-ney v. Sandford*, 26 W. Va. 386. In all those cases the relations of the parties and the contracts passed upon were so different from the transactions now under consideration that these rules furnish very slight aid in this case. The possession of the defendant without payment of rent was consistent with his contract of purchase, and cannot be regarded as a circumstance in itself strongly tending to show that a loan, and not an absolute sale, was intended to be effected by the parties. This case resembles not so much those to which reference has

been made, as it does a long list of other cases holding that, if an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage, but a conditional sale. *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Kerr v. Hill*, 27 W. Va. 576; *Jones, Mort.* § 265; *Glover v. Payn*, 19 Wend. 519; *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321; *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. Ed. 619; *Rue v. Dole*, 107 Ill. 275; *Stratton v. Sabin*, 9 Ohio, 28, 39 Am. Dec. 418; *Wallace v. Smith*, 155 Pa. 78, 25 Atl. 807, 35 Am. St. Rep. 868; *Stahl v. Dehn*, 72 Mich. 645, 40 N. W. 922; *Digman v. Moore*, 8 Wash. 312, 36 Pac. 146; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941. In each of these cases there was an absolute conveyance, and then a defeasance, either in the deed or a separate paper, providing that the grantee should reconvey within a specified time upon payment by the grantor of so much money, or that within a certain time the grantor might repurchase. But there was not in any of them any clause by which the grantor bound himself to pay the money and take a conveyance of the land. These defeasances were held to amount to nothing more than options given the grantor to repurchase, and the conveyances were held to be conditional sales, and not mortgages. Had the defeasances bound the grantor to pay the money and take the land, the conveyances would probably have been held mortgages, since it appears from the opinions delivered that the absence of any clause so binding the grantor was virtually held to be decisive of the question.

In another long list of cases it is held that one who purchases at a foreclosure or execution sale for the benefit of the debtor, and upon an agreement to convey to him upon the subsequent repayment of the amount paid, takes the property as a mortgagee, even when the debtor has not actually paid any money toward the purchase, if he has abstained from bidding, or induced others so to do, whereby the purchaser obtained the property at a price below its real value. *Jones, Mort.* § 332; *Ryan v. Dox*, 34 N. Y. 307, 80 Am. Dec. 696; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Sahler v. Signer*, 37 Barb. 329; *Guinn v. Locke*, 1 Head, 110; *Helster v. Maderia*, 3 Watts & S. (Pa.) 384; *Roberts v. McMahan*, 4 G. Greene, 34; *Sandfoss v. Jones*, 35 Cal. 481; *Smith v. Doyle*, 46 Ill. 451; *Beatty v. Brummett*, 94 Ind. 76; *Reece v. Roush*, 2 Mont. 586.

The principle announced in these last-named cases seems to be fairly applicable to the transaction now under consideration. The purchase in each of these cases was held to have been made for the benefit of the debtor, and upon an agreement to reconvey to him upon repayment of the purchase money,

interest, and costs. These differ from the cases in the former list in this: that, in the cases in said former list, the purchases were not made at judicial sales, nor upon an agreement to reconvey, nor does it appear that, in addition to the agreement to reconvey in case the option to repurchase should be exercised, there was any declaration of trust made by the grantee. In the cases given in the last list, all these things appear. An examination of the transaction of January 23, 1899, between the plaintiffs and defendant in this cause, reveals the fact that the purchase made by the plaintiffs at the judicial sale was intended for the benefit of the defendant. It appears from the testimony of the plaintiffs, as well as that of the defendant, that prior to the sale it was understood and agreed that the plaintiffs would purchase the land of the defendant for the purpose of reselling it to him at an advance of \$3,000. This arrangement was perfected, as has been shown. Snyder, the debtor, paid all the expenses of the plaintiffs; amounting, as he claims, to \$300. He says further that he procured certain liens to be released in order to reduce the amount of the indebtedness on the land, and on the day of sale kept other people from bidding on the property by representing that the plaintiffs would purchase for his benefit. The plaintiffs do not deny that he paid their expenses, including attorney's fees, nor that he reduced the amount of the indebtedness, nor that he kept persons from bidding on the property, but they say they did not authorize him or direct him to do so. In his letter of January 11, 1899, Rickard said to Snyder that he felt sure that the persons whom he had seen in Snyder's interest would buy the property, and resell it to him, and give him an extension of time for such an advance as would be reasonable; that they would not go security, nor lend money out of the state of Virginia, but were willing to buy the land, and trust to Snyder's health to make the payments; that he would have to pay more for the property (naming \$3,000), but it would still be very cheap, and he would then owe honorable gentlemen, who would treat him differently from what he had been treated, according to his letters; and that he would have to pay, in addition, all expenses of looking up the title, writing papers, etc., and pay the expenses of four gentlemen to visit him. The terms stated in this letter were fully embodied in the final agreement made and executed by the parties. The plaintiffs purchased and entered into a contract of sale with defendant on the same day. It was all one transaction, fully agreed upon and understood prior to its execution. The plaintiffs did not purchase with the expectation of keeping the land, or deriving any advantage from their purchase, except a profit of \$3,000 on the transaction. Except for the \$3,000, it was confessedly for the benefit of Snyder. Prior to January 23, 1899, Snyder was the

legal and equitable owner of the land, subject to indebtedness to various persons amounting to over \$16,000. On that day he became the debtor, by express contract of the plaintiffs, in the sum of over \$19,000, and continued to hold the equitable title to the land, while the plaintiffs held the legal title for their security. He was their debtor, bound by an express contract to pay them the money and take the land. The relation of debtor and creditor existed between him and them. This is one of the strongest indications of a mortgage. In *Davis v. Demming*, 12 W. Va. 246, this court held that: "The distinction between a mortgage and a conditional sale is that where money is not loaned, but is advanced, with an agreement that, if it be repaid at a given time, the vendee will reconvey the land, and the whole transaction shows clearly that no debt really remained after the execution of the deed, such transaction is a conditional sale; but if, no matter in what form the papers might be drawn, the whole transaction shows that after the execution of the deed the debt still remained, such transaction will be held a mortgage." Jones, Mort. § 265, says: "The existence of a debt is the test." In *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321, Chief Justice Marshall said: "It is therefore a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor." On the whole, the transaction of January 23, 1899, in view of the prior understanding and agreement that it should be consummated exactly as it was carried out, and the fact that Snyder paid all expenses, reduced the indebtedness, and induced bidders to refrain from bidding, cannot be regarded as anything other than a single transaction, the sole object of which was to put the plaintiffs in the shoes of Snyder's creditors, with the added advantage of having the legal title in themselves for their security, with an additional \$3,000 for their risk and the use of their money, while Snyder was to have every other benefit arising from it. This clearly stamps it a mortgage. It is wholly immaterial that the parties did not call it a mortgage, but saw fit to term it a purchase by the plaintiffs, and resale by them to the defendant. It matters not what they call it. The law fixes its real character. "Whenever there is in fact an advance of money, to be returned within a specified time, upon the security of an absolute conveyance, the law converts the transaction into a mortgage, whatever may be the understanding of the parties. Even a sheriff's sale will be converted into a mortgage when it is made the means to carry out the agreement of the parties to raise money by way of loan, and the loan is made in consequence of it." Jones, Mort. § 332.

It is needless to say that the reasons given for holding that the release of October 6, 1899, does not bar the right to specific performance, on the theory that the parties

stand in the relation of vendor and vendee, are more clearly sufficient to sustain the like holding that it does not bar the right of the mortgagor to redeem. Viewing the parties as sustaining the relation of mortgagor and mortgagee, equity is somewhat more liberal to the mortgagor than to a vendee seeking specific performance. The latter must tender with his bill the purchase money, when he calls for a conveyance of the legal title. 20 Enc. Pl. & Pr. 458, 459. In the case of a mortgagor, it is not necessary to make an actual tender of the money with the bill. An offer to pay whatever may be found to be due is sufficient. Jones on Mort. § 1095. In the case of a mortgage, it is the practice to direct the land to be sold, the debt and costs paid, and the residue, if any, to be paid to the mortgagor. Bart. Chy. Pr. 992. A vendor has the option to cause the land to be sold, and the proceeds thus disposed of, or to rescind the contract for failure of the vendee to comply with his part of it. Hence, if the vendee desires specific performance, he must aver his readiness and willingness to pay the purchase money, as a bar to the vendor's right to rescind. The omission of this averment in the answer of defendant praying affirmative relief makes it defective as a cross-bill for specific performance, but that is immaterial, since it appears that the relation of the parties is that of mortgagor and mortgagee, on which basis the matters in difference between them must be settled. The discussion of their rights on the assumption that at the time of the execution of the release they sustained the relation of vendor and vendee is simply an elaboration and illustration of the principle upon which relief from a release of an equity may be set aside on the ground of constructive fraud. However, the averment of the answer is hardly sufficient. It may be argued from it that the defendant desires to redeem, and is willing to pay the debt, but this averment is qualified and limited by the prayer for relief in reference to the sale of timber, as provided in the contract of January 23, 1899. As these sales of timber could not be made, except by the consent of the plaintiffs, that clause of the contract is too uncertain to be enforceable. He must unqualifiedly express an offer to pay whatever may be found due on the mortgage debt. However, it is familiar law that when the court can see that, on the evidence, a plaintiff has a good case, relief in which cannot be decreed because of a defect in the bill, an amendment will be permitted, and the cause remanded, with leave to amend. Snyder is in a like situation. On the evidence, he has a good case for relief by a cross-bill, to which his answer corresponds, but it is defective because he fails to offer to do equity. Therefore the decree can be reversed, and the cause remanded, with leave to him to amend his answer in this respect.

As the cause is to be remanded with leave,

as aforesaid, it is proper to say, by way of guidance in further proceedings, that, upon strict and full proof, such as to preclude the existence of any shift or device to evade the statute against usury, the plaintiffs may be allowed any just and reasonable expenses incurred by them in making their loan, and not already paid by the defendant. 27 Am. & Eng. Ency. Law (1st Ed.) 1013; Bridges v. Sheldon (C. O.) 7 Fed. 17, 18 Blatchf. (U. S.) 507; Nourse v. Prine, 7 Johns. Ch. (N. Y.) 69, 11 Am. Dec. 403; Smith v. Wolf, 55 Iowa, 555, 8 N. W. 429; Beadle v. Munson, 30 Conn. 175. This is not improper where the expense of examining the title and similar services is incurred by the lender at the instance and request of the borrower, and on the faith of his promise to pay it. 27 Am. & Eng. Ency. Law (1st Ed.) 1013; Harger v. McCullough, 2 Denio (N. Y.) 119; Thurston v. Cornell, 38 N. Y. 281; Jones v. Berryhill, 25 Iowa, 289. It is proper to remark, also, that as the status of the defendant is substantially that of a mortgagor filing a bill to redeem, without having made a previous tender of the amount due, the costs in the trial court are to be included in the decree against him, but not the costs in this court. 20 Am. & Eng. Ency. Law, 623, citing a large number of cases.

No further suggestions are deemed necessary, it being assumed, now that the relations of the parties have been defined, that, under the advice of competent counsel, the defendant will make such amendments in his answer as will give him such relief as he desires, within the limits of his rights as herein ascertained.

For the reasons stated, the decree will be reversed, the injunction dissolved, except in so far as it prohibits and restrains the defendants, their agents, servants, employes, and tenants, from cutting and manufacturing into lumber any timber on any of the lands in the bill and proceedings mentioned, and from removing or selling any lumber already manufactured at the mill on said lands, and the cause remanded, with leave to both parties to make such amendments to their pleadings as may be consistent with the principles stated and rights adjudicated as herein indicated, and for such further proceedings as the parties may be entitled to have under principles here announced, and the rules and principles governing courts of equity.

BRANNON, J. (dissenting). Sampson Snyder was owner of a number of tracts of land in Randolph county—in all, about 3,600 acres—and became financially embarrassed, and in a chancery suit his lands were decreed to be sold for debts amounting to upwards of \$16,000. They were sold under the decree to Robert Liskey, John W. Liskey, and W. H. Rickard for \$16,660, and the sale was confirmed. On the day of the sale, 23d January, 1899, the two Liskeys, Rickard, and

Snyder entered into a sealed contract by which said Liskeys and Rickard sold to Snyder the same lands for \$19,660, and expenses of the vendors in travel from Harrisonburg, Va., to Beverly; and attorney's fees for examining titles. Snyder paid no money down, but gave his bonds for the purchase money, payable at different dates in future. Said contract provided that, on failure of payment, Snyder should surrender possession of the lands. On 6th October, 1899, an agreement under seal was made between the Liskeys, Rickard, and Snyder, which recited that the Liskeys and Rickard had purchased the lands at the judicial sale, and that Snyder, by said contract of 23d January, 1899, had the privilege to redeem the lands by payment of large sums set out in that contract, and that Snyder had found it impossible to raise the money to meet any of the installments payable under that contract, and that, in consideration of \$1 paid, and the further consideration that the Liskeys and Rickard surrender to Snyder all bonds executed by him for purchase money under the contract of 23d January, 1899, and also surrender a deed of trust upon some personal property and two lots in the village of Harmon, given by both Sampson Snyder and his son John Snyder to further secure payment of the purchase money required by said contract, the said Sampson Snyder released all right and title to said lands, and all claims and demands against said Liskeys and Rickard, or said land, growing out of any transaction whatever, and no party to said agreement should thereafter have any claim or demand against another, growing out of said transaction of 23d January, 1899. On the same date with this release agreement, 6th October, 1899, a written lease of said lands by Liskeys and Rickard to Sampson Snyder was made, by which the Liskeys and Rickard let said lands to Snyder for one year; the consideration stated being that Snyder was to pay \$600 as balance due on rent for the past year, and \$1,200 rent for the year ensuing. Afterwards said parties made another written lease, by which the land was leased to Snyder for another term, ending 1st March, 1901, for \$425. On 20th December, 1899, D. C. Reherd purchased from the Liskeys an interest in the lands. In March, 1901, Robert Liskey, John W. Liskey, William H. Rickard, and D. C. Reherd filed their bill in chancery against Sampson Snyder, stating the above facts, and the further facts that Snyder was yet in possession, refusing to surrender it to the plaintiffs; that he failed to pay the balance of rent; that a large part of the land was in sod, valuable for grazing, another part in fallow, which should be tilled and put in grass, another in a large orchard, bearing yearly 3,000 or 4,000 bushels of apples, and another part in merchantable timber of great value; that Snyder was holding possession in order to secure the ben-

efit of the grass, meadow land, the fruit, and crops from the fallow land, and to cut, remove, and market the timber on the land, and then had a saw mill on the land, and was actively engaged in sawing the merchantable timber and selling it; that, unless restrained, he would use crops, grass, and fruit, and sell the timber, to the irreparable injury of the plaintiffs. The bill alleged Snyder to be insolvent. The bill prayed an injunction against cutting timber and manufacturing it into lumber and removing it, or cultivating and pasturing the land, taking fruit, and for general relief. Snyder filed an answer, setting up that he had applied to the Liskeys and Rickard for a loan to discharge the decree against his lands, and that he made an arrangement with them whereby they were to lend him a sum sufficient to pay the decree—the loan to be secured by a lien on the land—and they were to be present at the sale under the decree, and bring with them an attorney to advise as to the safety of the loan—Snyder to pay traveling expenses and fee of attorney; that, pursuant to this arrangement, the land was knocked down at the sale to Liskeys and Rickard, and the sale was confirmed after the execution of an agreement showing that the purchase was for his benefit, and he was to have the lands on repayment of said purchase money, with interest, and traveling expenses of the purchasers and their attorney from Harrisonburg, and his fee. The answer stated that Snyder had given the Liskeys and Rickard his bonds, not only for \$16,600, the price they purchased the land for under the decree, but also \$3,000 bonds required by them upon the loan, in addition to interest, traveling expenses, and attorney's fee. The answer charged that Liskeys and Rickard had purchased for the benefit of Snyder at the judicial sale, and they were not in fact the purchasers, but merely the agents and trustees of Snyder, and took by the judicial sale no title against Snyder, except as an equitable mortgage for the money paid by the purchasers and interest. The answer stated that, relying upon their promises, he did enter into the contract of 23d January, 1899, by which he repurchased the lands of Liskeys and Rickard, and gave bonds for \$19,660. It denied that Snyder abandoned his purchase under that contract, or admitted his inability to pay the money required by it, but that, on the contrary, the timber alone would pay it. It further charged that the Liskeys and Rickard came to his home, and requested him to give them a statement by which they could more effectually raise money to carry on business, and that they would stand by the sale contract between them, and allow him time to pay, and did not want his property, but that the state of things impaired their credit in certain business enterprises, and therefore they wanted a statement from him showing that they were own-

ers of the lands, and presented and asked him to sign a writing prepared by them, which he did not fully consider and understand, and that, as they informed him that the paper was not intended to have, and would not have, any effect upon his ownership, he signed it—the same paper or release mentioned above, dated 6th October, 1899. The answer stated that the two leases of the land were only given to strengthen the credit of the Liskeys and Rickard, and not to operate as a relinquishment of his right to the land. The answer prayed that, upon payment to the plaintiffs of the sum legally due to them, they be required to convey to him the said lands. Upon the hearing a decree was entered for the plaintiffs, perpetuating the injunction, granting a recovery of the lands by the plaintiffs, and awarding them a writ of possession, and Snyder appeals.

Snyder rests his case upon the theory that the Liskeys and Rickard bought in the land for his benefit at the judicial sale, and that he is thus entitled to have the land, upon principles found in numerous cases. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Walraven v. Lock*, 2 Pat. & H. 547; *Heiskell v. Powell*, 23 W. Va. 717. Though it is the theory of Snyder that the purchase at the judicial sale was in fact for his benefit—his purchase—yet I do not regard even his answer, and more plainly yet his own evidence, as showing that. They show that the contract was that Liskeys and Rickard were to purchase and then sell the land as their own property to Snyder. Snyder could not buy. They were no relation to him—under no call to come hundreds of miles simply to buy in the property for him without profit to themselves. That theory does not bear the face of plausibility. It was a serious thing for them to make this trip, and make themselves personally liable for \$16,660, for nothing. I do not know that this trust-purchase theory is material, in view of the release agreement of 6th October, 1899, and the leases; but if we can say that at the birth of the transaction, in the judicial sale, there was no trust, it goes to dissipate Snyder's claim based on a trust. If it did not exist then, when did it arise? If a trust existed, and were not afterwards released, it would deny the plaintiffs the so-called bonus of \$3,000 in fixing the amount due. But as stated, a fair interpretation of facts stated in the answer and in Snyder's evidence is that there was no arrangement to buy in the land for Snyder's use. That such is the truth is plainly shown, not only by the evidence of Liskey and Rickard, but by a letter from Rickard to Snyder telling him that he had seen some parties in his behalf, and that if his property was worth what Snyder represented, and his debts were not over \$15,000, those parties would buy the property at \$15,000, and then sell it to Snyder on time, but would not lend, and that

he would have to pay \$3,000 more, and traveling expenses, and attorney's fee for investigating title. This shows that the sale was not to be in trust for Snyder, and that he accepted the proposition with eyes open to this fact. Will a court of equity make it another contract—a mere loan—in the face of this? Of course, the letter of the record of sale is against such trust purchase. Then on the very day of the sale a formal contract is signed by Snyder, declaring that the Liskeys and Rickard purchased under that sale, and had sold the land to Snyder. Snyder says as a witness that that contract was agreed to before the sale—that arrangement as to the sale. It was no purchase for Snyder. The parties declined to loan or indorse, or act in any other form than as purchasers, with absolute rights as such; and he knew it, and let them purchase on that faith. He says that, owing to this arrangement, he deterred others from buying, when others would have bought at a higher price. This proves nothing. Would others have sold to him and indulged him? Would the land have sold for more? It had been twice before offered for sale; the best bids being at one sale \$10,000, at another \$13,000, and then an upset bid of \$15,000. This does not show, but negatives, that Snyder could have done better. It negatives inadequacy of price, or any deductions or claims based on that theory, though that cuts no figure in the case. Now, how can Snyder, in the face of all these things—in the face of his written admission in that contract that those parties were the purchasers—deny that fact, and say they were purchasers in trust? If so—if that were the truth—we should expect a paper so stating, and giving him, in so important a matter, involving his all, a right simply to repay, and get his land back. He was about 58 years of age, entirely capable of contracting. True, he was an unfortunate debtor, in hard circumstances, like thousands before and since, and our mere sympathy goes out to him in his distress; but we cannot for that relieve him. True, we may say that \$3,000 profit was large, but any man has right to drive a good bargain. He urged and begged those people, by letter after letter, to come to his relief—did so when the sale was at his very door—and they evinced no eagerness, and he knew their terms, and accepted them. Could he get anybody to do better for him? It does not so appear, and, if he could have done so, it would be immaterial. These purchasers came far, took upon themselves a large debt, bought land far from them, sold it to a man well advanced in years, without a dollar paid down. Liskey and Rickard on oath utterly deny that they purchased for Snyder, and solemn papers under hand and seal support them. I have said this much, not because I do not think that, if such trust purchase really existed, it was released by Snyder afterwards, but to show that there was not

such trust at the beginning of this transaction, and thus no superstructure can be reared upon it.

Time passed, and the date of payment for the first installment of purchase money under that contract came, and found Snyder unable to meet it. If he could not raise one-third, how could he raise the balance? The land was involved, and a very large amount, perhaps all, of the personal property, and two village lots of himself and son also. A large debt was growing, and might not be paid by the property. He made a contract by which, in consideration of a release of the debt and the personal property and lots, he surrendered his purchase under the contract of 23d January, 1899. By that contract Snyder and wife released "all their rights and titles to said above described property, also all claims and demands against said first parties or said property as growing out of any transaction whatsoever and neither party hereto shall have any claim or demand against the other as growing out of the transaction of Jan. 23, 1899." Does not this drown and extinguish any trust in the judicial sale, or in the contract of sale, or any right in the whole transaction? His first contract promised to surrender the land for nonpayment. If not, can people contract at all? Not only that contract, but on the same day Snyder made a lease of the land, and thus became tenant; not only that, but he made a second lease for another term; not only that, but he paid a large amount of rent as tenant. Thus he confirmed that deed of release. No fraud is shown in it. If there were, it is waived by the second lease at later date, and rent. How is it possible for Snyder to deny the effect of those plain things? Do any writings bind? Does any contract? Snyder says that this release was not to affect his prior ownership. This he says in the teeth of that writing, sealed with his seal. It was a release and rescission, and yet no release or rescission. So the maker of a note once said that the understanding was that he was not to be bound, but the court said that he could not prove that understanding against a plain note. *Towner v. Lucas Ex'rs*, 13 Grat. 705. Same principle, *Martin v. Railroad*, 48 W. Va. 542, 37 S. E. 563; *Hukill v. Guffey*, 37 W. Va. 46, 16 S. E. 544; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *Miller v. Fletcher*, 27 Grat. 403, 21 Am. Rep. 356.

It is not pretended that the execution of this release created a silent mortgage, so as to admit oral evidence under that principle. It is simply asserted that it was agreed that it should not release and impair, when itself, in its words, does that very thing. If the dangerous doctrine of allowing oral evidence to destroy writings can go thus far, then away with the vaunted superiority of written over oral evidence of men's acts, and the rule that oral evidence cannot contradict writings. The courts

should narrow, not widen, the door allowing such evidence. This practice has largely repealed the statute of frauds. In these days of general education and facilities of making writings, there is less need of such a practice than long ago.

In this connection we may say that it is an easy matter to assert a trust for land, but the law steps in with no uncertain tread and says that "parol evidence to establish a trust must be clear and unquestionable." *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766. The whole case, as put by Snyder in his answer and evidence, bears the hue of unprobability, and is contradicted by his action and the documents. But it is said that, these parties occupying the relation of trustees and beneficiary, they could not thus deal with each other. The point is void of any probability. Their relation, if it existed, was not a fiduciary relation of the character to apply that rule, as in case of express trusteeship.

This case is uncontrollably governed by documentary evidence of absolute and certain import, and the oral evidence is therefore unimportant; but, if this were not so, a conclusive reason why we should affirm the decree is that the oral evidence is squarely, flatly conflicting, and involves credibility of the witnesses. There is but little law involved, but the case turns on facts, and documents bring in the solvent facts. So far as oral evidence does merit consideration, I will state what is worn and trite—that this court cannot reverse the lower court when the evidence is contradictory, and the credibility of witnesses is involved. *Camden v. Dewing*, 47 W. Va. 315, 34 S. E. 911, 81 Am. St. Rep. 797.

It is assigned for error that the court perpetuated the injunction, and gave the plaintiff's a recovery of the land and a writ of possession. If it is meant that equity has no jurisdiction for injunction at all, the point cannot be sustained. View Snyder as a tenant committing waste; equity has clear jurisdiction for injunction to stop waste. That late excellent work, *American & Eng. Decis. Eq.*, in volume 2, pp. 660, 668, says that the old common-law remedies are now superseded, and that "an injunction will therefore issue to restrain any act of waste by a tenant in possession whenever the threatened acts amount to a manifest injury to the inheritance and are a wanton abuse of the tenant's rights." "The remedy by injunction is so peculiarly adapted to the redress of injuries which constitute waste, that it has supplanted to a large extent the remedies at law." 28 Am. & Eng. Ency. Law, 922; 2 Taylor, Landl. & Ten. § 691. Insolvency is not requisite in case of a tenant committing waste. Viewed not as tenant, which he was, but as a trespasser, injunction lies; Snyder being insolvent, as shown by the whole record, and the damage in cutting and selling large quantities of timber entailing large damage. *Becker v. McGraw*, 48 W. Va. 539, 37 S. E.

532. On the theory disclosed by the answer—that of mortgage—the injunction was proper, and could not be dissolved. *Core v. Bell*, 20 W. Va. 169. But I suppose the assignment does not mean to question jurisdiction in the inception of the case, but only in perpetuating the injunction, and granting recovery of the land and a writ of possession at the end of the case. The case being one of a tenant guilty of waste, it was surely right to perpetuate the injunction without trial at law. *University v. Tucker*, 31 W. Va. 821, 8 S. E. 410. So, if the case were as Snyder contended, one of vendor and vendee, or equitable mortgage, and the mortgagor doing irreparable injury, as the evidence clearly shows that Snyder was cutting and sawing with a mill a large amount of timber. But did the court err in giving a recovery of the land and a writ of possession? Viewing the case as that of the tenant refusing possession after term expired, of course there is no equity merely for the recovery of possession; but as the court had clear jurisdiction for waste, and the bill alleged both waste and unlawful detainer, could not the court go on to give full relief by delivery of possession, under the rule that equity, having jurisdiction for one purpose, will give complete relief on the merits, and end the litigation, and not turn the parties loose for another lawsuit? *Hotchkiss v. Fitzgerald*, 41 W. Va. 357, 23 S. E. 576. But this action of the court does not rest alone on the consideration just stated. The bill set forth the plaintiff's title to the land, and the defendant's tenancy and detainer and waste. The answer of Snyder came in, settling up his claim under the alleged trust, presented his facts to sustain that defense, justified his detainer of possession under that claim, and, as upon a cross-bill, asked the court to adjudicate his right to the land, and to compel the plaintiff to execute the trust by conveyance of the land to Snyder on payment of the debt. Now, why should not equity, having jurisdiction on the bill, as just stated, and jurisdiction upon the cross-bill of the matters therein stated in defense of the bill, give final decision upon the rights of the parties, and, finding that the defendant had no right, give the plaintiffs their property? Note that this is not, like *Freer v. Davis* (decided this term) 43 S. E. 164, 59 L. R. A. 556, a contest between two distinct titles, adverse from their origin, but a question of which of the litigants was entitled to the one only title, and the land under it. It is a case where the question is one of equitable right, equitable mortgage, which can be adjudicated only in equity. The court adjudicated against this equitable title, and why should not the court give recovery and possession to the legal right, instead of sending it to a law court to get recovery? The court, if it decided, had to pass on the respective rights, and ought to have power to effectuate its decision.

(56 W. Va. 453)

GRAFTON & B. R. CO. v. BUCKHANNON & N. R. CO.*

(Supreme Court of Appeals of West Virginia.
Dec. 13, 1904.)

EMINENT DOMAIN—CROSSING ANOTHER RAILROAD—JURISDICTION—INJUNCTION.

1. The circuit courts have jurisdiction at law in proceedings for the condemnation of crossing by one railroad company over the real estate and line of another railroad company.

2. Injunction will not lie to restrain such proceedings.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Suit by the Grafton & Belington Railroad Company against the Buckhannon & Northern Railroad Company. Decree for defendant, and plaintiff appeals. Affirmed.

A. G. Dayton and Fred O. Blue, for appellant. Samuel V. Woods and Reese Blizzard, for appellee.

McWHORTER, J. The Buckhannon & Northern Railroad Company, a corporation under the laws of the state of West Virginia, filed its petition, after due notice given, in the circuit court of Barbour county, for the purpose of condemning a right of way for crossing over the line of the Berry Branch of the Grafton & Belington Railroad Company, on the west side of the Tygart's Valley river, necessary to the petitioner in building and constructing its road for public use from the town of Buckhannon, in Upshur county, through the counties of Barbour, Taylor, and Marion, to Fairmont, in Marion county, and thence to the Pennsylvania state line; praying that commissioners be appointed by the said court to ascertain and report what would be a just compensation to the owners for the real estate and crossing sought to be obtained for the said purposes, and that such other proceedings might be had in said premises as the law might require, and that upon payment of compensation found to be just that petitioner might have the right and privilege to construct, maintain, and operate said railroad across the said Berry Branch of the Grafton & Belington Railroad Company at the point and place designated in said petition, notice and maps therewith filed. On the 27th day of February, 1904, the Grafton & Belington Railroad Company presented its bill in chancery against the Buckhannon & Northern Railroad Company, praying an injunction restraining the defendant from proceeding with its petition and application for a condemnation of said crossing at the point proposed, as set out in said notice, until a decree of a court of equity having jurisdiction had been obtained, decreeing that said crossing is a proper crossing, and the mode and manner of said crossing, and that the court

*Rehearing denied December 31, 1904.

might fix and determine what is the proper crossing, and the mode and manner of said crossing, as provided by law. The court granted the order of injunction as prayed for. The defendant answered the bill, and gave notice of motion to dissolve said injunction. On the 12th day of April the motion was heard in vacation before the judge of the circuit court of Barbour county at Grafton, when the defendant company tendered its answer, demurrer, and affidavits A and B, and moved the courts to dissolve the injunction theretofore awarded in the cause. The motion was sustained and the injunction dissolved. The plaintiff appealed from said order of dissolution of the injunction.

The first question to decide is whether an injunction will lie. It is contended by counsel for plaintiff that under section 11, c. 52, Code 1899, the applicant to condemn was necessarily required to first go into a court of equity and procure a decree for such crossing. But there is another provision in subsection 7 of section 50, c. 54, Code 1899, respecting grade or other crossings, which gives the circuit court law jurisdiction for the condemnation thereof. "It is a well-settled rule that a court of equity will not usually enjoin an action at law on grounds which may be urged as a defense to such action. Even in cases of concurrent jurisdiction, the action will not be interfered with by a court of equity, unless that court can give a more perfect remedy, or the case can be better tried by the procedure of that court." 16 A. & E. L. 365. And 1 High on Injunctions, § 45, in treating of the subject of restraining judicial proceedings, says: "It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed. It is granted on the ground that an unfair use is being made of a legal forum which from circumstances of which equity alone can take cognizance should be restrained, lest an injury be committed wholly remediless at law. And the power of courts of equity to restrain the assertions or doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of another, is regarded as one of the legitimate uses of equity" (and cases there cited). "In cases of concurrent jurisdiction, proceedings at law will not be interfered with by the court of chancery, unless that court can give a more perfect remedy, or the case can be better tried by the procedure of that court." *Ochenbein v. Papeller*, L. R. 8 Ch. 695; *Hoare v. Bremridge*, Id. 22; *McLin v. Marshall*, 1 Heisk. (Tenn.) 678. "If the defenses set up in the bill to the defendant's claim are the same as those made in the suit at law, or are only such as can be made in equity, it is clear that no injunction ought to be granted before judgment at law,

although the bill may contain matter enough to warrant the granting it." *Mutter v. Hamilton*, 2 Hayw. 346. "The injunction should be to stay execution, not trial." *White v. Steinwicks*, 19 Ves. 85. The remedy of plaintiff is by writ of error, or in case the court is proceeding without jurisdiction, and a more speedy remedy is desired, the writ of prohibition could be invoked. A court of equity is without jurisdiction to enjoin the proceeding.

There being no error, the decree dissolving the injunction is affirmed, and the bill will be dismissed.

POFFENBARGER, P. (concurring). I think the injunction was properly dissolved and concur in the affirmance of the order; but I am unwilling to say on this appeal that a condemnation proceeding for a railroad crossing can be sustained in a court of law without a previous determination, by a court of equity, under section 11 of chapter 52 of the Code, or by agreement of the place of crossing and the manner of effecting it. That question is not properly before this court, and I do not think it ought to be drawn in here on the far-fetched theory that it is an additional reason for the conclusion arrived at. The statute, which the syllabus and opinion virtually nullifies, relates to great agencies of commerce and transportation, representing millions of capital, and affecting the prosperity and lives of the people in their operation. Nevertheless it is drawn in here unnecessarily and incidentally, and the intimation given out by this court that it has been repealed by implication. Going further in this indirect method, the court declares that, even if not repealed, it does not require the fixing of the place and manner of crossing before instituting the condemnation proceeding in the law court. May the railroad company, desiring the crossing, select the place and prescribe its own method of crossing, without reckoning the inconvenience and danger to the other company and detriment to the public arising from an improper location? Can the law court refuse the crossing demanded and grant another? Can it do more than find that the purpose for which the property is demanded is a public use, and that the taking is necessary, and authorize the crossing as demanded? Was it not the intention of the Legislature, in passing section 11 of chapter 52 of the Code of 1899, to remedy this defect in the condemnation proceedings for crossings by referring the place and manner of the crossing to the courts of equity, where, by means of depositions, plats, and other documents, the situation might be more carefully and fully laid before the court? This case indirectly and incidentally forecloses all these important questions.

It amply suffices for the disposition of this appeal to say injunction is never used to restrain a court from proceeding on the

ground of lack of jurisdiction, and that in this case there is an adequate remedy at law. "A writ of injunction is in no just sense a prohibition to the courts of common law in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court in which those proceedings are had nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause." 2 Story's Eq. Jur. § 875. Injunction does not lie when there is an adequate remedy at law. Here there is one. After the entry of an order authorizing the applicant to take possession of the land, a writ of error with a supersedeas is immediately available and completely efficacious, if there is any error in the proceeding due to want of jurisdiction or any other cause. For the purpose of an application for the writ of error the court would enter an order suspending the judgment. No injury whatever could result. Hence there is no equity calling for relief against the applicant, and none can be had by injunction against the court.

As the bill can, in no sense, raise the question of the extent of the jurisdiction of the law court, it is utterly incapable of bringing that question before this court on appeal. We can only say it is immaterial whether the law court has jurisdiction. The remedy chosen cannot bring up that question. To test it, you must resort to the writ of prohibition.

(56 W. Va. 602)

JOSEPH SPEIDEL GROCERY CO. v. WARDER et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 20, 1904.)

JUSTICE—JURISDICTION—ACTION AGAINST CORPORATION—TRANSCRIPT OF JUDGMENT—EXECUTION FROM CIRCUIT COURT—CONSTITUTIONAL LAW—STATUTES.

1. A justice has jurisdiction of an action for money against a domestic corporation either in the county of its principal office or in the county where the cause of action arose, if service of process can be made in that county on a director or other officer or agent of the corporation, whether the person served resides therein or not, and the return of service need not show that he resides therein.

2. Section 118, c. 50, Code 1899, allowing a transcript of a judgment of a justice to be filed in the office of a circuit court, and execution to be issued thereon, does not violate the provision of the Constitution requiring the amount for jurisdiction of the circuit court to exceed \$50.

3. Inconsistent clauses in the same section of a statute—which prevails?

(Syllabus by the Court.)

Petition by the Joseph Speidel Grocery Company for writ of prohibition to Hugh Warder and others. Writ denied.

A. W. Burdette, for petitioner. Ira E. Robinson, for respondents.

BRANNON, J. Hugh Warder sued the Joseph Speidel Grocery Company, a West Virginia corporation, before J. O. Jaco, a justice of Taylor county, on a money demand, and on April 2, 1904, the justice rendered a judgment by default against said grocery company for \$32.20 and \$2.25 costs. Warder filed a transcript of his judgment in the clerk's office of the circuit court, and caused an execution to issue to the sheriff of Ohio county, where is the principal office of said corporation, and the said grocery company moved the circuit court to quash the execution, but the motion was overruled. The summons in said action was served on an agent of said corporation in said county of Taylor, the return showing that the president, cashier, treasurer, or other chief officers were absent, and not found in Taylor county, and that the agent resided therein. The said corporation now applies to this court for a writ of prohibition against said justice, said Warder, and the circuit court of Taylor county, to prohibit them from further enforcing said judgment. The theory on which the prohibition is asked is that there was no jurisdiction of said action in Taylor county, because the said corporation kept its principal office in the county of Ohio, where alone it can be sued.

As to suits before justices, chapter 50 of the Code of 1899 is the sole fountain and guide to the exercise of the jurisdiction of their courts. They are courts of limited jurisdiction. They have no jurisdiction save that given by chapter 50. In section 16 we find the answer to the above question as to justices' courts: "The civil jurisdiction of a justice shall not extend to any action, unless the cause of action arose in his county, or the defendant, or one of the defendants, reside therein, or being a non-resident of the state, is found, or has property or effects, within the county." That section prohibits a civil suit in any county not in it designated. It is that section which designates the county for a civil action before justices. This section covers suits against a domestic corporation, because it has a residence in that county in which it keeps its principal office. It can therefore be sued in the county where it has that office in transitory actions. "There is therefore no difficulty in holding that, for the purposes of jurisdiction, procedure, litigation affecting a corporation, and the taxation of its personal property, it may be taken to reside where its chief office is." Its residence is where it exercises corporate functions. 1 Thomp. Corp. § 689. I repeat that section 16 points out the place of suit. Section 34 does not give the place of suit, but is designed only to provide for service

*Rehearing denied December 21, 1904.

of process. The heading in the Code above section 32, "Service of Process and Notices," shows that the design is only to provide for service of process, not to give the place of jurisdiction. Under section 16 suit may be in either the county of the principal office or of the cause of action.

I cannot see how we can disregard the provision in section 16 that a justice of the county of the cause of action shall have jurisdiction. A corporation is surely included within that section. A natural person is, and so is a corporation. That section would give the Taylor county justice jurisdiction, because the cause of action arose therein. Having thus jurisdiction in Taylor county, the next requisite is service of process. That is a different thing from the place of jurisdiction. It is true that a justice's summons cannot go out of his county for service, but the place of service cannot be said to give jurisdiction, though it must be in the same county. Section 34 of the Code of 1899, as amended and re-enacted in chapter 9, p. 79, Acts 1903, tells us as to service of process from a justice's court against corporations. It reads as follows: "Unless otherwise specially provided, such process or order, and any notice against a corporation, may be served upon the president, cashier, treasurer, or chief officer thereof, or, if there be no such officer, or if he be absent, on any officer, director, trustee or agent of the corporation, at its principal office or place of business, or in any county in which a director or other officer, or any agent, of said corporation may reside, or any officer or agent of said corporation in the county in which the property, land or other thing in controversy may be, or in any county where the cause of action arises. But service at any time may be made upon any corporation in the manner prescribed for similar proceedings in the circuit court." It is broad enough to cover a suit either in the county wherein is the principal office or the county in which the cause of action arose, because it declares that the process may be served in any county where the cause of action arose by serving it on certain persons, including an agent of the corporation, as in this case. When that section provides for service not only in the county of the principal office on certain officers, or, in default of them, on certain persons at its principal office, and then adds, in order to widen the scope of service, that it may be served on a director or other officer or agent in "any county where the cause of action arises," it is difficult to see how there can be any doubt of the right to sue in the county where the cause of action arose, as well as in the county of the principal office. We cannot think that the lawmakers would authorize a suit in both counties, as they did in section 16, and then, when making a statute for service of process to effectuate the jurisdiction given by that section 16, would fail to make it coextensive with the demands of

section 16. We must look at both, and make section 34 of the same scope of section 16, as its words allow us to do so, in order to carry out the jurisdiction given by section 16. It is suggested that it is only when the president, cashier, treasurer, chief officer, or any other officer, director, trustee, or agent cannot be found in the county of the principal office, that suit can be brought in the county of the cause of action; but that would put a limitation upon jurisdiction contrary to section 16, which gives the plaintiff choice to sue either where the cause of action arose or the defendant resides. We cannot suppose that the Legislature designed, after giving the choice in either county, to condition that choice upon not finding certain officers in the county of the principal office.

Said section 34 is a remedial statute, designed to facilitate and further the remedy, not to narrow the jurisdiction given by the general grant in section 16. Suppose we give to section 34 the construction asked of us, and say that suit must be brought in Ohio county, if any of the officers named can be found. This would practically deny all jurisdiction in the county where the cause of action arises. Never could suit be brought there. That would compel one in Jefferson county having a contract with a corporation, and a cause of action growing out of it, to go to the other end of the state for relief. The corporation has sent its agent to Jefferson county, and made its contract there, and the Legislature thought that, as the corporation chose to make the contract there, it was nothing but right that it should be suable there. The corporation is not permitted to be sued in any county, but only in two counties. To sue it in the county of its act is not harsh. Section 2, c. 123, Code 1899, allows a corporation to be sued in the circuit court of a county in which the cause of action arises, if you can get service on it. So in a justice's court. The law in both cases points where and on whom service is to be. Why not allow it in one case as well as another? A corporation can be sued in the county where the cause of action arose, if you can get service there. The case of *Harrow v. Ohio River Co.*, 38 W. Va. 711, 18 S. E. 928, supports this view in holding that section 34 authorizes service on an agent in the county where the suit is brought. All that this case requires us to decide on the record as it is, is as to the place for suit; all that we do decide is that there was jurisdiction before a justice of Taylor county under section 16, because the cause of action arose in that county, and that section 34 gives the means of service of the summons in that county. I will add, as it may not be without some benefit in the future, some thoughts or questions which have occurred to my mind touching section 34. Up to 1903, as the Legislature of that year thought, section 34 was defective, or not sufficiently broad. I am inclined to think at present that the first part of section

34, down to the words "or in any county in which," was designed to direct the service of process only in actions in the county of the principal office, and the balance in the county of the cause of action. The fact that a trustee is made a person for service under one clause and left out in the other tends to confirm this view. In other words, you might sue in the county of the principal office, and make service in that county on the president, cashier, treasurer, or other chief officer, or, if there were none such, or he be absent from the county, service might be made on a director, trustee, or agent at the principal office of place of business. Or the action might be brought in the county of the cause of action, provided a director or other officer or agent reside in that county, so that service could be made upon him; but he must reside in that county. No matter that the cause of action arose in that county. That would give jurisdiction; but you must also get a director, officer, or agent residing in that county for service of the summons. This was, in the opinion of the Legislature, too narrow a limitation on the right to sue in the county of the cause of action. It thought that, as the right was given by section 16 to sue where the cause of action arose, process was too much hampered by making it a condition of suit there that a director or other officer or agent must have his permanent residence there, and that the right of suit in that county ought to exist, though the director, officer, or agent was not a resident there; and in 1903 there were added to section 34, after the words "may reside," the words "or any officer or agent of said corporation in which the property, land or other thing in controversy may be, or in any county where the cause of action arises." My inclination is to think that before the act of 1903 an action could be in the county of its cause, if an officer residing in it could be found for service of process. Take detinue for a horse. I cannot think that it would be confined to the county of the principal office before the Acts of 1903. Suppose the horse was not in that county, but in another. The detention would give action in that other county, if you could get service in it on a person specified in section 34 residing in that county. So in case of a money demand. I cannot think the amendment of 1903 has really added anything to the jurisdiction, or given it in a county where there was none before; but it has authorized, in the county of the cause of action, service of process on "any officer or agent," though not residing in that county; it has dispensed with his residence there. I think that before the act of 1903 you could serve on an agent a summons in an action in the county where the cause of action arose, if he reside there; but under the act of 1903 he can be served in that county, though not residing in it. Anyhow, this act of 1903 gives the clear right to serve process in the county where the controversy of

property is or the cause of action arose. The act makes that clear.

It is suggested that the act of 1906 has left section 34 just as it was before. I cannot think the act is without an effect. I am sure it has dispensed with residence in the county. I see no other change. Here we come across a question. It will be asked how this can be when the words, "or in any county in which a director or other officer may reside," are re-enacted in section 34. Are those words to be ignored? They are. Before the act of 1903 they were to be regarded and followed. They demand that the person served reside in the county. If we still regard those old words in the section, what becomes of those words coming last in the section, those latest enacted; that is, the words, "or any officer or agent in the county in which the property, land or other thing in controversy may be, or any county where the controversy arises"? Before 1903 the words demanded that the person served reside in the county, and in 1903 the Legislature amended by authorizing service on the same persons, so only that they be served in the county, leaving out all demand that they reside in it. There is irreconcilable conflict. We must look for the intent. Are we not justified in saying that the Legislature intended to allow service in the county where the cause of action arose, without requiring the person served to reside in that county? Was not that the intent? As the law allowed suit in that county, was it not the intent to make it effectual by making service on an agent there good, wherever he might reside? Would there not be as good reason to expect that the agent would let the corporation know of the suit, though he did not reside in the county, as if he did? I have said that these two clauses are inconsistent. Which shall prevail? The law answers: "Where there is an irreconcilable conflict between different parts of the same act, the last in order of position must control." 26 Am. & Eng. Ency. L. (2d Ed.) 619. "So it has always been the rule that when different provisions of a statute, all passed at the same time, could not be reconciled, the one that came last in point of position must prevail. And this was upon the theory that effect should always be given to the latest, rather than to an earlier, expression of the legislative will, presumption being that the latter part of the statute was last considered." *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860. See *Bacon's Abridgment*, 227; *In re Richards*, 98 Fed. 935, 37 C. C. A. 634. The words "may reside" were in section 34 before 1903. The words allowing service on "any officer or agent of said corporation in any county" were added in 1903, without any provision as to residence. So, not only for the reason that those words are last in the statute, but also because they were last enacted, are they to be controlling. The section is badly

drawn. The draftsman of the act of 1903 may have erroneously thought that the office of that section was to fix the place of action, and that the section gave suit not only in the county of the office, but in any county whatever in which a director, officer, or agent might reside, and intended to let that remain so, and to add for a place of action any county wherein any such person could be served. The consideration as to residence of the party served is not material as to the county in which suit may be brought, that being fixed by section 16. It is only material in ascertaining whether the person served must reside in the county of service, and in ascertaining whether, under section 38, the return must show, if the action be elsewhere than in the county of the principal office, that the person served reside therein. I think the act of 1903 has repealed this. I will not say whether it has repealed the necessity of showing in the return the residence where the action is in the county of the office.

Another reason, suggested for the writ of prohibition is that the Constitution limits the jurisdiction of the circuit court to cases wherein the amount in controversy is over \$50, and that section 118, c. 50, Code 1899, allowing a transcript of a justice's judgment to be lodged in the clerk's office of the circuit court, and execution to be issued from that office, is unconstitutional. The circuit court tries nothing. The case has ended in a final judgment before the justice. The only matter left is execution of the judgment, which is ministerial, not the exercise of judicial function. The Constitution refers to judicial action.

Prohibition denied.

NOTE BY BRANNON, J. The petition raises the question of Chaddock's agency by denying it, whilst the answer asserts it, and Speidel's affidavit denies it. The return of service states that Chaddock was an agent. The return cannot be attacked in a collateral proceeding, if at all, for this cause. *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785. Who is an agent for service? What must be the character of agency? These questions do not arise. As the return states that Chaddock was agent, the question really does not arise.

Prohibition refused.

POFFENBARGER, P. (concurring). Nothing in this case calls upon us to say the amendment to section 34 of chapter 50 of the Code of 1899 dispenses with the necessity of the agent's residence in the county in which service is to be had, for it is undisputed that the person served in this instance does reside in the county of Taylor. I do not think we ought to go beyond the case made. Hence I do not concur in so much of the opinion and syllabus as announces the proposition that section 38 of chapter 50

of the Code of 1899 is repealed by the amendment to section 34 of that chapter. My own views on that question are withheld, because I do not think it is before this court now for decision or discussion.

(56 W. Va. 478)

MOSSER et al. v. MOORE et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 13, 1904.)

**TAXATION—SALE — VALIDITY—VACATING DEED
—REDEMPTION—TENDER.**

1. A list of lands delinquent for taxes and a list of lands sold for taxes, giving no specification or description whatever of a tract or lot of land sold for taxes—utterly blank therein—are void, and render a tax sale of such tract and deed under it void, and such defect is not cured by section 25, c. 31, Code 1899. *Dent, J., dissenting.*

2. When a tax deed is vacated for irregularity in the proceedings of record, where the land is chargeable with taxes, the owner must, as a condition precedent to the vacation of the deed, pay the purchaser what is required to be paid by Code 1899, c. 31, § 25.

3. Statutes for redemption from tax sales are to be liberally construed to attain the end.

4. If a tax purchaser refuse a redemption, not on account of the amount of money tendered, but claiming the validity of his purchase, and refusing a tender generally, the amount of money tendered, though too small, becomes immaterial.

5. A small deficiency in the amount of money tendered for redemption from a tax sale, attributable to mistake, will not vitiate the tender.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County;
John Homer Holt, Judge.

Bill by J. K. Mosser and others against J. H. Moore and others. Decree for defendants, and plaintiffs appeal. Reversed.

Dalley & Bowers and A. Jay Valentine, for appellants. Conley & Smith and Talbott & Hoover, for appellees.

BRANNON, J. Eliza E. McMillen owned three town lots, numbered 189, 190, and 191, in the town of Parsons, Tucker county. The clerk of the county court of that county, O. S. Billings, made a deed, 10th January, 1903, conveying said lots to J. H. Moore and A. A. Dorsey, which deed recites that the sheriff of Tucker county, in January, 1902, sold to Moore and Dorsey the said lots for delinquency for taxes charged against them by the town of Parsons in the name of Eliza E. McMillen for the year 1899. These lots were once owned by Ruth N. Ryder, and she gave a deed of trust on them for debt, and afterward, while said deed of trust still rested on the lots, Ruth N. Ryder conveyed them to said Eliza E. McMillen. Afterwards the lots were sold under said deed of trust, and purchased by Thomas Keck for himself and as trustee for the benefit of J. K. Mosser and others. Then Mosser, Keck, and others, the

*Rehearing denied December 31, 1904.

† 3. See Statutes, vol. 44, Cent. Dig. § 326; Taxation, vol. 45, Cent. Dig. § 1393.

owners of said lots, filed a bill in Tucker county against Moore and Dorsey to set aside the said tax deed, claiming that it was wholly void. They also say in their bill that, after said tax deed had been made, they tendered the tax purchasers the sum which was properly payable to them, and thus offered to make a redemption, but that said Moore and Dorsey refused to allow the redemption, and then said Mosser and others paid to the clerk of the county court \$27.25 as the amount paid by the tax purchasers with 12 per cent. interest. The answer of the defendants admits this offer to redeem, but says that the sum offered was too little, as it did not include the cost of the surveyor's report and the clerk's fee for making the tax deed, which seems to be the fact. The cause was heard upon the bill and answer and exhibits, and a decree was entered holding the tax deed valid, and that whatever defect or irregularities existed in the tax sale were cured by the tax deed. From this decree J. K. Mosser and his associates have appealed.

The plaintiffs contend that the lots were never returned delinquent for the taxes of 1899; that the lots were never advertised for sale as delinquent for said taxes, as required by law and the ordinance of said town of Parsons; that such lots were never sold for said taxes, as recited in the tax deed; and that no proceedings were had or notice given that would have given notice to any owner of said lots, or any one claiming interests therein, of any purpose on the part of the town or any public officer to sell the same for taxes for 1899 or any other year. I suppose that no one will deny that there must be a delinquent list including the particular land sold for taxes. There can no more be a sale without delinquency and a delinquent list than there can be a sale without an assessment, because the statute requires such delinquency and delinquent list. I repeat that there can be no sale without delinquency, and delinquency, to sustain a tax sale, must be proven by that delinquent list. There can be no one thing pointed out as necessary to sustain a tax sale that is more essential than a delinquent list, because it is the only evidence of that without which no sale can be made; that is, nonpayment of the taxes assessed. If land is not on that list, Code 1899, c. 31, § 51, says that it shall be presumed the taxes were paid. In this case there appears a copy of a list of real estate delinquent for taxes in Parsons for 1899, certified by A. C. Scheer, State Auditor, having a first column headed "Names," and a second column headed "Real Estate," and a third column headed "Amt." In the first column are the names of 29 persons, including Eliza E. McMillen; and in the second column, intended for the specification of the real estate delinquent, there is not a mark, but it is entirely blank—in other words, not a tract or lot of real estate is mentioned. In the third column an amount of money stands

annexed to each name; that annexed to the name of Eliza E. McMillen being \$18.14. We suppose that the taxes chargeable to her amounted to that sum; but whether for real estate or personalty we could not say, except that the caption says that the list is for real estate; but for what real estate those taxes are charged and delinquent we are left utterly in the dark. It is just as though there were no delinquent list at all. That list is a nullity—vacancy. It leaves out that most essential element, specification and description of the land delinquent. In reference to the assessment list, Blackwell on Tax Titles, § 223, says: "An assessment that does not identify the land is void. A description sufficient to give notice to the taxpayer that his land is assessed, which the Legislature cannot dispense with, nor work a cure upon any proceedings defective in that regard. * * * The test is this: Is the description sufficient to identify the land and give notice to the owner of the assessment, or is it so defective that it might probably mislead the owner? Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of person or property. But how can the duty of payment of taxes be performed without the identity of the subject-matter of the duty be made known to him who is to perform it by name or description?" 27 Am. & Eng. Ency. L. 683, says: "It is essential to the validity of an assessment of real estate that it contain a description of the property sufficiently accurate and certain to enable the owner readily to identify it as his, and to furnish a basis for the tax lien, and for proceedings in rem against the tract, should such become necessary to the collection of the taxes." See Black on Tax Titles, § 112. Of course, this law would apply to the delinquent list. This delinquent list did not suggest to the owner of these lots any delinquency, and therefore it would mislead; it would give no notice to them that the lots were delinquent. By law this list must be returned to the town council's office, and a copy thereof to the State Auditor. Persons have right, upon examination in those offices, to be informed distinctly by that list that their land is delinquent. This list, merely from the name of Eliza E. McMillen being found on it, suggests some delinquency; but that is not enough. It must tell what delinquency. We have the authority of section 25, c. 31, Code 1899, for saying that, if an irregularity appear on the face of the proceedings in said offices, and be such as to materially prejudice and mislead the owner of the real estate sold as to what real estate was sold, and when and for what year, it will vitiate the sale, unless it appear clearly that, but for the irregularity, it would have been redeemed. A delinquent list is an essential document in the "proceedings" in those offices under that section.

Furthermore, as to the sale, no sale list

appears to prove the sale. If there had been such list, we presume it would have been furnished by the defendants. The bill says there was none, but the answer denies that allegation. Likely, as the deed recites that the lots were delinquent and sold, we have to say that some delinquent list and sale list were made and filed, as Code 1899, § 29, c. 31, makes it *prima facie* evidence of its recitals. Then, what is its character? Not only must there be such a list, because required by law, but it must have requisites of legal certainty, like assessment and delinquent lists. We can only surmise the character of that sale list, if it ever existed, from the advertisement in a newspaper by the sheriff of Tucker county of the sale for taxes under which the tax deed was made. In that section of it relating to the town of Parsons the name of Eliza E. McMillen is given in the column containing the names of persons charged with taxes, but in the column headed "Quantity of Land" there is nothing in connection with her name, nor is there in the column headed "Local Description," but they are both blank as to property and description, and only in the column showing amounts of taxes do we find anything connected with the name of Eliza E. McMillen—the sums \$23.83 for amount necessary to redeem, and \$24.30 for amount of taxes, costs, and fee for receipt. We are justified from this publication in saying that the sale list was totally defective in not specifying the property sold. We are further justified in this position by the sheriff's receipt given to the tax purchaser for \$24.30, which gives the name of Eliza E. McMillen as a person charged with taxes and leaves blank the quantity of land. The receipt contains no further description or specification of the property sold than that it was in "Parsons Corpr.," which we take to mean in the town of Parsons. But what property in no way appears. So we say that those two essential things are entirely wanting—a delinquent list and a sale list. They are so utterly defective as to be no lists. There is vacancy where there must be colorable substance. There is utter voidness and emptiness where there should be body. Substantially there are no lists at all. Surely, we are bound to say that this want of record would mislead the owners, because it would give them no notice of delinquency and sale, and, this being so, the sale is not good by the Code and by cases cited below. Where an essential part of the proceeding is totally wanting, there is vacancy, and the proceeding is void. *Forqueran v. Donnally*, 7 W. Va. 114. We must say that the recital of the deed from the clerk will prove delinquency and sale; since, while these deeds may be *prima facie* evidence, the *prima facie* case is repelled by evidence showing those lists to be void, not voidable or merely defective. Total failure to file delinquent and sale lists does mislead. There is no warning in the

place where warning ought to be found. We go to those lists in those offices to see whether our land has been returned delinquent and sold. *Barton v. Gilchrist*, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *Gerke v. Brewing Co.*, 46 W. Va. 93, 33 S. E. 122; *McCallister v. Cottrille*, 24 W. Va. 173. These lists gave no notice to the owners of the lots. The form of delinquent list given in section 12, c. 30, and of the sale list in section 18, c. 31, Code 1899, show that the lists in this case do not conform to law.

It appears from the Code that irregularity in the proceedings fixed by law leading to a sale for taxes will overthrow a sale, if it be of a kind to mislead those interested in the land, except as to defects cured by the Code. This follows from the language of Code 1899, c. 31, § 25, that the purchaser shall get good title "notwithstanding any irregularity in the proceeding under which the same was sold not herein provided for, unless such irregularity appear on the face of such proceeding of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner." From this two things appear, namely, that such defects as mislead are fatal, and, second, that some defects are cured by the statute. Having above seen that the defects in this case are such as to mislead, we must see whether they are cured by the statute. It is insisted that they are so cured by the clause of section 25 reading: "And no irregularity, error or mistake in the delinquent list or in the return thereof, or in the affidavit thereto, or, in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the matter of laying off any real estate as sold, or in the plat, description or report thereof, made by the surveyor or other person, shall, after the deed is made, invalidate or effect the sale or deed." We hold that this does not cure the defect in the delinquent and sale lists above specified. Those defects are not merely irregularities within the meaning of that curative provision. That provision supposes lists not utterly void, mere nonentities, vanities, but lists which have substance, which contain enough to make them colorable lists under the law, but which have some defect in them. Surely the Code never meant to dispense wholly with a delinquent list or a sale list; and there are none in this case. We must not think that the word "description" in the statute above quoted dispenses with a description of the land in an assessment list or a delinquent or sale list. That refers to the description made by the surveyor in his plat or report, not the description of the land in those lists; since description in those lists is necessary as notice to the landowners. Therefore we hold that this deed is void.

The next question is whether the landowner must pay the taxes and costs prescribed

by that clause of section 25 which says that no tax deed shall be set aside for any mistake or irregularity in the proceedings until the landowner shall pay purchase money paid for the real estate at the sale and subsequent taxes and costs of survey and report. We hold that such payment must be made as a precedent condition to the vacation of the deed. That clause of the statute is important. It is argued that, as the defects pointed out above make the proceeding null, not simply voidable, it logically follows that there is no duty to pay such taxes on the owners. This is a distinct clause in the statute. As the tax purchaser has paid taxes chargeable to the owner, equity calls upon the owner to repay the tax purchaser money which the owner should have paid, and which the tax purchaser had paid for him. I think the statute means just that. This follows from another consideration. We have seen that there be some defects cured by the statute where the sale stands good, and clearly this refunding provision does not apply to those cases. Therefore it must apply to cases not cured by the statute, where the defect causes the failure of the purchaser's title. In addition the bill offers to pay the purchasers the proper amount. It may be thought that this position is inconsistent with our holding on this point in *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; but I distinguish that case from this because in it the land was assessed contrary to the prohibition of law, and sold contrary to another prohibition, whereas in this case it is not so. In this case the owners were chargeable with taxes; in that case *Cassey L. Newsum* was not chargeable with taxes by assessment, as the state had other means of getting omitted taxes from her. *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615.

Defendants resist the vacation of the deed because not enough money was tendered. But a tender was made. There was lacking only a small sum, which should not defeat relief. *Wyatt v. Simpson*, 8 W. Va. 394. Redemption statutes are to be liberally construed. *Danser v. Johnsons*, 25 W. Va. 381. Besides, the defendants refused redemption because too late, and this dispenses with the question of the amount. *Koon v. Snodgrass*, 18 W. Va. 320; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

Therefore we hold that the tax deed is utterly void, and we reverse the decree of the circuit court of Tucker county, and send the case back to that court, with direction to ascertain the proper sum to be paid to Moore and Dorsey by the owners of the three lots, and then to enter a decree vacating the said tax deed on payment to Moore and Dorsey of the proper sum.

NOTE BY BRANNON, J. I add this note though likely not material: What property was sold by the sheriff belonging to Eliza McMillen? Judging by the record of the

sale, he could not have cried the sale of any particular piece of her property. It has been suggested that the sale would apply to any piece of her property in Parsons. This cannot possibly be sound law. Assessment list, delinquent list, and sale list must describe it. In addition to authorities above cited, I add Cooley on Taxation (3d Ed.) 740: "In listing the land it must be described with particularity sufficient to afford the owner means of identification, and not to mislead him. * * * The result of the whole is that, where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of payment cannot be performed, and the assessment is void." The suggestion that the sale might apply to any piece of property of Eliza McMillen is accompanied by the admission that this defect is such as would vitiate the deed, and is not cured by statute, and yet it is said that the sale is not void, but only voidable. How it can be that this defect is such as to mislead, and such as is not cured by section 25, c. 31, Code 1899, and yet be only voidable, not void, I do not see. I repeat that it is void, because of those lists, as to Eliza McMillen, being no lists at all; not colorable lists, even, but so radically defective as to be void as to her. It cannot be thought that those delinquent and sale lists can be aided by oral evidence to prove what property was meant to be returned delinquent and sold, or what property the sheriff actually cried out. The record is the sole test as to this. *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509.

DENT, J. (concurring). I concur in the conclusion in this case, but not in point 1 of the syllabus, nor the reasoning of Judge BRANNON'S opinion in relation thereto. Under chapter 31, Code 1899, there are four classes of cases in which suits can be instituted to set aside tax deeds:

First. Under section 25, when the owner has been misled by some irregularity in the proceedings as to what portion of his real estate was sold, and when for what year or years it was sold, or as to the name of the purchaser thereof, provided he would have redeemed the same had he not been so misled by such irregularity, and provided further that he pay the tax purchaser the amount of his purchase money and the subsequent taxes and costs paid and incurred. This is a mere avoidance of the sale by redemption, and it is not because the deed is void, but because it is voidable by reason of the misleading irregularity existing in the proceedings which prevented the owner from paying the taxes and redeeming the land before the deed was made. *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 93, 33 S. E. 122.

Second. Under sections 26 and 27, when the taxes are not in arrear, but have been once paid. To avoid the deed under this head, suit must be brought within five years

after the deed is made. Both these classes represent privileges reserved by the statute to the owner, and of which no other person can take advantage except by his authority. Hence the deeds by virtue thereof are rendered voidable, but not void. They are good against all others except the owner, his alienees, heirs, or devisees.

Third. Under section 9, when the officer making the sale is guilty of fraud in connection therewith; that is, holds an illegal interest therein. The cases of *Phillips v. Minear*, 40 W. Va. 58, 20 S. E. 924, and *McClain v. Batton*, 50 W. Va. 121, 40 S. E. 509, which properly come under this head, were both decided wrong, because they were improperly confounded with the first class of cases as above set forth. The sales were both set aside because of the fraud of the officer, when such fraud was neither alleged nor proven, but was conclusively presumed from a defective affidavit, contrary to both the rules of law and equity. *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553; *Billingsley v. Minear*, 44 W. Va. 657, 30 S. E. 61; *Trustees v. Blair*, 45 W. Va. 812, 32 S. E. 203; *First National Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Pusey v. Gardner*, 21 W. Va. 469. The cases of *McClain v. Batton* and *Phillips v. Minear* and *Johnson v. Minear*, 40 W. Va. 160, 20 S. E. 926, are in hopeless conflict with *Boggers v. Scott*, 48 W. Va. 316, 37 S. E. 681; *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 98, 33 S. E. 122; *Stat. v. Sponangle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

Fourth. Under ordinary equitable jurisdiction to remove cloud from title because the deed is void for illegality or fraud. Cases under the third class naturally fall under this head, but they are put in a separate class, because section 9 provides that the interest therein of the officer making the sale shall render it void. This fourth class includes all tax deeds which are for any reason void, and not merely voidable, and therefore covers all suits to set aside such deeds except those which come under the first and second classes. The following cases belong to this class: *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Holt v. King*, 54 W. Va. 441, 47 S. E. 362; *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627; *State v. Eddy*, 41 W. Va. 95, 23 S. E. 529; *State v. Tavenner*, 49 W. Va. 696, 39 S. E. 649; *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615; *Campbell v. Wyant*, 26 W. Va. 702; *Wyatt v. Simpson*, 8 W. Va. 394. There are a line of cases in which tax deeds were held to be void under the law as it existed prior to the enactment of the present statute in 1882, and which have been superseded thereby, to wit, *McCallister v. Cottrille*, 24 W. Va. 173; *Simpson v. Edmiston*, 23 W. Va. 675; *Barton v. Gilchrist*, 19 W. Va. 223; *Orr v. Wiley*, 19 W. Va. 150; *Jones v. Dils*, 18 W. Va. 763; *Dequasie v. Harris*, 16 W. Va. 360; *Burlew v. Quarrier*, 16 W. Va. 108.

The reason for such holding is given in *Simpson v. Edmiston*, cited, and is, in short, that a tax purchaser is not in law a bona fide purchaser, but takes only such title as the deed gives him, and, it being void for defects in the tax proceedings is a nullity and passes no title, and creates no privity between the purchaser and the delinquent owner. These cases were so decided under the provisions of section 25, c. 31, Code 1868, and section 25, c. 117, p. 320, Acts 1872-73, which is in these words, to wit: "When the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor according to the provisions of this chapter and caused the same to be admitted to record in the office of the clerk of the county court of the county in which such real estate or the greater part thereof may lie, such estate shall stand vested in the grantee in such deed in and to said real estate as was at the commencement of or at any time during the year or years for which the said taxes were assessed, vested in the party assessed with the taxes for which it was sold, and in any other person or persons having title thereto who have not in his or their own name been charged on the assessor's books of the proper county or district with the taxes on said real estate for the year or years for the taxes of which the same was so sold, and actually paid the same as required by law, notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice the rights of the owner whose real estate is sold. * * *" In the cases aforesaid the court held that such prejudicial error existed, and no estate passed to the tax purchaser, but his deed was a nullity.

The present section 25, c. 31, Code 1899, provides that all the right, title, and interest of the delinquent owner of the land shall be transferred to and vest in the tax purchaser "notwithstanding any irregularity in the proceedings under which the same was sold not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold and when and for what years it was sold, or the name of the purchaser thereof; and, unless it be clearly proven to the court or jury trying the case that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter. * * * And no deed for any real estate sold under the provisions of this chapter shall be vacated or set aside in whole or in part by reason of any mistake or irregularity in the proceedings of record as aforesaid, unless and until the person entitled to have the same so set

aside, shall pay or tender to the purchaser or his heirs, devisees or assignee, or the person holding under him or some one or more of them, the purchase money paid for the said real estate at the time of the sale thereof, and all the taxes since paid thereon for any year or years for which such person so claiming or those under whom he claims have not paid taxes thereon, and the costs of the survey or report made as hereinbefore required, with interest on each sum from the date of the payment thereof to the time of such payment by the person so claiming." Under these provisions, which cover every possible irregularity in a tax proceeding, the deed is not void, but is voidable on compliance by the owner with the stipulated conditions—that is, showing that he would have redeemed the land were it not for the misleading mistake or irregularity; and on payment of the sum necessary for the redemption thereof, and until this is done, the deed is valid to pass the title, and can in no wise or by no person be collaterally attacked for any irregularity, error, or mistake coming within the purview of section 25. The deed cannot be treated as void, but on a proper showing it may be vacated and annulled by the court. The errors or mistakes for which the deeds in the last line of cases mentioned were held void all come within the purview of, and are covered by, section 25. Hence those cases have ceased to be authority as to such questions. *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484. A void deed is a nullity, and may be treated as such in any proceeding in which it may be involved, while a voidable deed is one which may be set aside or vacated by proper showing in a direct attack thereon by the party interested. Under section 25, no irregularity, error, or mistake in the tax proceedings, however gross, is sufficient to render a tax deed void. Independent of such action, any irregularity which vitiates the power to sell will render such deed void. If there is no assessment of taxes, or it is for any reason illegal, if the land has not been returned delinquent, or has not been certified to the officer for sale or has not been sold, then the tax deed would be void, for all these elements are necessary to give the clerk authority to make the deed. But all mistakes, errors, or omissions in carrying on these essential steps are mere irregularities in the proceedings, none of which are sufficient to justify the setting aside or vacating the deed as voidable, unless it "be such as to materially prejudice and mislead the owner of the real estate so sold as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof"; and not then unless the owner would have redeemed the same had it not been for such irregularity, and not then unless the owner pay or tender a sufficient sum to the tax purchaser or his representative to redeem the same. One of

the errors in this case relied on to make the deed void is the failure to describe the real estate sold with sufficient explicitness. The delinquent list shows that it was the real estate of *Eliza E. McMillen*, and the amount of taxes due and unpaid thereon. Hence it was to all intent and purpose a delinquent list, although it failed to contain a description of the real estate sufficient for its identity. *Mrs. McMillen*, however, could tell from it that her real estate had been returned delinquent, and the amount of taxes due thereon. The omission of the description did not affect the legal authority to sell, but was only an irregularity or mistake in the proceedings "not otherwise provided for," which misled the true owner, not *Mrs. McMillen*, as to what portion of his real estate was sold and the name of the purchaser thereof, as it really furnished him no notice of these matters, and thereby prevented him from redeeming the same. Such irregularity rendered the deed not void, but only voidable, on payment of the sum necessary to redeem the same. This is virtually confessed in the opinion, which is confusing and contradictory. If the tax deed is void, the tax purchaser is not entitled to have his purchase money, taxes, and costs returned, for redemption is not required. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Holt v. King*, 54 W. Va. 441, 47 S. E. 362; *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627; *Cunningham v. Brown*, 39 W. Va. 588, 20 S. E. 615; *Simpson v. Edmiston*, 23 W. Va. 675. Yet the opinion holds the tax deed void, and requires the redemption of the land by repayment of the purchase money, taxes, and costs, as though the deed were only voidable on such repayment. The same omission in the return of the officer as to the lands sold is held in both the syllabus and the opinion to render the deed void in the very teeth of that clause of section 25 which provides: "But no sale or deed of any such real estate under the provisions of this chapter shall be set aside or in any manner affected by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty therein required to be done or performed by him after such sale is made, or by the illegal or defective performance or attempt at the performance of any such act or duty after such sale." This is a most just and commendable enactment of the Legislature. There is no good reason founded in equity or justice why, after a sale is made, it should be set aside or affected in any manner by the failure of the state's agents to do or perform any duty required of them, or the illegal or defective performance on their part of any such duty. To allow the state or an individual to take advantage of any such failure on the part of its officers is to allow the grantor to annul its contract by reason of the unauthorized acts of its agents after the contract is fully made, and the purchase money paid, before consummation by deed.

In cases of individual sales no such power would for one moment be tolerated or recognized, and it is unjust to allow such power to exist in cases of public sales authorized by law for the benefit of the state. While the illegal neglect of duty on the part of its officer may not bind the state except by virtue of this provision, it should not bind innocent tax purchasers who have no control over the state's officers, and have no power to prevent the neglectful or illegal discharge of their duties. They are in no sense the agents of the tax purchasers. Their authority is conferred upon them by the state, and exercised for the state's benefit.

I am aware that this provision has been so construed by this court as to make it only effective after deed duly executed and recorded (*Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484; *Hays v. Heatherly*, 36 W. Va. 631, 15 S. E. 223; *Baxter v. Wade*, 39 W. Va. 231, 19 S. E. 404; *Winning v. Eagan*, 19 W. Va. 44; *Boggers v. Scott*, 48 W. Va. 316, 37 S. E. 661), and even extended to embrace certain cases after the deed has been executed and recorded (*Phillips v. Minnear* and *McClain v. Batton*, heretofore cited). Where the matter is to end depends on the future decisions of this court. The reasons given by Judge Lucas for such holding in *Jackson v. Kittle*, 34 W. Va. 216, 12 S. E. 488, are as follows: "If this concluding paragraph is to be given the force of a sweeping indemnity against all defects in the return of the officer making the sale, then the preceding paragraph, which I have quoted, would be entirely useless or repugnant. Such a construction will be avoided, if possible. Conflict and repugnance in statutes should always be avoided by construction, if possible. Indeed, a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word should be superfluous, void, or insignificant. Where a general intention is expressed, and the act also expresses a particular intention incompatible therewith, the particular intention will be regarded as an exception, and will prevail." The preceding paragraph quoted is as follows: "And no irregularity, error or mistake in the delinquent list or the return thereof or in the affidavit thereto or in the recordation of such list or affidavit or as to the manner of laying off any real estate so sold or in the plat, description or report thereof made by the surveyor or other person shall after the deed is made invalidate or affect the sale or deed." The general clause before quoted is as follows: "But no sale or deed of any such real estate under the provisions of this chapter shall be set aside, or in any manner affected, by reason of the failure of any officer mentioned in this chapter to do or perform any act or duty herein required to be done or performed by him after such sale is made, or by illegal or defective performance or attempt at the performance of any such act or duty after

such sale." There is no repugnancy or conflict between these two provisions. And, if they were repugnant or conflicting, the first must give way to the last, both in position and enactment. The supposed repugnant part of the first quotation was enacted in 1873, while the second quotation was not added until 1882. Yet the first is by such construction made to modify and amend the last. This is contrary to the usual rules of construction, for the last should prevail over the first. See the opinion in the case of *Spedel Co. v. Warder* (decided at this term), 49 S. E. 534, where such rule is stated and improperly applied. 26 Am. & En. Enc. Law (2d Ed.) 618, 619. The first is not near as broad, and does not cover the same ground, as the last. The first only operates after the deed is made, while the second, according to its unequivocal language, operates on the sale before deed as well as after the deed, and no part of it is useless. Judge Lucas' construction in confining the second to the sale or deed after the deed is made renders a portion of the first useless as covering a small portion of the general ground covered by the second. Both these clauses are in perfect harmony with each other, except that the language of the latter makes its provisions apply to the sale before deed made, and to so construe them does not make any clause, sentence, or word superfluous, void, or insignificant that are not superfluous, void, and insignificant under the construction by Judge Lucas. Nor is the general intention, if it can be so called, to prevent the omission and neglect of duty or the state's officers after the sale from in any manner affecting or invalidating such sale in any wise, incompatible with the specific intention to prevent the same or other irregularities from invalidating the sale or deed after the deed is made. In truth the general intention of the section is to prevent the invalidity of the deed, while the specific intention of the last clause is to prevent the invalidity of the sale or deed by particular acts or omissions after the sale. Judge Lucas' argument is plainly fallacious, and has not a single rational foundation stone on which to rest. The decision results in the holding that a sale made void by the misconduct of one officer thereafter can be made valid by the illegal and unauthorized act of another officer or himself. *Barton v. Gilchrist*, 19 W. Va. 223; *McCallister v. Cottrille*, 24 W. Va. 173. Judge Lucas says, in effect, the clerk has no power to make the deed, yet, if he does illegally do so, it cures the defect that made the sale void. The Legislature never intended to enact such an absurd paradox. The language of the enactment is simple, and plainly expressive of the legislative intention, and requires no references to other clauses with which it is not in conflict, but to which it is only cumulative, to ascertain its proper construction. If the Legislature had intended to limit its op-

eration until after deed made, it would have so expressed itself, as it had already so limited other clauses which were fresh in its mind. Not only has the Legislature so enacted, but it is right and just. Agents of the state should have no power to defeat lawful sales made by them after they are made, any more than private persons should have such power; otherwise the bona fide tax purchaser would be at the mercy of the state's agents after his purchase, unless he can obtain an illegal deed to cure a void sale.

Notwithstanding the fallacy of this decision, it appears to be the settled law of this state, and I only mentioned it here to emphasize the fallacious construction of the same clause in the present case, and to show to what extremes a fallacy once adhered to finally leads.

(56 W. Va. 446)

**THIRD NAT. BANK OF CUMBERLAND,
MD., v. LABORINGMAN'S MERCANTILE & MFG. CO. et al.***

(Supreme Court of Appeals of West Virginia.
Dec. 13, 1904.)

**CORPORATIONS—AUTHORITY OF PRESIDENT—
RATIFICATION BY DIRECTORS—NOTES
OF CORPORATION.**

1. The president of a corporation has no inherent authority, by virtue of his office, to execute a negotiable note which will bind the corporation.

2. The directors of a corporation may ratify any act done or contract made by its president without authority, which they could have authorized him to do or make.

3. The authority of an officer of a corporation to do a particular act may be inferred from proof of his habitual doing of such acts, with the acquiescence of the directors of the corporation. And where no such acts are proven, if any act or contract of such officer, made without authority, is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully as if the officer had been expressly authorized to do the act or make the contract.

4. M., as president of the defendant corporation, without authority, made the negotiable note of the corporation; had it discounted by the plaintiff bank, and the proceeds thereof credited to the bank account of defendant. The proceeds of the note so deposited were by direction of M. credited on the books of defendant to an account due it from another company, of which M. was manager, and for which indebtedness he was liable to defendant. Defendant then, by its checks drawn on this fund in bank by its manager in favor of various wholesale houses, its creditors, paid out the same; but all of these transactions were, at the times thereof, unknown to the directors of the company, but were afterwards brought to their notice. The defendant failed to return to the bank the money, the benefit of which it had thus received, when its receipt had become known to defendant's directors.

Held, that the failure of the defendant to return to the bank the money so received by it, when its receipt had become known to its directors, was a ratification of the execution and use of the note by Murphy as aforesaid.

5. It is a general principle, which applies without regard to the mode of ratification, that a voidable engagement, made by one assuming to act as agent, cannot be ratified in part, so far as it is beneficial to the principal, and repudiated so far as it is detrimental to him. (Syllabus by the Court.)

Error to Circuit Court, Tucker County; John Homer Holt, Judge.

Action by the Third National Bank of Cumberland, Md., against the Laboringman's Mercantile & Manufacturing Company and others. Judgment for defendant company, and plaintiff brings error. Reversed.

Cunningham & Stallings, for plaintiff in error. C. O. Strieby and C. W. Dailey, for defendants in error.

MILLER, J. The Third National Bank of Cumberland, Md., a corporation organized under the laws of the United States, commenced its action in debt in the circuit court of Tucker county against the Laboringman's Mercantile & Manufacturing Company, a corporation organized under the laws of the state of West Virginia, P. M. Murphy, president, P. M. Murphy, N. B. Twigg, M. M. Phelps, W. E. Patterson, El. S. Muse, J. B. Guinard, F. M. Houser, J. W. Baker, Samuel Buser, B. A. Stuckey, and Geo. W. Everett, for the recovery of \$1,000, debt, with \$2.79, protest charges, and interest, and at the August rules, 1901, filed its declaration therein, in which it is alleged that the defendant company, by P. M. Murphy, its president, made its certain negotiable note in writing, dated the 29th day of March, 1901, and subscribed its name thereto, as follows, to wit, "Laboringman's Mer. & Mfg. Co.," by P. M. Murphy, president, thereby meaning the Laboringman's Mercantile & Manufacturing Company, whereby it promised, three months after date, to pay to the order of P. M. Murphy, president, \$1,000, at the Third National Bank of Cumberland, Md., without defalcation, for value received; that said P. M. Murphy, president, before the maturity of the note, indorsed the same to P. M. Murphy, and in like manner Murphy indorsed it to Twigg; that all of the defendants indorsed the note in the order as above named; that said Geo. W. Everett indorsed it to the plaintiff bank; and that at its maturity the note was protested for nonpayment. At the November term, 1901, of the court, on motion of the plaintiff, the action was abated as to all of the said indorsers of the note, including P. M. Murphy, president, and was ordered to be proceeded in against the defendant the Laboringman's Mercantile & Manufacturing Company. The plaintiff at the January rules, 1902, filed in the clerk's office an amended declaration against the defendant corporation alone, but otherwise substantially in the language of its original declaration. At the March term, 1902, of the court, the defendant company entered its plea of nil debet, and it also filed two several special pleas in writing, both verified by affidavit. One of said special pleas avers that the defendant

*Rehearing denied December 31, 1904.

¶ 1. See Corporations, vol. 12, Cent. Dig. § 1641.

did not make or deliver for discount the note sued on and described in the declaration, and that said note was not discounted by plaintiff for defendant. The other plea avers that the defendant company did not make or deliver for discount the note sued on and described in the declaration, and that said note was not discounted by the plaintiff for the defendant; that P. M. Murphy never had the authority of the defendant to make or deliver the said note for discount to the plaintiff; that N. B. Twigg and the others named therein, whose names appear on the back of the note, never indorsed the same; that the plaintiff never discounted the note for defendant; and that the defendant never became liable to pay the plaintiff the sum of money in the said note specified. Issue was joined on each of the aforesaid pleas, and at the same term a trial of said action was had before a jury. At the conclusion of the evidence the defendant demurred thereto, in which demurrer the plaintiff joined, and the jury found for the plaintiff the sum of \$1,042, if the law, upon the demurrer to the evidence, be for the plaintiff; but, if the law be for the defendant, they found for the defendant. The court sustained defendant's demurrer, and gave judgment against the plaintiff for costs. To this judgment the plaintiff excepted, and obtained from this court a writ of error and supersedeas to the same.

Upon the issues thus made, the burden was upon the plaintiff bank to prove the authority of Murphy to make said note for the company.

It appears from the record that the defendant did a general mercantile business at Davis, Tucker county, W. Va. Said P. M. Murphy was at the date of the note in controversy, and had been for some time prior thereto, president, W. E. Patterson, secretary and a director, and W. W. Golightly, general manager, of the company. Who the other directors were, is not shown. Its stockholders numbered about 100. There is no evidence in the record showing the extent of the authority of the president of the company, except a by-law in these words: "The president shall preside at all meetings of the stockholders and board of directors, call all special meetings, sign minutes of all meetings; all contracts made by the company, and all certificates of stock." Murphy, as it is shown, claiming to act as president, executed the note in controversy, payable to himself as president, and then indorsed as such, and also individually, and presented it, with the other names indorsed thereon, some of which on the trial proved to be forgeries, at the Third National Bank of Cumberland; had the same discounted, by the bank, and the proceeds thereof placed to the credit of the defendant. It is not shown that any of the directors or officers of the company had at that time any knowledge of the making or discounting of the note. Said W. E. Patterson, J. B. Guinard, and Geo. W. Everett, stockholders in said company, whose names appear on the back

of the note, testified that they did not indorse and did not authorize any person to indorse or put their respective names upon said note for them, and that they had not seen the note until the day of the trial. H. E. Weber, president of the bank, testified that the note sued on came into possession of the bank through Murphy, as president of the defendant company; that it was discounted; that the proceeds thereof were placed to the credit of the defendant; that the bank then and prior thereto had an open account with the defendant; that the "note was signed by Murphy, president, brought to us by Murphy, president, and Mr. Murphy is the only person we ever saw or knew, of the company, until we came up here to try this case." He further testified that on May 19, 1898, Murphy came to the bank, represented himself to be the president of the defendant company, asked to open an account with the bank, and at the time deposited some money therein, and said that later he would probably want a loan of \$3,000; that on the 28th day of May, a week later, and almost two years before the note in controversy was made, the bank discounted a \$3,000 note for the company, and placed its proceeds to the credit of defendant. It further appears that the proceeds of the two notes and some deposits, amounting to \$1,400 or \$1,500, placed in the bank by Murphy and Golightly for the company, were checked out and paid to wholesale merchants who were creditors of the defendant, in checks in their favor drawn on said bank; but nothing is shown by the records of the company or otherwise to prove that the directors or other officers of the company, except Murphy and Golightly, had any notice or knowledge of the aforesaid transactions. It is also shown that at the time of the execution and discount of the \$1,000 note there was another company at Davis, called the Davis Poultry Company, of which Murphy was manager; that this last-named company owed the Laboringman's Mercantile & Manufacturing Company about \$1,044, for which said Murphy was liable; that Murphy told Golightly that he (Murphy) had deposited in the plaintiff bank, to the credit of defendant, \$1,000 of his own money, which should be placed on the books of the defendant company to the credit of the Davis Poultry Company; and that the credit of \$1,000 to the poultry company was accordingly made on the books of the defendant company, leaving a balance of \$44.73 due to defendant from the poultry company. It also appears that Murphy told said W. E. Patterson that he had received some money from the estate of his (Murphy's) father; that he had deposited \$1,000 thereof to the credit of defendant company, which was to be applied by defendant to its account against the Davis Poultry Company, and on Murphy's private account as manager of the last-named company. This information was communicated by Patterson to Golightly. It is further shown that one George Thompson

loaned to Murphy for defendant company \$200 on the 15th day of January, 1901, and \$500 on the 2d day of February, 1901; that Thompson took no notes or other written evidence for these loans; that they were repaid to him with the checks of the defendant company, signed by Murphy, as treasurer, and countersigned by Golightly, as manager; that F. A. Cruikshank on the 12th day of February, 1901, loaned to Murphy \$200 for the defendant company, for which Murphy gave the company's note, signed by him as president, which note was afterwards paid to Cruikshank, at his own house, in currency, by Murphy, but not until after the note had been placed in the hands of A. R. Stallings, an attorney, for collection, and after Murphy had been notified of that fact. Murphy then requested Cruikshank to take the note out of the lawyer's hands, and he (Murphy) would pay it. In December, 1900, or January, 1901, A. Thompson loaned \$400 to Murphy, as the president of defendant company, and received its note therefor from Murphy, which has never been paid; the company having repudiated it. In May, 1901, J. W. Baker loaned to Murphy \$300, and received for it the note of the defendant company, executed by Murphy, and payable at its office, which has not been paid. It is shown by the record book of the defendant, introduced in evidence, that the \$3,000 note and loan obtained thereon were authorized by the company, and that the note of the company therefor, in pursuance of such authorization, was executed by Murphy, as president, and by Patterson, as secretary. There is no pretense that any officer of the company except Murphy had any knowledge of any of the other loans. After discounting the \$1,000 note, and before it fell due, Murphy left the country; being largely in debt to the defendant. He was not served with summons in said action, and was not present at the trial thereof. The evidence further shows that the proceeds of the \$1,000 note were credited by the bank on its books to defendant company, and by its checks drawn by W. W. Golightly, its manager, paid out through the bank to the creditors of the company.

The question presented is, did the court err in sustaining the demurrer of defendant to the evidence, and in rendering judgment thereon in favor of the defendant? It is conceded by counsel for the plaintiff in error that Murphy, as president of the Laboring-man's Mercantile & Manufacturing Company, had no inherent authority to execute the note for the company. In *First National Bank v. Kimberlands*, 16 W. Va. 579, Greene, J., says: "The president of a bank or of any other corporation has, except to the very limited extent which we have above indicated, no inherent authority by virtue of his office to enter into contracts or agreements which will bind the corporation." In *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237, 241, it is held: "In the absence of anything

in the act of incorporation bestowing especial power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of a president or other officer, unless it is shown to pertain to his official duty or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it. The authority requisite to charge the company must therefore be derived from the board of directors." Cook on Corporations, vol. 2, p. 1506, note, says: "The president and secretary have no inherent power to execute notes in the name of the corporation." It is not contended by the bank that Murphy had express authority from his company or its directors to execute or discount the note in controversy.

Plaintiff in error contends that, notwithstanding the unauthorized execution and discount of the note by Murphy, the company ratified his acts by holding him out as its agent, and by retaining the proceeds of the note. Morawetz on Priv. Cor. vol. 2, p. 595, says: "The doctrine of ratification must not be confounded with the doctrine of estoppel by acquiescence or laches. Actual ratification of an act involves a voluntary adoption of the act. Full knowledge of the act assented to, and an intention to adopt the act as the act of the corporation, are therefore essential. A corporation can never be charged with an unauthorized act of its agents on the sole ground that the act has been ratified by the shareholders, unless the shareholders had full knowledge of the act." The same rule applies to a ratification by the directors of a corporation of the unauthorized act of an agent or officer. The case of *National Bank v. Kimberlands* (point 8 of syllabus) holds that "the directors of a bank may ratify any act done or contract made by the president without authority which they could have authorized him to do or make." On page 581 of the same case the court says: "Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence defines and establishes, as to the public, those powers." And this principle is equally true when applied to the president. But as the inherent power of the president is so much more limited than that of the cashier, the evidence of this character, from which the right to exercise unusual powers can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank. Not only may the authority of an officer of a corporation, as a bank, to do a particular act, be inferred from proof of his habitual doing such acts with the acquiescence of the directors of the corporation, but, where no such acts are proven, if any act or contract of such of-

ficer made without authority is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully as if the officer had been expressly authorized to do the act or make the contract. This ratification need not be shown by direct evidence that it was expressly approved by the board of directors, but such ratification may be inferred from their accepting the benefits of the act or contract; as, if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation and applied to its use, even without the knowledge of the directors, if it is not returned, when it becomes known to the directors that it has been applied to their use, such conduct would be a ratification of the contract of such president or other officer."

There is nothing in this record showing the existence of such facts as constitute a public holding out by the company that the execution and discount of the \$1,000 note by Murphy was within the scope of his delegated authority, but the record book of the defendant company does show that Murphy was expressly authorized to negotiate the \$3,000 note. It does not appear that the directors had knowledge at the time of any of the other loans obtained from the Thompsons, Cruikshank, and Baker. Murphy's conduct indicates an intention on his part to conceal his acts from the directors of his company. As soon as Cruikshank had placed his claim in the hands of an attorney for collection, Murphy went at once and paid the note, and took it up; fearing, no doubt, that suit might be commenced and summons served on the proper officers of the company if he did not do so, and that this might lead to an investigation of the affairs of the company. The stockholders and directors of the Laboringman's Mercantile & Manufacturing Company were bound to take notice of the entries in its books made in the due course of its business, but no entry relating to the \$1,000 note or its proceeds is shown therein. Golightly says that his company had an account against the Davis Poultry Company and Murphy, its manager, for \$1,044.73; that, on request of Murphy, that account was credited with \$1,000 paid by Murphy as aforesaid. This entry on the books of the company certainly would not be notice of the execution and discount by Murphy of the \$1,000 note. No person except Murphy and Weber, the president of the bank, is shown to have had any knowledge of the note transaction until after the protest of the note. Murphy had not been habitually executing and discounting notes, nor borrowing money in the name of the defendant, with the knowledge or acquiescence of its directors. Neither was the execution or discount of the \$1,000 note expressly ratified by the said directors, with or without full knowledge of all the circum-

stances of the case. But its proceeds were actually placed to the credit of defendant on the books of the bank, and appropriated by the company to its own use, by checking the same out to its creditors in payment of its debts. A corporation, like a natural person, may ratify, affirm, and validate any contract made or act done in its behalf which it was capable of making or doing in the first instance. 10 Cyc. 1069. Where the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified the act. Id. 1073. "A leading principle in the law relating to this subject is that where a contract is made by one assuming to act in behalf of a corporation, and for a purpose authorized by its charter, and the corporation, after knowledge of the facts attending the transaction is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act, and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole, and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous, while retaining so much of it as is beneficial; that it cannot keep the advantage while repudiating the burden; that it cannot disaffirm the contract while keeping the consideration." Id. 1078. In the case of *Bank v. Kimberlands*, supra, in which the facts are somewhat dissimilar to the facts in the case under consideration, the court applied the above-quoted general principle, and held that "the acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and, if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned when its receipt becomes known to the directors." The directors of the defendant company had, or should have had, notice of the execution of the note in controversy, and of its disposition to the bank by Murphy, by reason of the present action brought upon that note. But the company, having then received the benefit of the transaction, repudiated it, and did not, when sued, nor since that time, return to the plaintiff the money thus received and used by it. The failure of the defendant to return the money so received, when its receipt had become known to its directors, was and is a confirmation of the transaction.

It is suggested that, while there may be a recovery in such cases in an action of assumpsit for money had and received, this action in debt may not be maintainable, because it is alleged that defendant, by Murphy, its president, made its certain note—

being the one in suit—but that the only evidence of the alleged contract of defendant is the unauthorized note upon which the action is predicated. "It is a general principle, which applies without regard to the mode of ratification, that a voidable engagement cannot be ratified in part so far as it is beneficial to the corporation, and repudiated so far as it is deleterious." 10 Cyc. 1072. Hence the receipt and use of the proceeds of the note, having been ratified by the company, by reason of its failure to return the money, when its receipt had become known to its directors, the note upon which the money was obtained from the bank was also thereby ratified.

For the reasons stated, we hold that there was and is a ratification by the company of the whole transaction, that this action in debt can be maintained by the plaintiff against the defendant company upon the note in controversy, and that the defendant is liable to the plaintiff thereon. We therefore reverse and set aside the judgment of the court below, and enter such judgment as that court ought to have entered. It is therefore considered that the defendant's demurrer to the plaintiff's evidence be, and the same is, overruled, and that the plaintiff do recover from the defendant company the said sum of \$1,042 found by the jury as aforesaid, with interest thereon from the 13th day of March, 1902, until paid, and its costs by it in the prosecution of said action expended.

Note upon Application for a Rehearing.

Defendant insists that plaintiff had no right of action on the note, if at all, until after its execution by Murphy had been ratified by the failure of defendant to return to plaintiff the money realized thereon, and that the defendant was not required to do this until its directors had full knowledge of the transaction.

It might be inferred from an expression in the above opinion that neither the defendant nor its director had any knowledge of the note sued on, or of the disposition of its proceeds, until after the action was commenced. That feature of the case was not sufficiently discussed in the opinion, and for that reason this note is appended thereto.

The record shows that on the 1st day of July, 1901, the date of the maturity of the said \$1,000 note, it was duly protested for the nonpayment thereof against all of the indorsers thereof; and that written notices of protest were signed by the notary, and mailed on that day to the following named persons, informing them that the note had not been paid, payment thereof having been demanded and refused, and that they would be held responsible for the payment thereof. The said notices were under separate covers, and addressed to Davis, W. Va., to Laboringman's Merchantile & Manufacturing Company, N. B. Twigg, M. M. Phelps, W. E. Patterson, E. S. Muse, J. B. Guinard, F. M. Houser, J. W. Baker, Samuel Buser, B. A. Stuckey, and Geo. W. Everett.

Section 7 of chapter 51 of the Code of 1899 provides that the protest in the case of a negotiable promissory note shall be prima facie evidence of what is stated therein (or at the foot or on the back thereof, if signed by the notary) in relation to presentment, dishonor, and notice thereof. Section 8 of chapter 99 declares that the sending of a notice of pro-

test or dishonor of any bill, note, or other negotiable instrument by or through the mails, properly addressed to the last known post office of any party, shall be deemed equivalent to personal service of the notice on such party.

J. W. Baker, whose residence was Davis, W. Va., W. E. Patterson, Geo. W. Everett, J. B. Guinard, and W. W. Golightly were witnesses on the trial, and said nothing as to the notices of protest. If the notices were not received by them, that fact could have been shown. Therefore, under the statute, without evidence to the contrary, we must hold that the above-named parties, to whom notices were mailed, had notice of the note and of its presentment and dishonor.

(56 W. Va. 403)

CARNEGIE NATURAL GAS CO. v. SOUTH PENN OIL CO. et al.*

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1904.)

CONTRACT—CONSTRUCTION—OIL AND GAS LEASES—ASSIGNMENT OF RIGHTS— ELECTION—ENFORCEMENT.

1. When a contract is made for the accomplishment of one main purpose, as is usually the case, it is necessarily the purpose of both parties, the thing upon which their minds met, and as to which they are in perfect accord, and every provision of the instrument must be read in the light of such purpose. In other words, the whole instrument must be considered in seeking its true meaning.

2. Words and expressions in common use are to be taken in their natural, plain, obvious, and ordinary significations, unless a contrary intention clearly appears from the context of the contract.

3. No word or clause in a contract is to be treated as a redundancy if any meaning reasonable and consistent with other parts can be given to it. 9 Cyc. 583.

4. Carnahan, being the owner of a number of oil and gas leases, covering a large tract of land, assigned all the gas and gas rights to which he was entitled by virtue of them to another party by a written contract, retaining all the oil and oil rights, and at the same time entered into another contract with the assignee, containing this clause: "The parties hereto shall have the right to operate said territory under their respective interests, and should Carnahan in his operations for oil develop a gas well or wells, the Gas Company shall have the right or privilege of having any such well or wells transferred to it upon payment of the actual cost of drilling the same, together with the cost of the rig and casing, and should the Gas Company in its operations for Gas develop and oil well or wells, Carnahan shall have the right or privilege of having any such well or wells transferred to him upon payment of the actual cost of drilling the same, together with the cost of the rig and casing. Each party shall have Thirty (30) days from the completion of any such well or wells in which to exercise its option to so purchase a well from the other and make payment therefor, and during which time they shall have the opportunity of testing and inspecting any such well drilled by the other. Any Gas Well drilled by Carnahan, and any oil well drilled by the Gas Company which shall not be so purchased by the other party within the time above designated, shall together with the product thereof, be and become the absolute property of the party drilling the same. Either shall give immediate notice to the other of the completion of any well in which the other

*Rehearing denied December 31, 1904.

† 1. See Contracts, vol. 11, Cent. Dig. §§ 730, 743.

would have an interest or right to purchase under this paragraph." Held that, upon the development of gas in paying quantities in drilling for oil, and the election of the gas company within the time limited to pay the cost of drilling the well and of the rig and casing, the party drilling it must deliver possession of the well to the gas company, and cannot continue operations therein in an effort to find oil in a lower stratum.

5. Such election on the part of the gas company converts the option into an executory contract, specific performance of which will be enforced in equity.

6. Pending the suit for such enforcement, further operations in violation of the contract will be enjoined, to maintain the status quo, and obedience to the final decree may be compelled by prohibitory or mandatory injunction, or both, according to the exigencies of the case.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by the Carnegie Natural Gas Company against the South Penn Oil Company and others. Decree for defendants, and plaintiff appeals. Reversed.

Hall & Hall and H. M. Russell, for appellant. R. F. & A. B. Fleming, T. P. Jacobs, and U. N. Arnett, Jr., for appellees.

POFFENBARGER, P. This case involves the rights of separate owners of the oil and gas in the same tract of land, as determined, not by principles of law governing the rights of separate owners of adjacent or superjacent strata, but by a contract entered into by them presumably to enable both to develop their territory and take out the substances belonging to them in the most practical, economical, and advantageous manner. J. E. Carnahan, being the owner of 37 oil and gas leases on lands in Wetzel and Doddridge counties, entered into two contracts with the Carnegie Natural Gas Company on the 23d day of October, 1899. By the first, he sold, transferred, and set over to said company, its successors and assigns, in consideration of \$1, the gas and gas rights in said leases, together with all his "estate, right, title, interest and privilege in and to the gas and gas rights" in the land described in the leases. This left in Carnahan the title to the oil in the same land. By the other contract, made on the same day, and no doubt a part of the same transaction, he and the Carnegie Gas Company determined the rules which should govern their respective rights and powers while operating in the territory—the former for oil, and the latter for gas. By the first clause the gas company bound itself to commence a well on a certain tract within 60 days from the date of the agreement, and drill the same with due diligence "through the Gordon Sand, unless oil or gas be found in paying quantities at a lesser depth." Should this well prove to be a good producer of either oil or gas, as determined by certain standards fixed by the contract, a second one on another part of the territory included in the leases, covering nearly 3,000 acres of land, was to be put down in like manner by

the gas company; and, if it should come up to the same standard, a third well was to be drilled; and, upon its measuring up to the requirements in production, a fourth one was to be drilled. These four wells were dealt with specially by the terms of the contract. Whether any terms used in reference to them shall be allowed to fix the meaning of the terms used in the clause relating to the general development of the territory by both owners will be discussed later on. That clause reads as follows:

"The parties hereto shall have the right to operate said territory under their respective interests, and should Carnahan in his operations for oil develop a gas well or wells, the Gas Company shall have the right or privilege of having any such well or wells transferred to it upon payment of the actual cost of drilling the same, together with the cost of the rig and casing, and should the Gas Company in its operations for Gas develop and oil well or wells, Carnahan shall have the right or privilege of having any such well or wells transferred to him upon payment of the actual cost of drilling the same, together with the cost of the rig and casing. Each party shall have Thirty (30) days from the completion of any such well or wells in which to exercise its option to so purchase a well from the other and make payment therefor, and during which time they shall have the opportunity of testing and inspecting any such well drilled by the other. Any Gas Well drilled by Carnahan, and any oil well drilled by the Gas Company which shall not be so purchased by the other party within the time above designated, shall together with the product thereof, be and become the absolute property of the party drilling the same. Either shall give immediate notice to the other of the completion of any well in which the other would have an interest or right to purchase under this paragraph."

Carnahan on the 14th day of February, 1902, conveyed all the interest and estate vested in him by these leases to the South Penn Oil Company. L. G. Robinson and others, having acquired some interest in them, joined in the conveyance. Both companies then proceeded with the work of development under the contract, each turning over to the other productive wells pursuant to the agreement, until the South Penn Company drilled a large gas-producing well, known as "Genine-Robinson No. 19." Upon striking the gas, the workmen withdrew their tools and notified the gas company; but, soon after the agents of that company appeared upon the ground, the gas company was informed by the agents of the South Penn Company that the latter intended to drill the well on down into the oil-bearing stratum, and would not then surrender it. Another large gas-producing well, known as "Die No. 1," was drilled by the South Penn Oil Company, and this it decided to drill deeper, and refused to surrender to the gas

company. Thereupon the Carnegie Company instituted two suits in chancery against the South Penn Company; setting out in its bills in detail the facts hereinbefore substantially given, and praying injunctions. As to the Genine-Robinson well, the prayer is that the South Penn Oil Company, its agents and employes, be restrained and inhibited from in any manner interfering with the plaintiff in its works and effort to pack said well for the purpose of saving the gas, and that the plaintiff may be protected in its peaceable possession thereof. As to the Die well, the prayer is that the defendant be restrained from drilling said well any deeper, and that it be required and compelled either to close and case in the gas, or allow the plaintiff to do so, to the end that the gas may be preserved until the matters in dispute between the parties shall be settled by the court. The bills allege that the Carnegie Company has no immediate use for the gas, in consequence of which it desires to have the wells shut in, for the time being, in order to prevent loss by its escape. The demurrer of the South Penn Company having been overruled, it answered the bill, admitting all, or substantially all, the facts, but claiming the right under the contract to drill the wells into the oil-bearing sands below the "Gordon Stray" sand, in which the gas was found; denying that it was permitting the gas to escape, and alleging that it was possible to operate the wells for both oil and gas, saving both by proper casing and piping, and the use of certain appliances made for that purpose. Depositions were taken and filed by both parties, and upon the hearing the court decided that the South Penn Company had the right to continue its operations, but, in doing so, was bound to prevent the escape of the gas as far as the same could be avoided by the use of the best methods, means, devices, and appliances known to operators in the oil business. Accordingly a bond in the penalty of \$20,000, with condition to take the precautions aforesaid for preventing the escape of gas, was required in each case, and the decrees provided that upon the execution of the bonds the injunctions should stand dissolved, without further order of the court. From this decree the Carnegie Company has appealed.

Nothing is said by counsel for the appellee in support of its demurrer. To avoid repetition and endeavor to make the opinion clearer on that phase of the case than it would be otherwise, as well as to put it in closer relation with the discussion of the propriety of the remedy sought, what is to be said about the demurrer is deferred until after the announcement of the conclusion respecting the main question—the right involved.

Whether the contract, rather than the principles of law, without reference to it, shall measure and determine the rights of the parties to this controversy, depends upon its interpretation. If it was their intention

that the contract should affect, by way of surrender or curtailment, any right to oil or gas which the parties, or either of them, had, it must be given such effect; and, if their intention can be ascertained from the language of the instrument, without reference to any extrinsic facts or circumstances its terms alone can be resorted to for that purpose. The South Penn Company having taken its rights subject to this contract, and thereby adopted it as its own, its name may be inserted in lieu of that of Carnahan in reading the provisions of the contract. So read, it says that if the South Penn Company, in its pursuit of oil, shall "develop" a gas well or wells, the gas company shall have the right or privilege of having any such well or wells transferred to it upon payment of the actual cost of drilling the same, together with the cost of the rig and casing; and if the gas company, in its pursuit of gas, shall "develop" an oil well or wells, the South Penn Company shall have the right to have such well or wells transferred to it upon payment of actual cost of drilling the same, together with the cost of the rig and casing. It further says each party shall give immediate notice to the other of the "completion" of any well, and that each party shall have thirty days from the "completion" of any well in which to exercise its option to purchase. What is meant by the terms "completion" and "develop"? Do they mean the same thing? Counsel for appellant insist that they do, and that as soon as a gas well or an oil well is developed the well is completed, within the meaning of the contract. Counsel for appellee say it is not completed until the company drilling it has sunk a well to such depth as it may desire, notwithstanding gas or oil production may be found before that depth is reached. The order and connection in which the two terms "develop" and "completion" are used indicate that the latter is dependent for its meaning upon the interpretation of the former. The first part of the clause forms the basis of the contract, and that uses the word "develop." What follows is sequential in its nature. The last subdivision of the clause, using the word "completion," provides for notice of the happening of that contingency which gives the nondrilling company its option to take the well. The second subdivision, using the same word, limits the duration of that option. Neither of these two clauses can be said to have been intended to affect what precedes them by way of enlargement or curtailment. They simply relate to the rights of the parties called into existence by the development of a gas well when the oil company is drilling, or of an oil well when the gas company is drilling. Hence, when the meaning of the term "develop" is ascertained, it must control.

In seeking the intent of the parties, the court is not limited to the ascertainment of the meaning of the two words and their re-

lation to each other, without reference to other considerations. The true rule of interpretation is that the whole instrument must be considered. From the terms of the contract, it is perceived that it relates to a large body of territory, supposed at the date of its execution to contain deposits of both oil and gas. To develop this territory, it would be necessary to sink a vast number of wells at great expense, many of which would prove to be worthless, while others would give up fabulous wealth. The great problem confronting the parties before and at the time of entering into the contract was the development of the territory. The location of the deposits must be ascertained. Some parts of the territory would prove to be, according to the experience of oil and gas operators, much more valuable than others. It was important, therefore, that test wells be drilled; and, the more numerous these should be, the sooner the extent, location, and character of the hidden wealth would be known, and the more rapidly it would be reduced to possession. This view of the situation, and the magnitude of the task confronting them at the time of the execution of the contract, is evidenced by the provisions of the first clause, which imposed upon the gas company, as part consideration for the assignment to it made on the same day, the burden of drilling four wells on different locations, provided the first three should produce in paying quantities, respectively, either oil or gas. Carnahan was willing that the exploration made by these four wells should cease upon the discovery and production of either oil or gas, for this clause did not require the gas company to drill through the Gordon sand, if at a lesser depth it should find oil or gas in paying quantities. In the event of finding gas in such quantity at a lesser depth, it had the right to cease drilling, but was not bound to do so. Clearly the object of the requirements of said first clause was exploration with a view to determining the value of the property, and indicating to Carnahan the location in which oil would be most likely to be found. It is not meant here to say that this interpretation of the first clause determines the meaning or shows the intent of the second clause, or defines, for the purposes of the contract, the word "develop." It is referred to merely as a circumstance, apparent upon the face of the contract, indicating in part the purpose for which it was entered into. Fortunes were to be spent in the development of that territory, much of which would be lost in the drilling of dry and unproductive wells. Operating separately and without any contract, the opening of a gas well in drilling for oil would impose upon the operator a great loss—the cost of drilling the well—for he could not take the gas, it being the property of the gas company. The opening of an oil well by the gas company in seeking for its deposit would sub-

ject it to the same loss. These were circumstances which presented themselves to the parties before they entered into the contract, and it was with a view to avoiding the risk of such great losses to themselves and waste of valuable deposits that they made this contract, providing for joint or concurrent operation; securing to each the preservation of what he intended to, and did, buy and retain. But for it, the development of a gas well, in drilling for oil, would give to the gas company great value as a result of the work and expense of Carnahan, if upon his abandonment the gas company could take charge of the well and market its product without paying the expense of drilling it; and the completion of a well by the gas company, non-productive in gas, but rich in oil, would give wealth to Carnahan, at the expense of the gas company, if he could take the product upon abandonment of the well by the gas company. Another clause provides indemnity in case of failure of the nondrilling party to exercise its option to purchase within the stipulated period. By such failure it forfeits the product of the well to the drilling party, by way of reimbursement for the expense of drilling the well. The contract says that in such case the well, "together with the product thereof," shall become the absolute property of the party drilling the same. This reflects the intent to make mutual concessions of rights and interests in aid of the general plan of development. It is an express concession or relinquishment of title under given circumstances. If further concessions are necessarily implied, or rather enforced, by compliance with an express agreement or stipulation of the contract, founded upon an adequate consideration, how can there be escape from it? Shall the court refuse to enforce the agreement because the effect of its performance is to deprive the party of title *pro tanto*? If the contract means what it says, in the clause providing that, "should Carnahan in his operations for oil develop a gas well or wells, the gas company shall have the right or privilege of having any such well or wells transferred to it upon payment," etc., how can that agreement be effectuated without an incidental relinquishment by Carnahan of any right he would have, in the absence of the contract, to go deeper with his exploration for oil? It is an utter impossibility. That right must be so extinguished, or the agreement remain unenforced, and it is the very soul of the entire contract. There is no principle of law under which the court can refuse to enforce a solemn agreement because by its execution a right not expressly agreed to be surrendered will be wrested from the party as a direct and inevitable result of compelling performance of his agreement. The result sought to be so avoided here is, moreover, so direct, immediate, certain, and apparent that the parties must have foreseen, contemplated, and intended it. The impossibility of knowing in advance of the

drilling what any well would produce made it necessary, in entering into this contract, to provide for all contingencies. By the provisions which they decided to put into it, in view of them, they saw that there would result to each party great economy in the prosecution of the work of development, the prevention of immense losses, the better preservation of the property of each party, and the more rapid development of the territory. In view of all this, is it strange and unreasonable that Carnahan should have been willing to release or forego the production of any oil that might possibly be found below the point at which a paying gas production might be reached, or that the gas company should be willing to give up and release its interest in any deposit of gas lying below the point at which oil might be found in paying quantities? What was surrendered appeared to them then to be, as it is now, altogether uncertain. It had a mere possibility of existence. What each got in return was conditional indemnity against the certain loss of vast sums of money to be laid out in the drilling of wells which he knew might not, and many of which he knew would not, yield him any profit. Upon what better consideration could a contract, a surrender of property rights, or an abandonment of a right of exploration, be based? In seeking the intent of the parties and the purposes of the provisions of the contract, we must view it from the position in which the parties stood pending the negotiations and settlement of the terms of the contract they were about to make, so far as that position is disclosed by what the contract contains. As examined from that point of view, the contract discloses a plain intent that each party, upon its finding, in the course of its drilling, the deposit belonging to the other party in paying quantities, should allow such other party to take charge of the well upon paying the cost of drilling it, and the casing and appliances attached to it, within the time limited by the contract. Hence the well is completed, within the meaning of the contract, upon the development of either oil or gas in paying quantities.

Thus called into existence by the contingent exigencies, foreseen by the parties, while endeavoring to agree, by contract of sale, upon a division between them of the two substances in the land, and enter upon and carry on the work of extracting their respective deposits, without increasing the risk or loss always attendant upon the prosecution of such enterprises, this covenant forms an important element of the consideration of the two companion contracts simultaneously entered into. It is the inducement that overcame a seemingly otherwise insurmountable obstacle to the effectuation of the relations to the property and to one another which the parties were endeavoring to bring about. It is an offspring of what they at the time deemed a necessity. Even upon the theory

of counsel for the appellee, something must stand in the place of it to enable the concurrent operation to be prosecuted on the premises without damage, loss, and hardship. Hence the willingness of their client to take upon itself the burden of endeavoring to save and care for, at its own expense, a product that does not belong to it. The necessity calling for the mutual covenant under consideration, or a similar one, leaves no doubt that it was inserted upon mature deliberation, and for the express purpose of determining the rights of the parties under the circumstances presented by this case. Therefore the position that the parties did not intend what the word "develop," in its ordinary acceptance, as applied to oil and gas operations, means, cannot be sustained. It would perhaps be difficult to find a word that would more clearly express the manifest intention of the parties, or indicate with a greater degree of certainty their respective rights upon the happening of the contingencies they contemplated.

This method of interpreting the contract may, to some extent, seem to go beyond its terms, in dealing with them in the light of the subject-matter, the situation of the parties, the purpose of the contract, the attending circumstances and conduct of the parties, but, when the terms of an instrument are uncertain or indefinite, it is proper to do so. 9 Cyc. 587; Devlin on Deeds, § 83; *Magers v. Edwards*, Adm'r, 13 W. Va. 822; *Caperton's Adm'r v. Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257; *Scrags v. Hill*, 37 W. Va. 708, 17 S. E. 185; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692. But is not all that has been said collected from the face of the contract? And is not its true meaning that which results from consideration of it as an entirety?

In this discussion of the contract, everything relied upon by counsel for the appellee seems to have been noticed, except the introductory words of the second clause, saying, "The parties hereto shall have the right to operate said territory under their respective interests." Upon this is predicated the contention that the instrument does not contemplate any relinquishment of rights. The language is clearly introductory to the main provision, upon which everything else hinges, as already shown, and is qualified by what immediately follows; else what follows is practically meaningless and wholly non-effective, according to its terms. The sentence relied upon does not say they shall operate to the extent of their respective interests, but under them, and then the manner and extent of operation are expressly limited and regulated. Upon what principle can any word of this contract be allowed to remain non-effective, there being no irreconcilable contradiction? That every word shall have effect when it is possible is an inviolable canon of the law of interpretation and construction. An extrinsic circumstance re-

lied upon is the alleged possibility of operating the wells for gas and oil at the same time without damage or loss to either party. This is denied, and the evidence respecting it is very conflicting; but, if it were conclusively shown, the contract, on its face, plainly discloses an intent to forego the privilege of that experiment.

This conclusion renders it unnecessary to discuss the case in the light of the principles which would determine the rights of the parties in the absence of a contract, unless it be assumed that their knowledge of these principles in some way bears upon the question of intent to be ascertained from the terms of the contract. Enough has already been said to show that it was very much to their interest to avoid the effect of these principles. By their relation, unrestrained by contract, the very contingency of loss, averted by the provisions of the contract, would have resulted to both parties from an effort to develop. It was not the case of a man operating under a lease which gave him both oil and gas, for, in the event of the production of either, his venture is profitable. Loss ensues only when he fails to find either deposit. But where one man owns the oil and the other the gas in the same land, the risk of each is much greater, as has already been shown, and this necessitates a contract to limit it.

Coming now to the demurrer, it is to be observed that, if there is any question of title, it is one purely of law; turning upon the construction of the contract, and involving nothing proper for determination by a jury. The principles announced in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, do not preclude equity jurisdiction of the whole case, when its extraordinary preventive jurisdiction is called for by acts working irreparable injury, if the circumstances of the case do not give the right of trial by jury on the question of title. Mr. Story says that if the relief is dependent upon a question of fact, first to be tried by a jury, the equitable jurisdiction for relief should be altogether declined, or the bill should be retained only pending a trial at law. Story's Eq. Jur. § 72. In *Freer v. Davis*, 52 W. Va. 1, 8, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895, the opinion says: "And the decisive test seems to be the necessity of a trial by jury of disputed questions of fact necessary to the ascertainment of the legal right involved." The limitation, by the decision in *Freer v. Davis*, of the doctrine announced in *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, does not deny equity jurisdiction in that case. See 52 W. Va. 8, 43 S. E. 166. We have here no hostility of title, nor any question of fact upon which relief is dependent, but only one of law—the construction of the contract. The bill is in the nature of one for specific performance. Oil and gas in situ are real estate. The wells are avenues or conduits

through which the oil and gas are brought to the surface and severed. They constitute the means of reaching appellant's property, and are analogous to ways, appurtenant to the property, and indispensable to its enjoyment. Carnahan bound himself, as hereinbefore shown, to sell them, under certain conditions, to the gas company, as part of the consideration, moving the entire agreement, in case he should drill any. Upon tendering payment, the gas company's option to purchase became an executory contract. An action at law for damages for the breach is as inadequate here as in the case of a contract of sale of real estate. The gas company is entitled to take out through the wells in controversy such of its gas as will flow from them, and there is no certainty that all of it can be obtained in any other way. A new well a few feet distant from one of them might be wholly unproductive. To require property to be involuntarily given up in exchange for money is contrary to the policy of the law. Hence it provides detinue for the recovery of specific personal property, unlawful entry and detainer for the possession of real estate, and ejectment for title. When the property is of such nature that none of the legal remedies will protect it, there is no adequate remedy at law, and ground for equity jurisdiction is shown. Withholding the wells in question here, prevents the appellant from obtaining its property, for, in violation of the contract, the means of procuring it are withheld. The covenant in question lies at the very foundation of the two contracts. To refuse enforcement of it would impair the value of the lease as a whole. No remedy in a court of law is broad enough to cover the extent of the inquiry, nor, to state a more technical ground, to give the appellant its specific property. Neither unlawful entry and detainer nor ejectment lies, for the appellant's right is under an executory contract, which will give him the right to possession by performance only. Appellant has not been put into possession and then ousted. Its right is as yet an equity, not a perfected title in the eye of the law. But two remedies are open to the gas company—an action at law for breach of the covenant, and a suit in equity for specific performance. The latter only can give the means of access to appellant's property, and is therefore the only adequate remedy, viewed from the standpoint of the nature of the right involved, and the only one that can directly maintain the value of the leasehold interest under the contracts. Equity has jurisdiction to enforce specific performance of a lease. *West Va., etc., Co. v. Vinal*, 14 W. Va. 637 (point 5, Syl.); *Oil Co. v. Oil Co.*, 47 W. Va. 84, 102, 34 S. E. 923; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *McCarger v. Rood*, 47 Cal. 138; *Smith v. Church*, 107 N. Y. 610, 14 N. E. 825; *Ryder v. Robinson*, 109 Mass. 67; *Robinson v. Perry*, 21 Ga. 183, 68 Am.

Dec. 455; 22 Am. & Eng. Ency. Law (Old Ed.) 972. "Equity assumes jurisdiction, however, for specific performance of contracts, over all manner of rights and interests connected with real estate—for example, in addition to contracts which relate to fee-simple interests in land, leasehold estates, life estates, easements, expectancies, riparian rights, and, indeed, any interest or estate, legal or equitable, which arises out of real property." 28 Am. & Eng. Ency. Law (2d Ed.) 104.

Thus it appears that the case arises under the ordinary equity jurisdiction, and not upon facts calling only for the exercise of the extraordinary jurisdiction by injunction. In such case the injunction becomes a mere process in the exercise of ordinary equity jurisdiction. It is a means or agency used to preserve the status quo pending the determination of the rights of the parties in equity, and process for executing the final decree, and in the latter instance may be either prohibitory or mandatory, according to the exigencies of the case. 20 Ency. Pl. & Pr. 518; Wharton v. Stoutenburgh, 39 N. J. Eq. 299.

For the foregoing reasons, the two decrees complained of will be reversed, the injunctions perpetuated, and the causes remanded for such further proceedings as may be necessary to give the appellant full relief upon its said bills, according to the principles herein stated, and the rules and principles governing courts of equity.

(56 W. Va. 678)

STATE v. EMBLEM.*

(Supreme Court of Appeals of West Virginia.
April 1, 1904.)

DISORDERLY HOUSE—RENTING PREMISES—EVIDENCE.

1. Upon the trial of an indictment for leasing and letting a house to be used as a house of ill fame, a written instrument, signed and acknowledged by the parties, purporting to be a contract for the sale of the property, relied upon as a defense, may be shown by the state to be a collusive, fraudulent paper, executed for the purpose of evading the statute, and, although on its face a contract of sale, to be only a colorable and sham sale, not precluding the existence of the relation of landlord and tenant between the parties.

2. To avoid the effect of such a paper, the state need not establish by direct evidence a separate verbal or written contract of lease. It may be inferred from facts and circumstances showing the fraudulent intent and purpose of the parties in the execution of the pretended contract of sale.

Dent, J., dissenting.

(Syllabus by the Court.)

Error from Circuit Court, Ohio County.

Elizabeth Emblem was convicted of misdemeanor, and brings error. Affirmed.

Dovener & Coniff, for plaintiff in error.
F. W. Nesbitt, Atty. Gen., for the State.

POFFENBARGER, P. In the criminal court of Ohio county Elizabeth Emblem was

convicted on a charge of unlawfully, willfully, and knowingly leasing and letting a certain house to one Minerva Martin, to be used or kept as a house of ill fame, and subjected to a fine of \$200, and of that judgment she complains.

She rested her defense upon an alleged executory contract of sale of the property to the person using it as aforesaid, and as evidence thereof introduced what purports to be a written contract, whereby she agreed to sell, and the other party to buy, the property, for and in consideration of the sum of \$7,500, on the following terms: \$40 cash, the receipt of which was thereby acknowledged, and the balance in equal payments of \$312.00, payable every quarter, all to be fully paid on or before the 1st day of October, 1906. It further provided for the payment of interest on all deferred payments in advance at the rate of 8%, and that the said Martin should pay all taxes and assessments of every kind that should be levied on the property after the date of the agreement. In addition to the foregoing provisions, the contract contained the following clauses: "It is expressly agreed by and between the parties to this agreement that if any one of said installments, or the interest accrued thereon, shall not be paid within three days after falling due, then all of said installments remaining unpaid shall at once become due and payable, at the election of the said first party." "And the interest paid on such purchase money shall be retained by the party of the first part, for the use and occupation of said property by the said second party prior to said default; and, in case said interest is not paid in full up to the time of said default, then the first party shall have the right, and it is hereby expressly agreed, that the personal property of the said second party now on said premises, or put on said premises during the time of this contract, shall be subject to a sale by the said first party to pay the balance of said interest up to the time of said default, the proceeds of which sale shall be retained by said first party for the use and occupation of said property." "Now, therefore, if the said party of the second part, her heirs, executors, administrators, or assigns, shall well and truly pay the said purchase money, interest, taxes, and assessments named in this agreement as it becomes due, the party of the first part, or her heirs, will well and truly make, execute, and deliver unto the party of the second part, or her legal representatives, a good and sufficient deed of the land aforesaid. But on failure of the party of the second part to pay the purchase money, or any part thereof, or the interest, taxes, and assessments, as above mentioned, then this agreement shall be void, as it regards the party of the first part, at her option."

The evidence fixes the value of the property at \$3,200 or \$3,300, and the rental value at \$22 or \$23 per month. Minerva Martin

*Rehearing denied December 31, 1904.

applied for the house as tenant, but was informed by Mrs. Emblem it was for sale, but not for rent. She then inquired about the terms, and Mrs. Emblem responded by asking how much she could pay down. She said \$15, which she paid, and was let into the property, and has since paid \$12.50 per week. The contract was not signed until about four weeks later, when she was called in for the purpose by Mrs. Emblem. They both signed and acknowledged it before a notary public, and later Mrs. Emblem had it recorded in the county court clerk's office. The weekly payments were called "interest," and no demand had ever been made for payment of any part of the principal. When she made application for the house, Minerva Martin was a stranger to Mrs. Emblem, and no inquiry as to her ability to pay for it was made, nor was the value of the property discussed, nor the price. Nothing was discussed but the interest. Mrs. Emblem asked how that was to be paid, but did not even mention the price of the house. Mrs. Emblem resided in another building, standing close to the house in question.

At the instance of the defendant the following instructions were given: "(2) The court instructs the jury that if they believe, from the evidence, that the contract introduced in evidence between the defendant, Elizabeth Emblem, and Minerva Martin, for the property mentioned in the indictment, was a bona fide contract of sale, and that under said contract the said defendant parted with the ownership and control of said property, then the jury must find the defendants not guilty. (3) The court instructs the jury that if they believe, from the evidence in this case, that the contract of sale introduced in this case operated between the parties thereto as a bona fide sale of the property mentioned in the indictment, then, even if they believe that the defendant knew that the property was to be used as a house of ill fame, the jury must find the defendant not guilty. (4) The court further instructs the jury that the contract introduced in this case is upon its face a contract of sale between Elizabeth Emblem and Minerva Martin for the sale of the property named in the indictment, and that it is a question for the jury whether such contract was bona fide or not."

The court refused to give the following instructions requested by the defendant: "(7) The court instructs the jury that if they believe, from the evidence, that the defendant, Elizabeth Emblem, and Minerva Martin, made and entered into the contract of sale, introduced in evidence, of the property named in the indictment, and further believe that said Minerva Martin occupied said property under said contract of sale, then the jury must find the defendant not guilty. (8) The court instructs the jury that paper writing introduced in evidence is by its terms and in legal effect a contract of sale, and not a

lease, and that if Minerva Martin occupied said property under said contract of sale, then the jury must find the defendants not guilty. (9) The court instructs the jury that, if they believe that the contract of sale introduced as evidence in this cause is such a contract as would bind the defendant, or such as the law would enforce between them, then the contract is bona fide, and they should acquit the defendant."

From an examination of the instructions given and refused, it is apparent that the ruling in *State v. Emblem*, 44 W. Va. 521, 29 S. E. 1031, does not govern this case. Here the jury have been instructed that the paper writing introduced is on its face a contract of sale. See instruction No. 5. This instruction and others given submitted to the jury the question whether it was a bona fide contract of sale. Instructions Nos. 7 and 8, refused, were so framed as to exclude this inquiry. Taken as a whole, these instructions are not open to the objection pointed out in *State v. Emblem*, 44 W. Va. 521, 29 S. E. 1031. On the contrary, they submit the very question which the court in that case said was proper to be submitted to the jury, namely, whether the contract was a sham and a device. The jury were told, by instructions Nos. 2 and 3, that if they believed, from the evidence, that the contract had been entered into in good faith as a contract of sale, they should find for the defendant, even if they believed she knew the property was to be used as a house of ill fame. If the contract was never intended to be enforced, nor to effect a change of ownership or control of the property, but only to be used as a protection from prosecution for violation of the statute, it was not a bona fide contract; and, if the evidence was such that the jury could find that it had been executed for that purpose, and no other, the court properly gave these instructions, and refused instructions Nos. 7 and 8. Said last-mentioned instructions are inconsistent with the others. They say mere occupancy of the property under the contract, without regard to the intent of the parties or the function the contract was to perform, entitled the defendant to an acquittal. If given, they would have amounted to a direction to find for the defendant, and this would have been irreconcilable with the submission by the other instructions of an inquiry as to a fact upon the result of which the finding was said to be dependent. Instruction No. 9 seems to have been framed for the purpose of obtaining from the court, for the guidance of the jury, a definition of the term "bona fide contract," used in some of the other instructions; and, if it had properly defined the term, it should have been given. But it did not do so. On the contrary, its effect would have been to confuse and mislead, instead of to enlighten. Whether a contract is binding and enforceable by law is a much broader and more

difficult question to answer than whether the parties entered into it with honest and lawful intentions. Moreover, it is a question of law, and not of fact, and one for the court, and not for the jury. The manifest purpose in asking this instruction was to nullify other instructions given, by obtaining from the court a construction of them that would preclude any inquiry on the part of the jury as to the intent of the parties to the contract and the purpose for which it was executed.

It remains now to say whether the evidence is such as warranted the giving of the instructions and is sufficient to sustain the verdict. If not, instructions Nos. 7 and 8 should have been given, and the others refused, and the verdict set aside. The ostensible purchaser was a strange woman, who came with the pittance of \$15 in her possession to rent a property worth about \$3,300. Without any previous inquiry as to her ability to pay for it, or any discussion of price or terms, except the payment of \$50 per month, to be known as "interest," the property was sold on the spot to this strange, penniless woman at the price of \$7,500, and she was let into possession of it. In addition to the \$50 per month interest, she was to pay \$312.09 of the principal every quarter, besides taxes and all other assessments, making more than \$154 per month to be paid under the contract. Where did Mrs. Emblem suppose the money was to come from? Did she expect it to be earned in washing, sewing, teaching, clerking, or any other honest vocation, such as could possibly have been followed by the woman who applied to her for the property? On the payment of \$15, the woman was let into the house four weeks before the contract was signed. Is it customary or consistent with business principles to put a purchaser under an executory contract of sale in possession of real property without payment of any of the purchase money and prior to the execution of the written contract? It sometimes occurs between parties having confidence in each other; but are rank strangers so let into property as purchasers? The woman used the house from October, 1900, until she was indicted in July, 1901, and was still occupying it at the time of the trial in November, 1901, and no part of the purchase money was ever paid or demanded; but the interest was paid every week. This circumstance, standing alone, would signify little, if anything; but, considered in connection with what transpired at the inception of the arrangement between these parties, it has force and weight. Nothing was of sufficient importance then to merit discussion but the "interest." Subsequently nothing was collected or demanded but the "interest." This imports that the contract was never intended to have any effect or to be enforced. Did Mrs. Emblem know the purpose for which the house was to be used? The rent stipulated

for under the designation of interest was double the rental value of the property for ordinary purposes. She took a contract which she knew was impossible of performance, except as to the weekly payments of "interest," and which no responsible party would have executed. She declined a rental contract which would have been consistent with the ability of the applicant. All these unusual, extraordinary, and apparently unreasonable acts, taken in connection with the close proximity of her residence to the property, and the fact that it was used for the illegal purpose aforesaid for about four weeks before the contract was signed, were amply sufficient to warrant the finding that she knew, at the time she executed the paper, what use was to be made of it. This unusual and extraordinary conduct does not emanate from imbecility, and can hardly be regarded as merely fortuitous. Presumably there is method and a purpose in it, something different from, and beyond, an ordinary sale of real estate. These circumstances plainly indicate that it was not in fact intended to be a contract of sale; and, as they support the hypothesis of an arrangement to give legal color to an illegal transaction, it was competent to direct an inquiry by the jury as to whether that was the actual arrangement.

It is insisted that, in order to sustain a conviction, there must be evidence of a secret verbal or written agreement for a lease of the property, contrary to, and inconsistent with, the alleged contract of sale—something in the nature of a defeasance, by which control of the property is retained by the alleged vendor. This is wholly unnecessary; for the jury have found that the written instrument never was intended to have any force or effect as between the parties, but is a mere collusive arrangement between them, and against the public, to prevent the enforcement of the statute. They have found from the circumstances, the only kind of evidence obtainable in such cases, that it was understood and agreed between these parties that, notwithstanding the contract, the ostensible vendee was never to pay, nor the vendor to collect, anything but the \$50 per month, and that, although that was called interest on purchase money, it was in fact nothing but rent. The power to ascertain the intent of parties, and deal with them accordingly, where an attempt is made to evade the criminal law, is well settled. Even the records of courts may be overturned on the ground of fraud, and the criminal, attempting to hide himself thereunder, brought forth and punished. "A judgment of acquittal upon a verdict procured by fraud will not bar a second trial for the same offense. Even if a third person fraudulently manages to be put upon the jury to acquit a prisoner, the latter will not be deemed in jeopardy from the panel so constituted, though himself innocent of the fraud, and the judge

may direct the juror's withdrawal." Bishop, Cr. Law, § 119. "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar a real prosecution in the future; if the proceeding is really managed by himself, either directly or through the agency of another—he is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge, indeed, is imposed upon, yet in point of law adjudicates nothing. All was a mere puppet show, and every wire moved by the offender himself. The judgment, therefore, is a nullity, and is no bar to a real prosecution." Bish. Cr. Law, § 1010.

A familiar maxim of the law is that fraud vitiates everything. It blinds neither the state, the courts, nor individuals, whatever the form of its covering may be. The intent to cover and hide the offense here charged by this alleged contract of sale, and to set up a sham, shift, and device under which the forbidden acts may be done with impunity, is so apparent that to permit it to stand, by denying the right of the courts to go under it and dig up the intent of the parties with which to condemn it as a glaring and brazen fraud upon the public and an attempted obstruction to the administration of the criminal law, would be a travesty upon justice and a capitulation on the part of the courts and the Legislature to the powers of darkness, as well as a violation of legal principles. Whether Mrs. Emblem is liable is not determined by her declaration of non-liability in respect to the transaction, nor does her notice thereof to the public by the recordation of the contract avail anything. Whether she is guilty is a question of law, dependent upon the facts found from all the evidence; and a self-serving act or declaration, forming a part of it, if competent, has only such weight as the jury may deem it entitled to under all the circumstances. The recordation of the contract is a self-serving act, condemnatory in its effect, if it has any weight. She could have no purpose in it, other than that of attempting to give her fraudulent evasion of the law an appearance of fairness. It was not notice of any lien or title in her for the protection of which recordation of the paper was necessary.

The admission and subsequent exclusion of certain improper evidence is assigned as error for which there should be a reversal. Upon this question the authorities are divided. *Thomp. Trials*, §§ 351, 723. In *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348, and the decisions of a number of the states, it is held not to be reversible error, if error at all. Of course, inadmissible evidence, or rather that which is not evidence, but relates to the parties or the subject-matter of the controversy, should not be stated in the hearing of the jury; but errors will occur in all courts, and they are allowed to correct their

own errors in proper time, and, when they have done so, the injury ought to be deemed to have been cured and repaired. To say it is not accomplished by the instruction of the judge to the jury not to consider the condemned and excluded evidence, and his rejection of it, because it is not evidence, is to impute to the jury a stupidity and lack of intelligence and mental powers incompatible with the solid qualities which the law accredits to jurors.

Mrs. Emblem was convicted on another indictment for leasing or letting another house to Gene Edwards for the same unlawful purpose. Upon the trial of it, the evidence and rulings of the court were in all substantial respects the same as in this case, and the foregoing rulings and observations render it unnecessary to write a separate opinion in it.

As the two judgments complained of are free from error, they will be affirmed.

DENT, J. (dissenting). William and Elizabeth Emblem entered into conditional contracts of sale of their separate properties to separate grantees, and placed them in possession, and the contracts, which were in writing, on record. Some time afterwards they were indicted, charged with renting or leasing their properties and permitting them to be used for the purpose of maintaining houses of ill fame. They were found guilty and obtained writs of error to this court.

The evidence shows that at the time of the contracts they surrendered all ownership and control of the properties to their grantees, and there is no evidence tending to show that they claimed or were exercising ownership or control over the properties at the time the indictments were found. A similar case, founded on a similar contract against the same parties, was heretofore determined by this court. *State v. Emblem*, 44 W. Va. 521, 29 S. E. 1081. The sole question submitted to and determined by the jury was whether the conditional contracts of sale were mere shifts or devices to cover up the leasing of the property for the unlawful purpose aforesaid, and not a parting with the ownership and control of the property. The jury answered in the affirmative, and this court is now called upon to say whether the evidence was sufficient to justify such finding. There was no evidence at all showing that the defendants exercised any acts of control or ownership over the property, and the jury was left to infer, from the nature of the contracts and the uses to which the property was being put, with the knowledge of the defendants, that the contracts, though on their faces conditional contracts of sale, were mere shifts and devices to cover up a leasing or renting of the property with knowledge of the purposes to which it was being put. This finding, in my opinion, is not justified by the evidence, for the reason that the defendants had the right

to sell their properties and surrender control and ownership thereof, to avoid liability under the statute before such liability arose or attached. And it matters not that this was their object in so doing, so they surrendered complete control and ownership, they could thus relieve themselves from future liability. The owner and controllers of the property could be held liable, but not those who had disposed of their ownership and control, though it be only conditionally done. The statute is only intended to cover the leasing of the property by the owner and controller thereof, and not sales thereof, either conditional or absolute. Such statutes are strictly construed, and strictly confined to those who are plainly included in the language thereof. 1 Bish. Crim. Law, § 693; *Mitchell v. State*, 34 Tex. Cr. R. 311, 30 S. W. 810; *Lamar v. State*, 30 Tex. App. 693, 18 S. W. 788.

It may undoubtedly be inferred from the evidence that the defendants entered into the contracts to avoid liability under the statute. This they had the same right to do as any person has the right to avoid being guilty of a crime or being responsible therefor. If, however, it had been shown that the contracts were entered into, not for the purpose of avoiding guilt, under the statute, but for the purpose of doing the thing forbidden by the statute, under the guise of a sale, and that the defendants still continued to exercise ownership and control over the property, they could have been justly convicted. There is no evidence justifying such conclusion, at least beyond a reasonable doubt; but the state's case is wholly lacking in this respect. The question is whether the defendants, acting in good faith, had the right to shift all future liability, before the same attached, as owners and controllers of their property, to the shoulders of their grantees, who were willing to assume such liability as owners and controllers of the property for the time being. They had probably been advised that they could do so. The statute does not so forbid. They executed the contracts in good faith, and had them recorded where they gave notice

to the public; thus shifting all ownership and control of the property and right to possession thereof to their grantees, who assumed the same for a full consideration therefor. Their object in doing so was, not to evade the law, but to comply with it—to surrender their ownership and control and avoid the liability. This was not to prevent or hinder the enforcement of the criminal law, but to prevent themselves from being classed as criminals by reason of their ownership and control of the property. This in no wise prevented the state from prosecution of those who were in actual occupancy, ownership, and control of the property, or from closing and abating the property as a nuisance.

The plain intent of the Legislature was to render the property, through those who owned and controlled it, liable for the offense, and was not intended to effect those who were remotely interested, but who were not owners and controllers thereof. The statute, being derogatory to the common law, and an evasion of the rights of individuals not personally guilty of crime, should be confined to those mentioned in it by a strict construction thereof, and not extended to cover those who were endeavoring in good faith to avoid being guilty of offending against its express meaning. To extend its purpose and meaning by play upon the words "shift, device, and evasion," to include those not within its terms, is to legislate and not construe. Courts should confine themselves to construction, and should not usurp legislative powers, unless the demand for so doing is imperative. In this case no such imperative demand exists, as the state is all-powerful to close all such houses without resorting to the doubtful expedient of punishing an old man and woman, who are guilty of no criminal intent to evade its law, while hundreds who are actually guilty of participating in the offense, and patronize and uphold its evil, are permitted the freedom of the city. I may be wrong, owing to my limited information on the subject; but to such injustice I cannot assent, although I have no sympathy with wrong of any kind.

(137 N. C. 349)

WHISENHANT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 20, 1904.)

MASTER — INJURY TO SERVANT — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE OF INJURY — JURY QUESTIONS.

1. Where a freight train on which plaintiff and other laborers of a railroad were riding home was given a sudden increase of speed and a violent jerk by the engineer putting on steam in response to a signal from the conductor when the slowing train was naturally expected to be about to come to a full stop to let the laborers off, there was negligence on the part of the railroad.

2. In an action against a railroad for injuries to a servant, evidence examined, and whether plaintiff was guilty of contributory negligence held a question for the jury as against a motion for nonsuit.

3. Whether the negligence of the defendant or the contributory negligence of the plaintiff, if any, was the proximate cause of the injury, was, under the evidence, also a question for the jury as against a motion for nonsuit.

Montgomery, J., dissenting.

Appeal from Superior Court, Burke County; Neal, Judge.

Action by Joseph Whisenhant against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Avery & Avery and Avery & Erwin, for appellant. S. J. Ervin, for appellee.

CLARK, C. J. The plaintiff, with other laborers working on the defendant's road west of Morganton, was daily hauled to his work, and returned home, on the work or gravel train. This train stopped at Morganton daily in the evening, in order that the plaintiff and other laborers living at that place might get off. There was evidence tending to show the following to be the facts on this occasion: The train was returning from work, and was running backward, the caboose in front; then four flat cars, on which the laborers sat on the floor, there being no seats nor railing; then the tender and engine. The caboose was locked so the laborers could not enter it. The train slowed up for Morganton, whereupon the plaintiff got up and went to the platform of the rear end of the caboose, it not being safe to stand up on the flatcar, and stood on the top step to be ready to get off when the train stopped. There were no steps to the flat car by which he could get off. The engineer, instead of stopping as usual at that point in response to a signal from the conductor, suddenly put on steam, which caused a sudden and violent jerk, which threw the plaintiff on the track, broke his skull, and otherwise injured him.

This sudden increase of speed and violent jerk, when the slowing train was naturally expected to be about to come to a full stop to let the laborers living in Morganton get off, was negligence on the part of the defendant. The plaintiff could not safely have stood up on the flat car, and in stepping upon the rear platform of the caboose car, to be

ready to get off more readily and promptly, the plaintiff was not guilty of contributory negligence, unless it was shown that this was a more unsafe place. Whether it was more unsafe was a question for the jury. This is not the case of one sitting in a passenger coach getting up and going out to stand upon the platform. Here the plaintiff could not get into the caboose. He could not stand up on the flat car. Whether, in going upon the platform of the caboose, he took a greater risk and thus incurred contributory negligence, and whether, if he did, the subsequent negligence of the defendant in unexpectedly increasing speed (instead of stopping as usual), and the sudden and violent jerk which threw the plaintiff off the train, injuring him, were not the proximate cause of the injury, were eminently questions of fact which only a jury could determine. It was therefore error to nonsuit the plaintiff, for by so doing the judge passed upon the issues of fact which should determine this cause—(1) whether or not the plaintiff was guilty of contributory negligence; (2) if that was true, was such contributory negligence, or the subsequent negligence of the defendant by increasing speed and causing the plaintiff to be thrown off, the proximate cause of the injury? If the plaintiff could have escaped unhurt but for the jerk, the negligence of the conductor in signaling at that point for an increase of speed, instead of stopping as usual for the plaintiff and others to get off, as from custom they had a right to expect, and the negligence of the engineer in suddenly turning on steam, thus causing a violent and unexpected jerk, was the proximate cause. Upon a nonsuit, the evidence must be taken in the most favorable light for the plaintiff. The cause should have been submitted to the jury, with appropriate instructions upon the different phases of the evidence. The plaintiff is entitled to have a jury pass upon his allegations and proofs, as guaranteed by the Constitution.

Error.

MONTGOMERY, J. (dissenting). This action was brought by the plaintiff to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the conductor on one of defendant's trains. The negligence complained of is, in substance, as follows: That the defendant owed the plaintiff, who was employed by defendant as a laborer engaged in the repairing of the railroad track, the duty of carrying the plaintiff to and from Morganton on his going to and returning from his work; that the habit and custom of the defendant was to slow down the rate of speed of the engine and train upon reaching a cross street in Morganton near to station, so that the plaintiff could alight and go to his home; that on one of these return trips the plaintiff, while standing on the platform of the caboose when the train had slackened its speed and he was

ready to alight, was suddenly hurled to the ground through the negligent conduct of the conductor, who, suddenly and without warning to the plaintiff, gave a signal to the engineer which resulted in a violent jerk. The evidence did not make good the allegations of the complaint. The plaintiff's evidence was to the effect that it was the habit and custom of the conductor to stop the train at the cross street in Morganton, and that the plaintiff always got on and off after the train had been stopped. The plaintiff's evidence was further that, as the train approached Morganton and had slowed to a low rate of speed—that is, as he said, from three to five miles an hour—he went out on the platform with a bundle and bucket in one hand, and holding with the other to an iron rod attached to the platform, and just as he was about to alight was thrown off and to the ground, through a sudden jerk and motion of the cars, and badly hurt. His testimony further was that if he had been sitting down on the flat cars he would have been perfectly safe.

The much-discussed question, in the oral arguments and in the briefs, on the subject of contributory negligence, is not necessary for us to discuss from the view we have taken of the case. We cannot see in what particular the defendant had been negligent. There cannot be culpable negligence in any case where the party charged with the negligence owes no duty to the other. In *Carter v. Lumber Co.*, 129 N. C. 203, 39 S. E. 828, the court approves of the definition of negligence given by Alderson, B., in *Blythe v. Water Works*, 25 L. J. Ex. 213, which is as follows: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a provident and reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party not intentionally." Another good definition of negligence is found in volume 7, A. & E. Enc. of Law, p. 370, which is in these words: "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care, under the cir-

cumstances, in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." Now, under the evidence in this case (we mean the plaintiff's evidence), the duty of the defendant was to furnish the plaintiff safe transportation to Morganton, to stop the train at or near the station, at the usual place where the plaintiff got off, that he might alight in safety. The conductor did not stop the train as he ought to have done; but that was not the cause of the injury. The cause of the injury was the sudden jerk of the train by which the plaintiff was thrown off the car and injured. If that jerk had occurred at the stopping place, and after the train had stopped, or was nearly (almost) to a full stop—that is, very slowly and slightly and gently creeping along—that the plaintiff might alight, the defendant would have been negligent. *Nance v. Railroad*, 94 N. C. 619; *Denny v. Railroad*, 132 N. C. 340, 43 S. E. 847. But the train in our case was moving at from three to five miles an hour, and the defendant had been standing some little time on the platform. The defendant did not owe him the duty to keep a lookout for the plaintiff on the platform. The conductor had a right to suppose that he was in a place of safety which had been provided for the laborers on that train. A jerk of the cars, therefore, while the train was in motion, was not negligence in the conductor so far as this plaintiff was concerned, who was standing on the platform. The defendant owed the plaintiff no duty to look out for him and to care for him in that unusual place—that place of danger. Of course, if the conductor or engineer had seen the plaintiff in the situation in which he placed himself, the sudden jerk of the cars, if it had occurred then, would have been evidence of negligence; or if the plaintiff had been where he ought to have been, in a safe place by his own admission, and had been injured by the sudden jerk, then that fact would have been evidence of negligence on the part of the defendant. *Denny v. Railroad*, supra.

I think there was no error in the dismissal of the action as by nonsuit.

(70 S. C. 220)

GRIFFIN v. GRIFFIN et al.

(Supreme Court of South Carolina. Nov. 24, 1904.)

SUBROGATION—PURCHASER AT VOID FORECLOSURE—PLEADING.

1. Where a purchaser at a void sale under a mortgage sues to subrogate himself to the rights of the mortgagee, the complaint should allege that the purchaser bought with the belief that he was obtaining the legal title, and should set forth the amount of the price.

Appeal from Common Pleas Circuit Court of Clarendon County; Leroy F. Youmans, Special Judge.

Action by Samuel W. Griffin against Joseph D. Griffin and others. From an order overruling a demurrer, defendants appeal. Reversed.

The following is the complaint:

"The complaint of the above-named plaintiff respectfully shows to this court:

"(1) That on the 16th day of January, A. D. 1883, the defendant Joseph D. Griffin made and delivered to Moses Levi his bond, bearing date on said day, conditioned for the payment of the full and just sum of \$2,585 on or before the 8th day of December, 1883, with interest from date at the rate of ten per cent. per annum until paid in full.

"(2) That on the 19th day of January, 1883, the said Joseph D. Griffin, to secure the payment of said bond, executed and delivered to Moses Levi his deed, and thereby conveyed, by way of mortgage, to Moses Levi, his heirs and assigns, the following lands and tenements, situated in the said county of Clarendon: 'My individual share as an heir of John Griffin, deceased, of the real estate owned by the said John Griffin at the time of his death, and five separate shares of said real estate of five other heirs of the said John Griffin, which have been conveyed to me and which I am the owner. The real estate of which the said six shares are hereby granted, bargained, sold and released (being six-elevenths thereof) is situate in said county and state, on Jack's Creek, contains 183 acres, and is bounded south and west by lands of J. J. Holliday, east by lands of L. N. Richbourg, and north by lands of D. W. Brailsford. The run of Jack's Creek being the line on the southeast corner.'

"(3) That the said deed was what is commonly known as a 'Scotch mortgage,' and contained a condition, in substance, that if the said Joseph D. Griffin should pay or cause to be paid to the said Moses Levi all his indebtedness to him then existing or thereafter contracted, as well as the sum of money evidenced by the said bond, with interest thereon, if any shall be due, according to the true intent and meaning of the said bond, then the deed of bargain and sale should cease, determine, and be utterly null and void. But in case of nonpayment of the indebtedness then existing, or of any debt thereafter contracted, or of the said bond,

the said Joseph D. Griffin empowered the said Moses Levi, his heirs, executors, administrators, and assigns, to grant, bargain, sell, and convey the said premises at public auction, make a conveyance in fee of the said premises to the purchaser at such sale, and after deducting from the proceeds of sale all taxes paid by the mortgagee, the principal and interest due on the said debt or debts, and all counsel fees and costs of sale, then to pay the overplus, if any, to the said Joseph D. Griffin, who further agreed that, upon the completion of said sale by conveyance, the purchaser should be entitled to immediate possession, and any holding thereafter by the said Joseph D. Griffin, or other person holding under him, shall be as tenant of the said purchaser, at a rent of \$30 per month, payable monthly, and giving the purchaser the right to terminate such tenancy and obtain possession of the premises.

"(4) That on the 20th day of January, A. D. 1883, the said mortgage was delivered to the register of mesne conveyances of said county, to be by him entered on record, and was recorded.

"(5) That default having been made in the payment of the debt secured by said mortgage, the said Moses Levi, under the power contained in said mortgage, on the 4th day of February, 1884, sold the shares and interest covered by and described in the said mortgage; and by his deed containing all necessary recitations, bearing date the 13th day of February, 1884, the said Moses Levi conveyed the premises so sold to Ferdinand Levi, who, by his deed bearing date the 14th day of February, 1884, conveyed such premises to the said Moses Levi.

"(6) That by his deed bearing date the 16th day of January, A. D. 1891, the said Moses Levi sold and conveyed all his right, title, and interest in and to the said 183-acre tract of land to said Samuel W. Griffin; that the interests and shares of, in, and to said land so conveyed by said Moses Levi covered the six shares thereof which were embraced in the mortgage executed by said Joseph D. Griffin, referred to in the second paragraph of this complaint, and acquired by said Moses Levi under the foreclosure sale referred to in the fifth paragraph of this complaint, as well as such shares and interests in the said 183-acre tract of land as were otherwise acquired by said Moses Levi.

"(7) That the aforesaid conveyance from Moses Levi to Ferdinand Levi, bearing date the 13th day of February, 1884, is invalid, in law, by reason of the fact that the same was not signed in the name of the mortgagor by the mortgagee.

"(8) That the said sale and invalid conveyance from Moses Levi to Ferdinand Levi, and the said conveyance from Ferdinand Levi to Moses Levi, and the said conveyance from Moses Levi to Samuel W. Griffin, the

plaintiff herein, had, however, the effect of transferring and assigning the said bond and mortgage, and the debt thereby secured, and all the right, title, and interest of the said Ferdinand Levi and the said Moses Levi therein, to the plaintiff, Samuel W. Griffin, who by operation of law is subrogated to all the rights of the said Moses Levi and of the said Ferdinand Levi, acquired by, through, and under said mortgage.

"(9) That the condition of said bond and mortgage, as hereinbefore alleged, has long been broken, and there is due and remaining unpaid upon said bond and mortgage the sum of \$2,585, with interest thereon from the 16th day of January, A. D. 1883, at the rate of ten per cent. per annum, until fully paid.

"(10) That the defendants William H. Griffin, Richard M. Griffin, and Lawrence Griffin have been for a number of years, and are now, occupying, using, holding, and receiving the rents and profits accruing from the aforesaid mortgaged premises, alleging that such occupancy and holding is in behalf of and for the benefit of the defendant Joseph D. Griffin.

"Therefore, the plaintiff demands judgment: First, that the defendant Joseph D. Griffin, and all persons claiming under him, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises, or any part thereof; second, that the mortgaged premises be sold under the order and direction of this court, and the proceeds of sale, after deducting the costs and expenses of this action and of such sale, and any taxes that may be a lien upon the premises, be applied to the payment of the amount due upon the bond and mortgage hereinbefore set forth, with the interest thereon to the time of such payment; third, that judgment be entered up in favor of the plaintiff against the defendant Joseph D. Griffin for the sum of \$2,585, with interest thereon from the 16th day of January, A. D. 1883, at ten per cent. per annum, and that the net proceeds of sale be credited upon said judgment."

The defendant Joseph D. Griffin demurs to the complaint, "and, for cause of demurrer, alleges that the same does not allege facts sufficient to constitute a cause of action: (1) In that it does not allege facts showing that the plaintiff herein is the legal or equitable owner of the debt, bond, and mortgage mentioned therein, or either of them; (2) that the complaint does not allege facts sufficient to show that the plaintiff owns any interest, either legal or equitable, in either

the debt, bond, or mortgage mentioned therein."

From circuit order overruling demurrer, defendants appeal.

Wilson & Durant, for appellants. Jos. F. Rhame and W. C. Davis, for respondent.

WOODS, J. The circuit court overruled the demurrer to the complaint, and the defendants appeal.

It is well established that a purchaser who buys at a void sale purporting to be made under the power contained in a mortgage, with belief that he will obtain a good title, is subrogated to the rights of the mortgagee, and may foreclose the mortgage. As we understand, the objection to this complaint is that there is no allegation that the purchaser bought, and paid the purchase money, honestly believing that he would obtain a good title. In *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677, followed in *Chambers v. Bookman*, 67 S. C. 454, 46 S. E. 39, the equity of subrogation is placed on the ground that the purchaser bought under the honest belief that by the sale he would be clothed with the legal title. Perhaps cases may arise presenting peculiar features justifying the court in applying the doctrine of subrogation even when the purchaser did not feel confident of his title, but was impelled to bid at the sale to protect his own interests, rather than take the risk of the court holding a sale valid which he himself regarded invalid or of doubtful validity. No such peculiar circumstances are alleged in this case, and the demurrer must be sustained.

It is held in *Givins v. Carroll*, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889, that the subrogation of the purchaser to the rights of the mortgagee is ordinarily limited to the amount of the purchase money, and for this reason the payment of the purchase money and its amount should usually be alleged. We do not say, however, that a purchaser might not have equities, as between himself and the mortgagee, which would take the case out of the ordinary rule. As the mortgagee has not been made a party, and he, and not the mortgagor, is primarily interested in this question, we express no opinion as to whether the facts alleged in the complaint make this case an exception to the rule laid down in *Givins v. Carroll*, supra.

The judgment of this court is that the judgment of the circuit court be reversed, and that the demurrer be sustained, with leave to the plaintiff to move to amend as he may be advised.

(70 S. C. 196)

PARROTT et al. v. BARRETT et al.

(Supreme Court of South Carolina. Nov. 23, 1904.)

**WILL—CONSTRUCTION—DEATH OF LIFE TENANT
—PARTITION—RIGHTS OF REMAINDERMEN
—ESTOPPEL—FAMILY SETTLEMENT.**

1. Testator devised lands to A. for her natural life for her sole and separate use, and on her death to the heirs of her body living at the time of her death, share and share alike. *Held*, that at the death of the life tenant the fee passed to the children and grandchildren then living, per capita.

2. A father joined in a deed of partition of lands devised to his mother for life, and at her death to the heirs of her body, but died before the life tenant. *Held*, that his children were not estopped on the death of the life tenant from claiming under the will, though they remained in possession as heirs at law of their father after his death.

3. In a suit by grandchildren of testator to enforce a trust deed executed by their father, of lands set apart to him under partition deed between his mother, as life tenant, and his brothers and sisters, they are not estopped by the judgment from suing for general partition between themselves and their uncles and aunts under the will of their grandfather.

4. Where children do not claim from their father, but directly under the will of their grandfather, they are not affected by a family settlement to which their father was a party.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Sumter County.

Action by Nettie F. Parrott and others against George McD. Barrett and others for partition. From the decree, all the parties appeal. Modified.

The circuit decree is as follows:

"This is an action for partition. The subject-matter thereof is a parcel of land containing 889 acres, and referred to in the muniments of title as the 'Green Tract.' The testimony shows the land to be of unusually fertile character, and the market value high. The issues of law are few, and there are practically no issues of fact.

"A history of the case is this: The land belonged to Capt. James Rembert, who died testate many years since. He devised it to his daughter, Jane Rembert Barrett, 'to and for the natural term of her life and no longer, to her sole and separate use * * * and at and immediately upon her death * * * I give and devise and bequeath the said tract of land to the heirs of her body who may be living at the time of her death, share and share alike, to them and their heirs and assigns forever.' This Jane lived for many years after the death of her father—probably fifty—and only died in the year 1901; but on the 22d day of December, 1874, Jane and her children, Charles, Elizabeth, George, Caleb, Samuel, Albertus, and Martha, entered into a paper writing whereby they undertook to anticipate the time for partition set in the will, and actually effected a division of the Green tract betwixt them. Thereafter the son Charles died about the year 1880, and the plaintiffs herein are his children. As

will be conjectured by this time, the plaintiffs contend they were heirs of the body of Jane at the time of her death, and are now entitled to share the Green tract alike with Jane's children. The paper writing above referred to is in the handwriting of the late Hon. Thos. B. Fraser. It was stated in argument that he drew it. Annexed thereto is an elaborate plat of the Green tract, divided into twelve parcels. Some of the parcels so set off to the children of Jane have come into the possession of other persons, and some have become incumbered by strangers, and of some strangers are warrantors. All such new persons are parties hereto. The defendant Mary L. Barrett is the widow of Charles S. and mother of the plaintiffs, and she has become the owner by purchase of two parcels of land, containing together 103 acres, assigned in the first instance to Samuel J. Barrett.

"I am of the opinion that, under the will of James Rembert, the daughter, Jane, took a life estate, and that at her death in 1901 the title was then divisible in equal shares betwixt the six children of Jane and the plaintiffs, her grandchildren; that is to say, each was entitled to have one-tenth of the whole.

"It was argued at the bar (by Mr. Livingston) that the testator intended the share of each child of Jane to go to the children of each child, and that he did not use 'heirs of her body' and 'share and share alike' in a technical sense. And to give strength to that contention, other parts of the will were cited, wherein the testator directed a distribution 'among my heirs according to the provisions of the act generally termed the statute of distributions'; but, on the other hand, the use by the testator of different language for different devises goes to show he had different purposes, and not one purpose. The language of the will is too plain for construction, strong as the argument is. *Kerngood v. Davis*, 21 S. C. 207.

"I am, however, of the opinion that the paper writing above referred to, together with the things that have been done thereunder, have modified the direction of the will. It is not worth while to state the law of estoppel and of confirmation by minors, for it rests on sound principles of justice and equity.

"In the case at bar, Jane was entitled to enjoy the entire 889 acres from the death of the testator, James Rembert, in 1858, until her own death, in 1901, and to the exclusion of her children and their children. But in 1874, twenty-seven years before the time was ripe, she and her seven children made the paper writing 'in anticipation of the period prescribed in the said will, and for the natural love and affection which she bore to her said children.' If that paper can be sustained and be made the rule of division now, it ought to be done. It goes without saying, had the plaintiffs and those acting for them

ignored the paper writing and held their hands until 1901, they could now demand that the letter of the will be enforced. But the family division was so just, so reasonable, and so for the benefit of all concerned, that it deserved the most serious consideration at the hands of a court of equity. The parties cannot now be put in statu quo. Each of them has used and enjoyed his or her share for more than a quarter of a century. In 1887 the plaintiffs and their mother recovered in this court the share which Charles S. Barrett had accepted, and which one W. A. James, Sr., has a short time theretofore fraudulently gotten from them. They have ever since enjoyed that parcel and claimed it as their own. The plaintiff Nettie reached her majority in 1893, Janie in 1896, Lila in 1897, and Charlton 25th August, 1899. This action was begun in July, 1901. The plaintiffs knew their rights under the will of James Bembert, and they knew them before Jane's death, and while they enjoyed the rents and profits. They therefore have not begun an action to recover a newly-discovered right. Mrs. Mary L. Barrett testified: 'We have always thought that at the death of Mrs. Barrett they would act according to her will, and there would be a new division. Q. Is that the reason why you and your children have not improved it? A. Yes.' I am of the opinion the plaintiffs have waited too long to undo so just a family arrangement, and I am of the opinion their silence will be taken as a confirmation of it.

"Looking, therefore, to the paper writing for a chart of the rights of the parties, what does it provide? In my opinion, the shares set aside for all the children of Jane must stand intact, in whosoever hands they now be. But one parcel, No. 5, containing 168½ acres, was set aside for the mother, Jane, '[a] for her life, according to the terms of the said will; [b] and that in case there should be any persons living at her death who may be heirs of her body and not parties to this deed, and entitled to an equal share in the said tract of land under the terms of the said will, then that lot No. 5 shall be [1] held as a common fund out of which the interests of said heirs, not parties hereto, shall be paid and satisfied; or [2] for the reimbursement of any of the parties to this deed of settlement whose possession may be disturbed, for any loss from such disturbance by such heirs not herein provided for; [3] or the reimbursement of any purchasers from any of the parties to this deed who may be subjected to loss by such heirs not herein provided for by the parties hereby confirmed.' The letters and numbers in brackets are my own, and are not in the paper writing.

"How shall the 168½ acres of land left by Jane in 1901 be disposed of? Along with the paper writing, it ought to be inferred that the division at that time into seven shares for the children was one of equality.

The testimony so shows, as well. Had all the seven children lived until 1901, then only that portion of the above-quoted parts of the paper writing marked 'a' would have been operative, and the 168½ acres would in that event have gone in equal shares to the seven children who signed the paper. But so much of the quotation as is marked 'b' refers to a condition which has arisen since the paper was executed. There were in fact persons living at Jane's death who answered the description of heirs of her body, and not parties to the paper, and entitled by the will to an equal share of the 889 acres. That is the event on the happening of which further provision was made.

"I cannot concur in the view of defendants' counsel (Mr. Haynesworth) that the maker of the paper contemplated other children to be born to Jane. The paper was drawn by counsel of especial learning in the law, and he saw the manifest peril which lurked in the partition ahead of the allotted time. The words of the paper are apt and comprehensive and plain. I am of the opinion the very condition has arisen which the scrivener had in mind. Under the paper writing, the plaintiffs have received together only one-seventh of 720½ acres, and they have each received only one-twenty-eighth of 720½ acres, whereas in 1901 they were each entitled to one-tenth of the whole 889 acres by the will. The paper writing has provided how the deficiency of these new heirs of the body should be made good. Not in full, perhaps, but so far as the funds set aside for that purpose would go. The clauses 2 and 3 were practically the same thing. One has reference to the reimbursement of a child of Jane; the other, to a reimbursement of a purchaser from such child. The clause 1 is, in effect, not different from the clause 2. Under both the 168½ acres is the trust fund, either to make good what the six children might be called on to pay to the four grandchildren, or for payment direct to the four grandchildren. The 168½ acres was also the only fund set aside by the settlement for equality of division. The paper writing provides, 'and it is further covenanted and agreed that at the death of the said * * * Jane * * * and all heirs of her body not parties hereto shall be satisfied. Anything which remains of lot 5 shall go as directed by the said will for the whole tract.' If, therefore, it takes the whole of the 168½ acres to make the plaintiffs equal under the family settlement with the children of Jane, then the whole must so go. If anything remains after such equality has been effected, then that balance must itself be equally divided amongst the heirs of Jane's body, share and share alike. It may be assumed, under the family settlement, and under the testimony, too, that one acre of the land was and is practically as good as another acre, so that the unit or value for division is one acre. Under the

environment of 1901, each heir of the body of Jane is entitled to have, by the will, 89 acres, or a fraction less. Excluding the 168½ acres, the children of Jane have each received, on an average, 101 acres of land, and the grandchildren, the plaintiffs, have each received 26½ acres. If the 168½ acres be given entirely to the plaintiffs, their share will not then be equal to a tenth of the whole; but, under the terms of the family settlement, they can get no more. I am therefore of the opinion that the 168½ acres of land marked 'No. 5' on the plat is of right the sole property of the plaintiffs, and it is so decreed.

"It was stated at bar that no notice of lis pendens had been filed in the action, and that, since action began, the interests of Charlton S. Barrett had been purchased by A. B. Stuckey, Esq. It was further stated that there were questions betwixt Mannes Baum, creditor, and Geo. M. Barrett, and betwixt T. R. McGhan, creditor, and Margaret A. Phillips, which questions are reserved for future and further considerations. It is further ordered, that the costs of this action be paid as follows, to wit: the costs of plaintiffs by the plaintiffs, and costs of defendants by the defendants."

From this decree all parties appeal.

A. B. Stuckey and Johnstone & Cromer, for plaintiffs. Haynesworth & Haynesworth, Lee & Moise, and Knox Livingston, for defendants.

JONES, J. Plaintiffs seek partition of a tract of land, 889 acres, formerly in Sumter, now in Lee, county, among the remaindermen under the will of James Rembert, deceased, admitted to probate May 11, 1858. The second clause of the will provides: "Second. I will, devise and bequeath to my beloved daughter, Jane Barrett, all of that tract of land lying towards the south of my plantation, known as the Green tract of land, to and for the natural term of her life and no longer; to her sole and separate use, to be in no way subject to the debts, contracts or control of her present or any future husband; and at and immediately upon the death of my said daughter, Jane Barrett, I give, devise and bequeath the said tract of land to the heirs of her body who may be living at the time of her death, share and share alike; to their heirs and assigns forever. To be esteemed and regarded as of the value of five thousand dollars." Jane Barrett died in April, 1901, and this action was commenced on 22d July, 1901. The plaintiffs are the children of Charles S. Barrett, who was the son of Jane Barrett, and died in April, 1880, before the death of the life tenant. The defendants are the children of Jane Barrett and those in privity with them. Partition as claimed was resisted mainly on two grounds: (1) That "heirs of the body who may be living at the time of her death,

share and share alike," means children of Jane Barrett living at the time of her death, and therefore excludes plaintiffs, who, as grandchildren, do not answer that description. (2) The plaintiffs, by their ratification thereof or estoppel to deny, are bound by a partition of said lands made in 1874 among the life tenant, Jane Barrett, and her children, including Charles S. Barrett, the father of plaintiffs. The circuit court, in a decree herewith reported, held that under this will—there being six children and four grandchildren answering the description "heirs of the body," etc.—each of the four plaintiffs was entitled to one-tenth of the land, but that their right was modified by the partition of 1874, which he held plaintiffs had confirmed. It was therefore decreed that plaintiffs, in addition to the tracts Nos. 1 and 3, containing 106½ acres, set apart to Charles S. Barrett, plaintiffs' father, in said partition, should receive tract No. 5, containing 168½ acres, which had been set apart to Jane Barrett, life tenant, in said partition agreement, which contained this stipulation: "And it is hereby further agreed by the said parties, that the said lot No. 5, assigned to Mrs. Jane Barrett, shall be held by her for her life, according to the terms of the said will, and that in case there should be any person living at her death, who may be heirs of her body and not parties to this deed, and entitled to an equal share in the said tract of land under the terms of the said will, then that said lot No. 5 shall be held as a common fund, out of which the interest of such heirs, not parties hereto, shall be paid and satisfied, or for the reimbursement of any of the parties to this deed of settlement, whose possession may be disturbed, for any loss from such disturbance by such heirs not herein provided for, or the reimbursement of any purchasers from any of the parties to this deed who may be subjected to loss by such heirs not herein provided for by the partition hereby confirmed. And it is further covenanted and agreed that at the death of the said Mrs. Jane Barrett and all heirs of her body not parties hereto shall be satisfied, anything which remains of lot No. 5 shall go as directed by the said will for the whole tract." In reaching this conclusion, the circuit court held that, under the testimony, one acre of land was practically as good as another, and therefore took one acre as the unit of valuation, so that the plaintiffs, under the will being entitled to four-tenths of the 889 acres or 355 acres (omitting fractions) and having received 106 acres through their father under the partition of 1874, were entitled to 249 acres; but, having confirmed the partition agreement, their further recovery was limited to tract No. 5, containing 168 acres, the stipulated fund for equalization.

Both sides appeal; the plaintiffs contending that they had not confirmed the partition of 1874, and were not estopped thereby, and

were each entitled to one-tenth of the whole 889-acre tract; the defendants contending that plaintiffs, having ratified the partition of 1874, must be held as satisfied therewith, and that if entitled to any relief as "heirs of the body," etc., of Jane Barrett, they should be restricted to a partition of tract No. 5, in accordance with the terms of the will, share and share alike with defendants.

We agree with the circuit court in the construction of the will. The plaintiffs, as children of Charles S. Barrett, the son of Jane Barrett—their father having died before Jane Barrett—answered the description of heirs of the body of Jane Barrett; and, the will expressly directing that the heirs of her body living at her death should share and share alike, the plaintiffs take per capita, and not per stirpes, and so are, under the will, each entitled to one-tenth of the tract of land in question. This conclusion is fully sustained by the cases of *Kerngood v. Davis*, 21 S. C. 206; *Dukes v. Faulk*, 37 S. C. 205, 16 S. E. 122, 34 Am. St. Rep. 745.

We do not think that plaintiffs have done anything with reference to the partition of 1874 which should prevent the assertion now of their rights under the will. The first matter which is relied on as an estoppel against plaintiffs to assert their present claim is that plaintiffs, with their mother, Mary L. Barrett, after the death of the father, Charles S. Barrett, continued to use the land set apart to Charles S. Barrett as his heirs at law. We see nothing in this inconsistent with plaintiffs' claim under the will. Jane Barrett, the life tenant, had the absolute disposal of her life estate. In her motherly affection and unselfishness, she chose to share her life estate with her children. But the plaintiffs were in no wise parties to the partition agreement, at which time three of them were unborn, and the eldest was only about two years old. The legal effect of the partition agreement or deed, so far as plaintiffs are concerned, was merely to convey the life estate of Jane Barrett to the persons designated. Plaintiffs' right to use the estate which Jane Barrett conveyed to their father and his heirs was cast upon them by law, and as the result of Jane Barrett's generosity, not by any agency of defendants. If plaintiffs received any benefits, the benefits did not come from defendants, nor were defendants misled thereby, nor was any action thereby induced to defendants' prejudice. If plaintiffs, on coming of age, during the life of the life tenant, had repudiated the partition and reconveyed to Jane Barrett, no interest of defendants could have been favorably affected. We see no element of estoppel in pais in this.

It is suggested that the facts that the plaintiffs continued to occupy the lands set apart to their father on coming of age during the life of the life tenant, without some act in repudiation of the partition, was holding onto an advantage, inasmuch as it was pos-

sible that plaintiffs might (1) not survive the life tenant, and so would lose all interest in the 889-acre tract; or (2) in the event of one or more of the other children of Jane Barrett dying before her, leaving children, plaintiffs' interest might be less than what they might take under the partition. These were possible contingencies, but the conduct of plaintiffs would still not work an estoppel. The general rule of estoppel in pais is that "when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon these statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are incompatible, and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statement or conduct, if the latter has so far changed his position that he would be injured thereby." 4 Am. & Eng. Dec. in Eq. 258. To work an estoppel, the matter relied on must have induced the party claiming estoppel to assume a position which he otherwise would not have taken. *Draffin v. Charleston, C. & G. R. Co.*, 34 S. C. 464, 13 S. E. 427; 4 Am. & E. Dec. in Eq. 281. It follows that an act done after the party's position has been taken or changed will not avail as ground for estoppel, because it cannot have been relied upon. 4 A. & E. Dec. in Eq. 286. Whatever position defendants were induced to take was taken in 1874. It does not even appear that defendants have made any expenditures by way of improving the premises set apart to them in the partition, either before or after the plaintiffs attained their majority.

It is further contended that plaintiffs are estopped by record in the case of Mary L. Barrett and the plaintiffs, by their guardian ad litem, against William A. James, Sr., resulting in a decree adjudging Mary L. Barrett and plaintiffs here entitled to the tracts which had been set apart to Charles S. Barrett in the partition as his heirs at law, and entitled to judgment against James for rents and profits during his occupancy of said premises. It appears that on January 26, 1876, Charles S. Barrett mortgaged the said parcels of land to Thos. J. McCutchen & Co. to secure a debt of \$608.44, which mortgage had been foreclosed, and said parcels sold to Holmes & Durham, who afterwards conveyed to James. In 1887 the widow and children of Charles S. Barrett commenced the action against James, alleging that Holmes & Durham had bought said parcels under an agreement with Charles S. Barrett to convey to Mary L. Barrett and her children as soon as the loan for the purchase money was repaid; that said James had bought with knowledge of said agreement; and that Mary L. Barrett and her children owned said land as tenants in common, and as heirs at law of Charles S. Barrett. The

decree of Judge Kershaw, dated September 15, 1887, directed James to convey said parcels of land to Mary L. Barrett and the plaintiffs here, as heirs at law of Charles S. Barrett, and to pay them \$859.68, excess of rents and profits during his possession, 1882 to 1887, over payments by him to Holmes & Durham, etc. In February, 1888, James made the conveyance as ordered by the court, and plaintiffs have been in possession ever since. That suit was not between the same parties and does not involve the same cause of action as the present suit. No right under the will was asserted in that suit. As already stated, their claim of the premises during the life of Jane Barrett, as heirs at law of Charles S. Barrett, was perfectly consistent with the present claim under the will. Judge Kershaw expressly refrained from expressing any opinion upon the proper construction of the will of James Rembert or the effect of the partition.

The foregoing are the only matters relied on to show any confirmation of plaintiffs of the partition, or estoppel to assert rights under the will. The partition, in so far as plaintiffs are concerned, cannot be sustained on the ground that it was a family settlement, as plaintiffs had no voice therein, and their rights under the will could not be varied in such a settlement unless they were properly represented in it. Plaintiffs have been diligent in the assertion of their rights, as no cause of action accrued to them until the death of the life tenant, and they brought this action within a few months of the life tenant's death.

In the settlement of this case the court is disposed, as far as possible, consistently with plaintiffs' rights, to preserve the possession of defendants, or their privies, of the parcels set apart to them in said partition, as they are bound, as among themselves, to abide by the same. The court, however, is not quite satisfied with the rule adopted by the circuit court, in holding that each acre is practically as good as another, and in making one acre the unit of value, as the testimony is very meager on that subject. We therefore think that each parcel as set apart in the partition of 1874 should be valued by appraisers appointed for that purpose, and that plaintiffs should first be allotted tracts 1 and 3, now occupied by them; then, to the extent necessary to give them four-tenths of the value of the whole tract of 889 acres, they should be allotted from tract No. 5, containing 168½ acres; then, if this be still insufficient, any deficiency remaining should be made up to them by an assessment for equality of partition upon each parcel assigned to defendants in the partition, in the proportion which the value of their respective parcels bears to said deficiency, to be paid by defendants or their privies within such reasonable time as the circuit court may fix, and, in default of such payment, plaintiffs to have leave to apply to

the circuit court for the proper relief. After plaintiffs shall have thus received four-tenths of the whole tract of 889 acres, the defendants shall be entitled to the parcels respectively assigned to them in said partition. If the whole tract No. 5 be not required to give plaintiffs four-tenths of the whole 889 acres, the remainder should be partitioned according to law among the defendant children of Jane Barrett.

The judgment of this court is that the decree of the circuit court is modified in the particulars named, and the cause is remanded for such further proceedings as may be necessary to carry out the views above announced.

WOODS, J. (dissenting). I concur in the construction given to the will of James Rembert in the opinion of Mr. Justice JONES—that his daughter, Jane Barrett, took a life estate, with remainder to such persons per capita as should answer the description of heirs of her body at the time of her death. But I cannot agree that the plaintiffs are not bound by the terms of the deed for the partition of the land. Mrs. Barrett left surviving her, as the heirs of her body, six children, and the plaintiffs, the four children of Charles Barrett, a son who died before his mother. Under the will, therefore, the plaintiffs would be entitled to four-tenths of the land devised. The question is whether they have bound themselves by election to a different family arrangement. Obviously neither Charles Barrett, in his lifetime, nor the plaintiffs, as his heirs, were entitled to any portion of the land until the death of the life tenant, Jane Barrett. But during his lifetime, and by an agreement between Mrs. Barrett and her children, which was also a mutual conveyance, all the land was actually partitioned among the children, except a tract of 168½ acres, known as lot No. 5, which it was covenanted "should be held by Mrs. Jane Barrett for her life, according to the terms of James Rembert's will; and in case there should be any persons living at her death who may be heirs of her body and not parties to the said deed, and entitled to an equal share in said tract of land under the terms of said will, then that said lot No. 5 shall be held as a common fund, out of which the interest of such heirs not parties to said deed shall be paid and satisfied, or for the reimbursement of any of the parties to said deed of settlement, whose possession may be disturbed for any loss from such disturbance by such heirs not in said deed provided for, or the reimbursement of any purchasers from any of the parties to said deed who may be subjected to loss by such heirs not in said deed provided for by the partition by said deed confirmed; and further, that at the death of Mrs. Jane Barrett, and all heirs of her body not parties to said deed shall be satisfied, anything which remains of lot No. 5 shall

go as directed by said will for the whole tract."

Charles Barrett died in April, 1880. Since his death the plaintiffs, together with his widow, as his heirs at law, have used and enjoyed the land set apart to him, actively claiming title to it as their own by heirship from Charles Barrett. Mrs. Jane Barrett, the life tenant, died in 1901. The eldest of the plaintiffs attained her majority in 1893, and the youngest in 1899. The plaintiffs took the full benefit of the family settlement for some years after they attained their majority, by claiming and holding the land derived from their father under it. As his heirs they were his privies, and they elected to hold the benefits which accrued to them as such heirs. These benefits came through the deed. "No rule is better established than that one cannot claim under and against a deed or will." *Bailey v. Boyce*, 4 Strob. Eq. 91. It is true, the brothers and sisters of Charles Barrett would not have been entitled to the land set off to him even if the plaintiffs, as his heirs, had repudiated the family settlement, and given notice that they would not hold the land set apart to their father under that instrument. But Mrs. Barrett had, by the family contract, surrendered and conveyed away her life interest in the lands therein set apart to her children for the benefit of each and every one of them. The consideration paid by the mother for each of the children was as good, and inured as much to their benefit, as if each had surrendered an interest in the land set apart to Charles Barrett. This consideration paid by her to each child was sufficient to bind each of them and all who took the benefit of the consideration paid by her under or through any of them. The plaintiffs partook of the consideration by holding the land after the death of their father until the death of Mrs. Barrett, the life tenant. Having elected to take the benefits of the deed of conveyance of the life estate of their grandmother, the plaintiffs should not be allowed to hold those benefits, and after her death disavow the deed. The plaintiffs answer the description of the class of persons provided for in the family settlement who might be living at the death of Mrs. Barrett, and be heirs of her body, and not parties to the deed, for whom the tract of 168½ acres was provided, and to this and to the land set apart to Charles Barrett I think they should be limited.

I think the judgment of the circuit court should be affirmed.

(70 S. C. 214)

JONES v. ATLANTIC COAST LINE R. R.
(Supreme Court of South Carolina. Nov. 24,
1904.)

APPEAL—REVIEW—FINDINGS OF CIRCUIT COURT
—MAGISTRATE'S JUDGMENT.

1. The finding of the circuit court, on appeal from a magistrate, that the judgment is not sup-

ported by the evidence as to one cause of action, is not reviewable on appeal.

2. Where a general verdict is rendered before a magistrate, and the evidence does not support the second cause of action, it was proper to order a new trial as to both causes, there being no means to ascertain how the verdict should be apportioned.

Appeal from Common Pleas Circuit Court of Sumter County; Gary, Judge.

Action in magistrate court by Swinton J. Jones against the Atlantic Coast Line Railroad. From circuit order reversing judgment of magistrate, plaintiff appeals. Affirmed.

L. D. Jennings, for appellant. Mark Reynolds, for respondent.

JONES, J. This was a suit in a magistrate court in Sumter county for damages, and resulted in a verdict and judgment in favor of plaintiff for \$40. On appeal therefrom, the circuit court granted a new trial in the following order: "This case, which was tried before a magistrate without a jury, came up on exceptions to the rulings of the magistrate, and his judgment in favor of the plaintiff for the sum of \$40. The complaint states two causes of action, and the magistrate rendered a general verdict, not stating upon which cause of action, or how, the same was to be apportioned. After hearing all the testimony and the arguments pro and con, I find and conclude that there is no evidence to sustain the second cause of action in said complaint, and it being impossible to apportion the verdict, or to ascertain upon which cause of action the same was based or its component parts referable, it is ordered that the judgment of the said magistrate be, and the same is hereby, reversed, and a new trial granted. *Lampley v. Atlantic Coast Line R. R. Co.*, 63 S. C. 462, 41 S. E. 517."

The complainant sought to recover damages (1) in the sum of \$67.70 for loss of a box containing tools and material for repairing watches, clocks, and sewing machines, and (2) in the sum of \$30 for failing to stop the defendant's passenger coach at Mayesville station, in Sumter county, so that plaintiff might reboard the same as passenger, he being a passenger from Lynchburg, S. C., to Sumter, S. C., and having got off near Mayesville, an intermediate station, to attend to some business, on the statement and assurance of the conductor that there would be sufficient time, and that the passenger coach would be pulled up to and stop at the station proper for passengers. It is excepted, substantially, that the circuit court erred: "(1) In finding that there was no testimony to sustain the second cause of action, whereas there was sufficient testimony to sustain said cause of action. (2) Because there being sufficient evidence to sustain the first cause of action, which was for a sum greater than the verdict, the verdict should have been referred to and sustained under the

first cause of action. (3) In granting a new trial where the verdict was supported by the greater weight of the evidence."

The exceptions must be overruled. This court has no jurisdiction to review the findings of fact by the circuit court in a law case heard by that court on appeal from a magistrate's court. *Redfearn v. Douglass*, 35 S. C. 569, 15 S. E. 244.

The circuit court having found that the evidence was not sufficient to sustain the second cause of action, it was competent to order a new trial thereon. The verdict in this case having been a general one, and there being no means to ascertain in what manner the verdict should be apportioned, it was proper to order a new trial as to both causes of action. *Lampley v. R. R. Co.*, *supra*.

The judgment of the circuit court is affirmed.

(70 S. C. 229)

SCOTTISH-AMERICAN MORTG. CO. v. CLOWNEY et al.

(Supreme Court of South Carolina. Nov. 24, 1904.)

TRUSTS—DEED BY TRUSTEE—VALIDITY—RIGHTS OF BENEFICIARIES—NOTICE TO ATTORNEY.

1. Where a trustee has power of sale for reinvestment, a deed executed by him without payment to him of the purchase money is voidable, but not void.

2. Knowledge by an attorney that a trustee with power of sale for reinvestment is selling to his own wife is knowledge to his client.

3. Where a trustee with power of sale for reinvestment sells the trust property to his wife, the sale is voidable at the option of the beneficiaries.

Appeal from Common Pleas Circuit Court of Fairfield County; Allen J. Green, Special Judge.

Action by the Scottish-American Mortgage Company against Margaret M. Clowney and others. From the decree, plaintiff and certain of the defendants appeal. Modified.

The circuit decree is as follows:

"This action was commenced May 7, 1901, and is brought by the plaintiff against the defendants for the purpose of removing a cloud upon its title, and, failing therein, to be subrogated to the rights of an alleged purchase-money mortgage, which it is alleged was paid with its money. The defendant M. M. Clowney made default. The other defendants, who are the children of W. J. Clowney, the beneficiaries under the trust deed hereinafter mentioned, answered; the last named, Boyd C. Clowney, an infant, by his guardian ad litem. The cause was referred to James G. McCants, Esq., referee, to take the testimony upon the issues raised by the pleadings, and came on to be heard before me at the special November term, 1903, of the court of common pleas for Fairfield county upon the pleadings and testi-

mony so taken. There is no controversy as to the facts. The issues raised and argued are as to the proper conclusions to be drawn from the facts and the principles of law applicable thereto.

"The facts are as follows: On the 1st of January, 1877, Samuel B. Clowney, by his deed dated on that day, reciting 'in consideration of the sum of \$2,500, secured to be paid to me by William J. Clowney, trustee,' conveys with full warranty to said 'W. J. Clowney, as trustee, his successors or assigns,' a tract of land in Fairfield county, fully described therein, containing 649 acres, more or less, in trust 'to and for the use, benefit, and behoof of the children of the said William J. Clowney now living, and of them which may hereafter be born and living at the time of the death of the said William J. Clowney; and if all of the children of the said William J. Clowney shall die in his lifetime, leaving no issue, or if he shall die without leaving an issue living at the time of his death, then it is agreed by and between the parties to these presents that said tract of land shall revert to the said Samuel B. Clowney, his heirs and assigns forever, discharged and free from all trusts whatsoever; and the said William J. Clowney is hereby authorized and empowered to sell or otherwise dispose of the said tract of land whenever, in his judgment, it may be expedient for his said children, and to reinvest the proceeds upon the same trusts and subject to like reversion to the said Samuel B. Clowney, his heirs and assigns forever, as is hereinbefore provided as to said tract of land.' On the same 1st day of January, 1877, the said W. J. Clowney, as trustee, mortgaged the said premises to the said Samuel B. Clowney to secure his bond of even date, conditioned to pay \$2,500 in one, two, and three equal annual installments, computing from date, with interest at 10 per cent. per annum, payable annually, until the whole debt and interest be paid. After the description of the premises in the mortgage appears these words: 'And being the same tract of land as was conveyed to me as trustee by the said Samuel B. Clowney by deed bearing even date with these presents.' The deed and mortgage is witnessed by the same witnesses, probated by the same officer on the 8th day of February, 1877, and recorded the same day. The bond and mortgage were assigned to Smythe & Adger by S. B. Clowney on the 17th day of March, 1877, and by them to George W. Witte on the 6th day of February, 1878.

"On the 26th of April, 1886, proceedings were commenced to foreclose the said mortgage by an action in which George W. Witte was plaintiff, and William J. Clowney, as trustee, alone was defendant. This action proceeded to judgment for foreclosure and sale of the premises, the amount found due being \$2,131.58, with interest from September 22, 1886, and \$50 costs, and was dock

eted accordingly on the 8th day of October, 1886, in the proper office. In the meantime, pending this action, to wit, on the 9th of August, 1886, William J. Clowney, trustee, executed a deed conveying the said premises to his wife, M. M. Clowney, subject to the above mortgage, which deed was probated and recorded on September 16, 1886. This deed purports to be made 'in consideration of the sum of \$3,700 in hand paid at and before the sealing of these presents,' and 'in pursuance of the power conferred upon me, the said W. J. Clowney, trustee,' by the deed of January 1, 1877. Before the record of this deed W. J. Clowney handed Mr. H. A. Gaillard an application signed by M. M. Clowney to J. B. Palmer & Son, the investing agents of plaintiff, for a loan of \$2,000, offering a mortgage of the premises as security. Mr. Gaillard was the attorney of W. J. Clowney in the Witte foreclosure suit, and also the attorney of J. B. Palmer & Son in negotiating the loan, and forwarded them the application, made the abstract of title, and upon the consummation of the transaction received in checks from them the sum of \$1,922.50, the net proceeds of the loan, and applied the same in extinguishment of the judgment of Witte v. Clowney, trustee, on June 27, 1887. Subsequently the balance of the judgment was paid, and it was satisfied of record. The loan is evidenced by five notes dated November 15, 1886, signed by M. M. Clowney and W. J. Clowney, secured by a mortgage of the premises of the same date, executed by Mrs. M. M. Clowney alone. The mortgage was recorded on the 28th of January, 1887. On September 29, 1894, the mortgage was foreclosed, and the premises sold under the proceedings on November 5, 1894, and bought by the plaintiffs, who received the deed therefor, and have been in possession since.

"The cestui que trustents under the trust deed were not made parties to either of the foreclosure proceedings. At the reference Mrs. M. M. Clowney testified, under objection of plaintiffs' counsel, that she had no knowledge of any deed to her of the premises; did not know that there was such a deed; that no money passed to her from Mr. Clowney, nor from the mortgage company to her. She did not know that she was the owner of the land, never claimed the land or exercised any acts of ownership over it, and never had anything to do with getting money from plaintiffs. The mortgage was folded down, and she signed where directed. Did not read it, or know what was in it, and could not see from the manner in which it was folded. W. J. Clowney, the trustee, died March 12, 1903, leaving the three last named defendants, his living children. These have answered, the two adults setting up five defenses as follows: 'Under the trust deed the trust was a naked trust, and the statute executed the title in them, and plaintiff has no title.' 'That they not having assented to the mortgage of

W. J. Clowney to Samuel B. Clowney, the same is void for lack of power in the trustee to make. (3) That said bond and mortgage, if valid, has been foreclosed, and the judgment satisfied in full. (4) That the deed of W. J. Clowney, trustee, is void for want of power as a breach of trust of which the grantee had full notice. (5) That the notes and mortgage of M. M. Clowney to plaintiff from the foreclosure of which plaintiff derives title were taken by plaintiff with full notice of the breach of trust on the part of W. J. Clowney, trustee, as aforesaid.' And ask for the recovery of the land, and an accounting by the plaintiffs for the rents and profits thereof since January 1, 1895.

"The trust under the deed of 1877 is not a naked trust. Under the deed the trustee had power to sell. This, under the authorities, is sufficient to prevent the operation of the statute. *Carrigan v. Drake*, 36 S. C. 355, 15 S. E. 339. It is equally clear under the authorities in this state that the power to sell for reinvestment contained in the deed does not include the power to mortgage. As said by McIver, C. J., in *Allen v. Ruddell*, 51 S. C. 366, 29 S. E. 198, such power to sell for reinvestment negatives the power to mortgage; citing *Salinas v. Pearsall*, 24 S. C. 184. But I think the circumstances in relation to the bond and mortgage by W. J. Clowney, trustee, to Samuel B. Clowney, coupled with the fact that there is an entire absence of testimony to show that W. J. Clowney ever had any trust funds in his hands impressed with the trust mentioned in the deed, shows unmistakably that this transaction was the creation of the trust, and the mortgage was given to secure the purchase money, and hence it falls within the principle of *Elliott v. Mackorell*, 19 S. C. 238, and cases there cited. It follows, therefore, that the mortgage was a valid lien upon the premises paramount to the interest of the cestui que trustents.

"The testimony of Mrs. Clowney is competent. It is always competent to show that the consideration expressed in a deed was not in fact paid; and even the grantor may maintain an action to recover it, notwithstanding his deed. 2 Whart. Ev. No. 1042. Besides, the object of the testimony was to show a breach of trust, a fraud upon the beneficiaries under the deed; and the charge of fraud renders competent all testimony necessary to sustain it. *Burch v. Brantley*, 20 S. C. 503. This testimony is uncontradicted, and clearly shows that the transaction evidenced by the deed to Mrs. Clowney to plaintiff was an attempt on the part of the trustees to mortgage the trust property; that the alleged execution of the power of sale for reinvestment was pretentious, and no money ever passed to or was received by the trustee; and I hold the deed is absolutely void. The deed, being void, is a nullity, and carries with it the mortgage of plaintiff and his title under the foreclosure based thereon, for no amount of lack of notice can vitalize a null-

ty. In my view, it is therefore unnecessary to decide the question of notice, for, conceding the plaintiffs to be without notice, the defendants are entitled to all the relief that the equities of the case would warrant. There are no intervening incumbrances. The case is thus: the trust estate is subject to the payment of the Witte judgment. The corpus to which the beneficiaries are entitled is, and never has been more than, the difference between the incumbrance and the value of the land. The plaintiffs lent their money on the faith of the deed of the trustee to Mrs. Clowney, which, as we have seen, is void, and have become the purchasers of the premises under a foreclosure sale based upon a mortgage by Mrs. Clowney, which is also void, because based on the deed.

"The testimony shows that \$1,922.50 of the money lent was applied in extinguishment of the paramount lien. This, I think, brings the case within the principles of *Farr v. Sims*, Rich. Eq. Cas. 133, 24 Am. Dec. 396, wherein it is said: 'That, although a third person should not be punished for the fraud of another, he shall not avail himself of it . . . by setting up his purchase under a fraudulent sale to the detriment of the complainant.' And of *Hunter v. Hunter*, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663, where says the court: 'The doctrine of subrogation as applicable to this case rests upon the principles that where persons have in good faith bought the lands of decedent, and it turns out that the sale is void for want of authority to make it, then as a matter of equity and good conscience those who have purchased the property have a right to retain the property until the amount of the purchase money paid by them which has been applied to the removal of burdens resting on such property shall be refunded to such purchasers.' Therefore, plaintiffs cannot maintain their title acquired at this sale against the defendants, but are entitled to be subrogated to the Witte judgment to the extent of \$1,922.50, the amount of their money, the testimony shows, was applied in extinguishment of it.

"The plaintiffs have been in possession of the land under their purchase under the foreclosure of their mortgage, which, as we have seen, is void, and are accountable for the rents and profits received by them from the land since their occupancy. A statement of rents, taxes, and insurance received and paid by the plaintiffs is in evidence, and there is also some testimony tending to show that they have cut and sold timber from the land during their occupancy, which may amount to waste, and, if so, should be accounted for. The case therefore will be referred back to the referee, to take testimony and state the account between plaintiff and defendants, and to report the amount, if any, and to whom the same is due.

"It is therefore ordered, adjudged, and decreed that the defendants are entitled to

recover the possession of the premises described in the complaint from the plaintiffs upon the payment to them of the amount that may be found to be due to them upon the statement of account herein ordered. Further ordered, that it be referred to J. G. McCants, Esq., as referee, to take the testimony and state the account between the plaintiff and defendants, under the principles announced in *Givens v. Carroll*, 40 S. C. 414, 18 S. E. 1030, 42 Am. St. Rep. 889, charging the defendants with the sum of \$1,922.50 as of November 5, 1894, the date of the deed from Jennings; and upon the coming in of his report either party has leave to apply to the court for such further orders as may be necessary to carry this decree into effect. The costs of this action to be paid by plaintiff."

A. C. Douglass and W. D. Douglass, for plaintiff. Buchanan & Hannahan and J. E. McDonald, for defendants.

GARY, A. J. The facts of this case are fully stated in the decree of his honor the special judge, which will be set out in the report of the case. This court is satisfied with the conclusions announced in the circuit decree, except that in the matter of the \$1,922.50 applied to the extinguishment of the judgment of Witte against Clowney, the interest should be calculated from the 27th of January, as the record shows that the money was applied to the satisfaction of the judgment on that day, instead of the time mentioned in the decree. The reasons for our concurrence are, however, not the same in all respects as those upon which the special judge bases his conclusions, as will hereinafter be shown.

The pleadings raise the question whether the plaintiff was a purchaser of the land for valuable consideration without notice of such facts as rendered its title null and void. A plaintiff as well as a defendant may assert this right. *McGee v. Jones*, 34 S. C. 146, 13 S. E. 326. The circuit judge finds as a fact that the transaction evidenced by the deed to Mrs. Clowney and the mortgage to the plaintiff was an attempt on the part of the trustee to mortgage the trust property, and that the alleged execution of the power of sale for reinvestment was pretentious, and no money was received by the trustee. After thus finding, he says: "I hold the deed is absolutely void. The deed, being void, is a nullity, and carries with it the mortgage of plaintiff and his title under the foreclosure based thereon, for no amount of lack of notice can vitalize a nullity. In my view, it is therefore unnecessary to decide the question of notice, for, conceding the plaintiffs to be without notice, the defendants are entitled to all the relief that the equities of the case would warrant. There are no intervening incumbrances." The first exception assigns error in the ruling that the deed to Mrs. Clow-

ney was absolutely void, and as a nullity carries with it the plaintiff's mortgage and the title based thereon under the foreclosure proceedings. The authorities cited in the argument of the plaintiff's attorneys fully sustain the position that the deed was not absolutely void, but only voidable. This exception should be sustained.

The third exception assigns error in not finding that the plaintiff did not have notice of any breach of trust on the part of the trustee or Mrs. Clowney, which affected the validity of the deed executed by the trustee to Mrs. Clowney. The defendant's attorneys served notice that they would ask this court to sustain the decree in this respect upon the additional ground "that it was contrary to the law and public policy, and a breach of trust on the part of Wm. J. Clowney, trustee, to execute a deed of trust property to his wife, the said Margaret M. Clowney, of all of which facts the plaintiff had notice before and at the time of taking its mortgage from the said Margaret M. Clowney.

The plaintiff's attorneys contended that the deed of W. J. Clowney, trustee to Margaret M. Clowney, does not show on its face that the grantee was the wife of the grantor, and the fact that she was his wife cannot affect plaintiff's rights as a mortgagee or purchaser for valuable consideration without notice. It is, however, a fair and reasonable inference from the testimony that H. A. Gaillard, the plaintiff's attorney, had notice that Mrs. Clowney was the wife of the trustee, especially as it appears in the record that he was a subscribing witness to the execution of this deed. Knowledge of this fact on the part of the attorney is attributed as notice to his principal, the plaintiff herein. *Blackwell v. Mortgage Co.*, 65 S. C. 105, 43 S. E. 395. We are thus squarely confronted with the solution of the proposition whether the conveyance of the land by the trustee to his wife was in itself a breach of trust which public policy demands should have the effect of rendering the transaction voidable. The authorities are in accord as to the general principle that a trustee cannot buy at his own sale. The doctrine, with its limitations, is clearly stated in *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 176. The court says: "It is a well-established principle that a trustee cannot buy at his own sale. He cannot be vendor and vendee at the same time of trust property; that is, he cannot make a binding contract with himself in the purchase of the trust property under his control. On the contrary, all such purchases are subject to be vacated and set aside by the cestui que trust at his option, and this, too, without regard to the fact whether such purchase was made in good faith, at full price, or was fraudulent and delusive. This doctrine has been long settled, both in England and in this country, and it is a wise and wholesome principle. It strikes at once at the root of danger, and de-

stroys it. It removes from the trustee the temptation to do wrong, and guarantees the faithful execution of his trust in the sale of the property of his cestui que trust." Does a sale by the trustee to his wife of the trust property come within the spirit of this principle, which strikes at the root of danger, and removes the trustee from temptation to sell the property in such a manner that he will thereby receive a benefit either directly or indirectly? The husband and the wife sustain towards each other a highly confidential and fiduciary relation; and transactions between them are to be scrutinized with great jealousy, especially when it is made to appear that advantage was taken of the wife. *Way v. Ins. Co.*, 61 S. C. 501, 39 S. E. 742. So sacred is this relation that acts which would be champertous between third parties are not violative of law as between husband and wife. In *Ex parte Eilers*, 67 S. C. 108, 45 S. E. 140, this question of champerty was considered, and this court said: "In many respects the husband and wife are still regarded as one in law. It would be against public policy for the courts to hold that when a dutiful and confiding wife renders her husband financial aid in securing those rights accorded to him by law she should be held to be guilty of champerty." As a rule, the husband expects and realizes a pecuniary benefit either directly or indirectly from property acquired by the wife. This question as to the right of the trustee to sell the trust property to his wife, although new in our state, has been adjudicated elsewhere. In *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 Atl. 52, 19 Am. St. Rep. 435, it was held that, where a trustee sells the trust estate to one who, by previous agreement, purchases for the wife of the trustee, the sale will be set aside on the application of a cestui que trust; nor is evidence that the sale was fair and for the best price obtainable admissible. Also, that where a husband sells as trustee his wife is excluded from purchasing at the sale directly from him. If she desires to become a purchaser, she must apply to the court, and obtain an order that the sale be conducted by and under the supervision of a master. The court says: "The exclusion of the wife as a purchaser where the husband sells as a trustee is not so much for the reason that he may subsequently become entitled to some interest in her lands as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself." The court quotes as follows from the case of *Romaine v. Hendrickson's Ex'rs*, 27 N. J. Eq. 162: "So jealous is the law of the interest of the cestui que trust that it will not tolerate the slightest antagonism on the part of the trustee. The object of the rule is to prevent the trustee from using his information and power to the prejudice of the cestui que trust." See, also, *Davoue v. Fanning*, 2

Johns. Ch. 252; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076; and 1 Perry on Trusts, § 195. This doctrine, so wholesome in its nature, grows out of the principles of equity, and is not affected by the laws of our state relating to the rights and powers of married women. We are the more willing to apply these principles to the case under consideration, as the effect is to bring about substantial justice to all parties concerned. The sale made in breach of the trust is thus avoided, and the plaintiff is enabled to get back its loan, with interest.

It is the judgment of this court that the judgment of the circuit court be affirmed, except in the particular hereinbefore mentioned, and that it be modified in that respect.

(70 S. C. 242)

MORROW v. GAFFNEY MFG. CO.

(Supreme Court of South Carolina. Nov. 24, 1904.)

INJURY TO EMPLOYÉ—PLEADING—AMENDMENT—EVIDENCE—NONSUIT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. An amendment of a complaint in an action for personal injuries, alleging the acts to have been done willfully and maliciously, is admissible under Code Civ. Proc. 1902, § 194, allowing amendments "by inserting other allegations material to the case."

2. The question put by plaintiff's counsel to plaintiff as to whether, if he did not obey his employer, he would be turned off and kicked out, though objectionable to the nice proprieties of the court, was not prejudicial to defendant.

3. Where, in an action by a minor, he is permitted to testify as to his financial condition and that of his father, as well as to the number and ages of his brothers and sisters, like evidence by the father of plaintiff is admissible.

4. Where plaintiff, a child, in an action for personal injuries, is of weak mind, and had testified what his wages were, and defendant had testified that servants of his class received less pay in the mill, what servants of his class generally receive may be shown.

5. In order to locate objects in the room in question, a photograph of another room may be used by a witness.

6. Evidence as to whether a witness could have seen an object at a certain time in a certain place is inadmissible as opinion evidence.

7. Where there is some material evidence supporting plaintiff's case, a nonsuit was properly refused.

8. Where the evidence was conflicting as to whether plaintiff was of sufficient mental capacity to be guilty of contributory negligence, the question was for the jury.

9. One who attempts work exposing him to an obvious danger, though he may not appreciate the whole of it, assumes the risk if it is ordinarily incident to the employment.

10. Where a servant fails to comply with the rules of the master, of which he has knowledge, and such failure is the proximate cause of his injury, he is guilty of contributory negligence.

Appeal from Common Pleas Circuit Court of Cherokee County; James P. Carey, Special Judge.

Action by George Nicholls Morrow, by guardian ad litem, against the Gaffney Manufacturing Company. From judgment for plaintiff, defendant appeals. Affirmed.

P. H. O. Cabell and J. C. Jeffries, for appellant. Evans & Finley and Butler & Osborne, for respondent.

POPE, C. J. The plaintiff brings suit to recover \$15,000 damages for a personal injury from defendant. Both compensatory and exemplary damages are alleged. Trial had before Judge Dantzler and a jury. Verdict for \$6,000 was rendered in favor of plaintiff. A motion for a new trial was denied. After entry of judgment, defendant appealed on the following grounds:

"(1) Because his honor erred in allowing the complaint amended by inserting therein the proposed amendment, which was as follows: '(9) That the defendant company, through its agent, Patterson, plaintiff's boss, willfully, wantonly, recklessly, and negligently ordered the plaintiff to clean off the spinning frame, stating that it was standing, while the said Patterson knew or should have known said frame was not standing, but that the cylinder therein was revolving, and plaintiff, having explicit confidence in the word and intelligence of said Patterson, not knowing that said cylinder was running and [proceeded to clean the same], without any warning of the extra hazard being given by defendant or its agents, by reason whereof the right hand of the plaintiff was caught in said revolving cylinder and the fingers thereof mashed and lacerated and torn off, so that it was necessary to amputate all of them on said hand, causing him great pain, suffering, and mental anguish, to his great damage in the sum of \$15,000.' The error complained of being that the said amendment was a new cause of action, and one that was totally and wholly inconsistent and contradictory to the previous allegations of the complaint."

The "case" shows that a motion to amend, together with a copy of paragraph 9, was duly served upon the defendant before the trial, and that such motion to amend was called up and heard before the action was called for trial. A comparison of the original complaint and the proposed amendment shows that both grew out of the alleged injury of the plaintiff by the defendant; all the allegations show that plaintiff had his hand crushed in a machine operated in defendant's factory on or about the 14th March, 1902, while plaintiff was in the employment of the defendant and under the direction of its officers. Section 194 of our Code of Civil Procedure of 1902 authorizes the circuit judge to allow amendments "by inserting other allegations material to the case." We are satisfied that there was no error as here complained of. The act of 1898, now em-

¶ 9. See Master and Servant, vol. 34, Cent. Dig. §§ 550, 510-524.

bodied in section 186 of our Code, is in point. This exception is overruled.

"(2) Because his honor erred in not requiring plaintiff's counsel to examine witness George Nicholls Morrow in proper manner, and to instruct counsel not to make such remarks as 'and kicked you out.' The error complained of being that the tendency of such remarks was to prejudice the defendant's case with the jury."

An examination of the "case" for appeal will show, we think, this ground of appeal suggests too serious a view of the language of counsel for respondent. Here is the connection in which the language occurred, as well as a quotation of the exact language complained of. The plaintiff was being examined by his counsel: "Georgie, to whom did you look for your orders? Witness: To Mr. Patterson. Q. Mr. Patterson? A. Yes, sir. Q. Were you required to do what Mr. Patterson said? A. Yes, sir. Q. If you didn't do what Mr. Patterson said, Georgie, what would be the result? A. Turned you off. Q. Turned you off and kicked you out? A. Yes, sir." Then defendant's counsel objected to such remarks. The court merely said, "Proceed with the examination, gentlemen, and let the witness answer." Of course, the question of counsel, "and kicked you out," was objectionable to the nice propriety usually characterizing counsel in their examination of witnesses in court, but no injury was wrought to the defendant. This being the case, we cannot sustain the exceptions. It is overruled.

"(3) Because his honor erred in allowing, over the objection of appellant's attorneys, the following question: 'Georgie, don't you know he is a poor man?' meaning Georgie's father. The error complained of being that such question was not relative to any of the issues by the pleadings, was not a competent question, and was leading.

"(4) Because his honor erred in allowing the witness Morrow, the father of the plaintiff, to testify as to his financial condition, over the objection of appellant's counsel, to the following questions: 'State, Mr. Morrow, what are your circumstances as to the property, ownership of land, or anything like that.' 'Well, state your condition, Mr. Morrow, as to this world's goods.' The error complained of being that the financial condition of the father of this boy was incompetent and irrelevant to the issues raised in the pleadings, and would tend to prejudice the case in favor of the plaintiff against the defendant.

"(5) Because the court allowed the witness Morrow, the father of the plaintiff in this action, to testify, over the objection of the appellant's attorney, to the following questions: 'Those children, the ages of them, Mr. Morrow?' (meaning witness' children). The error complained of being that the family of the witness outside of the plaintiff,

the number and ages, had nothing to do with the issues raised in this pleading, and that allowing such matters brought out in form of evidence, in connection with the witness' poverty, tended to bias the defendant's case before the jury."

We will presently copy what testimony the plaintiff was allowed without objection to give. The plaintiff was a poor boy—a minor; hence, when he testified as to his own circumstances, those of his father and sisters and brothers that he was helping to support, without objection from the defendant, there was presented an issue that made his father's testimony on that line competent. Here is the plaintiff's testimony: "Q. Have you had to work, in addition to what your father gives you, for support? A. Yes, sir. Q. You do? A. Yes, sir. Q. Is your father a wealthy man, or is he a man of very moderate means—poor man—is he a poor man or rich man? A. He is sorter poor man. Q. Georgie, don't you know he is a poor man? Mr. Jeffries: Your honor, I do not think that is proper evidence. The Court: I think it is relative to the issues. Mr. Evans: Well, sir, are you dependent for your living— Witness: Yes, sir. Q. —For what you work for and what your father works for? A. Yes, sir. Q. Your father does what? A. Weaves. Q. He weaves down in the mill here? A. Glendale. Q. He does not own any land, does he? A. No, sir. Q. So you had to work for your living? A. Yes, sir. Q. With your hand? A. Yes, sir. Q. In the mill? A. Yes, sir. Q. And that is all you have got, isn't it? A. Yes, sir. Q. Well, Georgie, have you ever had any education? A. No, sir. Q. Have you gone to school much? A. No, sir. Q. You have had to work— A. Yes, sir. Q. —Instead of going to school? A. Yes, sir. Q. Is that it? A. Yes, sir. Q. Have you any brothers and sisters? A. Yes, sir. Q. How many? Can't you name them, Georgie? Now, how many have you got? A. Got five. Q. Got five? A. Yes, sir. Q. Yes, sir; how many older than you, and how many younger than you? A. I have got a sister older than I am— Q. That is all? A. Yes, sir. Q. All the rest younger than you? A. Yes, sir. Q. What is the age of the youngest one, Georgie? Mr. Jeffries: May it please your honor, that is not a proper way to question the witness. The Court: I do not see what the size of the family has to do with it. Mr. Evans: I want to show that it is a poor family, and he had to contribute to the support of the family. The Court: Well, I have allowed you to go to that extent. Mr. Evans (to witness): Where did your wages go? To support yourself and to help your parents and your brothers and sisters? Witness: Yes, sir. Q. Are you able to earn as much now as you did then, Georgie? A. No, sir." Under these circumstances, the testimony was not improperly given. These exceptions are overruled.

"(6) Because his honor erred in allowing the witness Morrow, father of the plaintiff, to testify to the following question, over the objection of appellant's counsel: 'Mr. Morrow, you are a man that has been working in the mill yourself—do you know the wages generally paid to sweepers?' The error complained of being: (a) That it was only competent to show what the plaintiff in this action was getting as a sweeper, unless it could be shown that he was getting the same as ordinary sweepers, and such evidence was never adduced. (b) Error because such testimony tended to contradict the plaintiff, who himself testified that he was getting fifty cents a day."

The mind of the young man was not considered very bright. He had spoken in his testimony of receiving 50 cents as a sweeper. Under the circumstances, it was legitimate to ask such questions to test this condition of his mind. A witness for the defendant testified that wages for a sweeper was from 25 to 35 cents a day. From this standpoint the testimony was not objectionable, and this exception is overruled.

Seventh and eighth exceptions:

"(7) Because his honor erred in allowing the appellant's witness Brannard Good to explain, over appellant's objection, the arrangement of spinning room from a photograph other than the one of the place in which plaintiff was injured. The error complained of being that there was no proof showing that the arrangement of the machinery was similar to that in the room in which plaintiff was injured."

We have examined with care the testimony relating to a spinning room in a factory. Great care was taken to explain that the photograph was not the picture of defendant's spinning room. The circuit judge said: "I will admit the testimony as a picture that the witness might go down there and draw himself. I simply admit it as a demonstration made by the witness himself. You may except to that ruling if you want to." The witness merely pointed out the location of objects with reference as to windows, etc. This exception is overruled.

"(8) Because his honor erred in overruling plaintiff's question to Geo. Smith, which was as follows: 'By taking down the lids of that machine that day, what could you have seen?' The error complained of being: (a) That the question propounded to witness was directly in reply to testimony brought out by plaintiff that he could not see the wheels of the machinery on account of the darkness of the day. (b) That it was competent for the witness to testify that he could have seen, if anything, by taking down the lids of the machinery."

An examination of the testimony fails to disclose such alleged error. The exception is overruled.

"(10) Because his honor erred in overruling the question asked by the defendant's attorney of defendant's witness John Graham, which was as follows: 'Now, under the condition of light in that room that day, could you have told whether the wheels in a frame were revolving, or a wheel seven inches in diameter was revolving, placed in same conditions?' (the witness having previously testified that he had been through that room that day). The error complained of being that this was directly in reply, and upon the knowledge of the witness of the condition of the weather that day, on which he would be entitled to give his opinion."

The circuit judge had to avoid the expression of opinions from witnesses who were not experts. He did right in this matter. Exception is overruled.

Eleventh and twelfth exceptions: These exceptions relate to the refusal of his honor to grant a nonsuit. We have examined the testimony, and find some testimony on material points in plaintiff's case. Hence no error. Exceptions are overruled.

"(13) Because his honor erred in charging the jury as follows: 'That it is for you to say, under all the testimony, whether the plaintiff in this case had sufficient age, intelligence, and capacity to render him guilty of contributory negligence.' The error complained of being, it is respectfully submitted to this court, that, from the evidence adduced of the knowledge and experience the plaintiff had in the work he had been engaged in, the jury had a right to assume that he had sufficient capacity and intelligence to render him guilty of contributory negligence, without having to pass on that point."

Both sides had offered testimony bearing upon this issue. Such testimony was for the jury, and not the judge, to pass upon. This exception is overruled.

"(14) Because his honor erred in charging the jury as follows: 'Now he [meaning the servant] does not assume the risk of working with dangerous machinery or with machinery that was not kept in repair, because the law says that he has a right to expect the employer to furnish him with suitable machinery, and to keep that machinery in repair.' The error complained of being: (a) That there is no allegation of defective machinery in the complaint. (b) That there is no allegation in the complaint of the machinery being out of repair. (c) That such charge is practically on the facts that the machinery was out of repair, and this especially in connection with that portion of the charge explanatory of appellant's first request to charge, which was as follows: 'One who attempts to do work which exposes him to an obvious and appreciated danger, even though he should not appreciate the whole extent of the danger, assumes the risk of injury. However his knowledge may have been acquired, there is no obligation upon the employer to give the workman warning of a

known danger.' I charge you that, gentlemen, adding the words, "risks ordinarily incident to the employment," as I have already explained to you in my general charge.'"

We cannot see how the charge, which embodies a correct principle of law, could have injured the defendant. The general charge of the circuit judge very admirably and ably presented the law. This exception is overruled.

"(15) Because his honor erred in charging appellant's second and third requests, which were as follows: '(2) It is the duty of the servant to obey reasonable rules adopted by the master for his benefit and protection, and, if injured while acting in violation thereof, this will constitute such contributory negligence as to bar recovery, if the observance of the rules would have prevented the injury. (3) If a servant is conscious of the dangers, the fact that he for a moment forgets their existence and thereby sustains an injury will not make the master liable'—by adding the following: 'I charge you that. I charge you the other one which I have just read, with the qualification which I have just given in my general charge as to contributory negligence; that is, as to whether the boy in this case was capable of being guilty of contributory negligence, and whether the contributory negligence operated or contributed as a proximate cause to the injury.' The error complained of being that, with the knowledge the appellant had of respondent's experience and work in the line in which he was engaged, it had a right to assume that he was capable and had sufficient intelligence to do his work, and that it was improper to submit the question of capacity of contributory negligence to the jury."

We think the circuit judge committed no error where he attempted to charge the law governing this branch of this case, for if the plaintiff was too weak-minded to know what he was doing as a moral or intellectual being, of course he was not amenable to the law relating to contributory negligence. Both plaintiff's and defendant's testimony was before the jury. It was the province of

the jury to pass upon this issue. The circuit judge was anxious that his charge should not only be full, but also just. We therefore fail to find error, as here complained of. This exception is overruled.

"(16) Because his honor erred in submitting to the jury the capacity of respondent to be guilty of contributory negligence, in modifying appellant's sixth request to charge, which was as follows: 'In an action to recover, if the plaintiff knew or had been told about the rules which, if he had followed in the performance of his duties, he would not have been injured, but acts in violation of such rules and is injured by not obeying the same, he cannot recover'—by adding the words: 'If the plaintiff was of sufficient age, intelligence, and discretion to be guilty of contributory negligence.' The error complained of being: (a) That in failing to comply with the rules, and going contrary thereto, would not be a case of contributory negligence. (b) That if it was contributory negligence, that the proof of experience and knowledge that this plaintiff had in the business in which he was engaged, it was wrong to submit to the jury the question of his capacity of being guilty of contributory negligence."

This exception is unjust, unintentionally, of course, to the circuit judge. The whole charge shows very plainly that the circuit judge relied upon his previous definition of contributory negligence in his general charge, in which he had quoted the exact language of this court in the case of *Rosemand v. Railroad*, 66 S. C. 91, 44 S. E. 574. Therefore, if a lad knew the rules of the defendant and failed to comply therewith, and such failure to comply with such rules was a proximate cause of his injury, he would be guilty of contributory negligence. It was not error to submit an issuable fact to the jury, as we have before remarked.

It is the judgment of this court that the judgment of the circuit court be, and the same is, affirmed.

WOODS, J., concurs in the result.

(108 Va. 437)

VIRGINIA PORTLAND CEMENT CO. v. LUCK'S ADM'R.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

DEATH OF SERVANT — ACTION — DECLARATION — SUFFICIENCY AS AGAINST DEMURRER — INSTRUCTIONS — REVIEW — CARE REQUIRED OF MASTER — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY.

1. Where, in an action for the death of a servant, each count of the declaration alleged that defendant had failed to perform the duty which it owed to deceased to keep its premises in reasonably safe repair, stating in what respect the duty existed, and wherein defendant had failed to perform it, and either charged that defendant had notice of the unsafe condition, or set out facts from which it was necessarily to be inferred that defendant was aware of the condition, and in all the counts it was alleged that deceased was without fault, the declaration and each count were sufficient as against a demurrer.

2. The correctness of an instruction is to be determined on appeal by taking it in connection with the other instructions given.

3. Where a servant is employed in working outside of the regular line of his employment under the direction of the master, greater care is required of the master toward the servant than if the servant had been working in his regular employment.

4. A servant, employed in trucking cement in a factory, on coming to a place in the floor where a large screw revolved in a trough, which was not covered, saw a board which seemed to fit the opening, and laid it on the same, but when passing over the board it slipped, and the servant was injured by his foot passing into the screw. *Held*, in an action for the death of the servant from the injury, that the fact that a hammer and nails were lying close by the opening, with which the board might have been nailed down, was a circumstance to be considered in determining whether deceased was guilty of contributory negligence.

5. Where a servant was injured by his foot passing into an open trough in the floor in which a large screw was revolving, *held*, that the question of the servant's contributory negligence was one for the jury.

Keith, P., dissenting.

Appeal from Circuit Court, Augusta County.

Action by the administrator of William Luck, deceased, against the Virginia Portland Cement Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following are the instructions referred to in the opinion:

"Defendant's Bill of Exception No. 1.

"Be it remembered, that on the trial of this cause the plaintiff asked the court to give the following instructions:

"Instruction for Plaintiff No. 1.

"The court instructs the jury that it was the duty of the defendant company to use all reasonable care to provide and maintain suitable structures, instrumentalities, machinery, and appliances, and not to expose its employes to risks beyond those incident to the employment, and not to expose them to risks beyond those risks in con-

49 S.E.—37

templation at the time of the contract of service; and its employes had the right to presume that these duties had been performed; and for injuries to its employes resulting from a breach of this duty the defendant company is liable in damages. And if the jury believe from the evidence in this case that the breach of this duty of the defendant company was the proximate cause of the injuries that resulted in the death of William Luck while in the employment of the said defendant company, then the said company is liable in damages in this cause. N. & W. R. R. Co. v. Ampey, 93 Va. 117, 25 S. E. 226, and authorities cited.

"Instruction for Plaintiff No. 2.

"The court instructs the jury that, although they may believe from the evidence in this case that William Luck knew that the passageway on the premises of the defendant company, under which the conveyancer that did the mischief ran, and that this conveyancer had been exposed by the company for the purpose of unclogging it, and that this passageway was on that account in an unsafe condition, yet, if they believe from the evidence that the danger occasioned thereby was not so imminent that a reasonably prudent man would not have attempted to go over it as William Luck did in doing the work that he was directed to do by the defendant company, and further believe from the evidence that the use of the said passageway by Luck in doing the work that he was directed to do by the defendant company was natural and necessary, and that said Luck in going along said passageway and over the said conveyancer used such reasonable precaution as a reasonably prudent man would have exercised in so doing, and was injured, and from which injuries he died, then the plaintiff is entitled to recover damages in this case. N. & W. R. R. Co. v. Ampey, 93 Va. 117, 25 S. E. 226, and authorities cited.

"Instruction for Plaintiff No. 3.

"The court instructs the jury that William Luck is presumed to have exercised due and proper care at the time he was injured; and the burden of proving that he was negligent is upon the defendant, unless such negligence appears from the plaintiff's evidence.

"Instruction for Plaintiff No. 4.

"The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover, that then, in ascertaining and fixing the damages in this case, they should find the same with reference—

"First. To the pecuniary loss sustained by Mrs. Minnie Luck, widow of Wm. Luck, deceased, and her child, by the death of Wm. Luck, fixing the sum at such sum as would be equal to the probable earnings of the said Wm. Luck, taking into consideration the age, business capacity, experience, habits, energy,

and perseverance of the deceased, during the lifetime of the said Mrs. Minnie Luck and child, if he had not been killed.

"Second. By adding thereto compensation for the loss of his care, attention and society to his wife and child; and

"Third. By adding such further sum as they may deem fair and just by way of solace and comfort to his said widow and child for the sorrow and suffering and mental anguish occasioned to them by his death."

"Instruction for Defendant No. 1.

"The court instructs the jury that the burden of proving his case is upon the plaintiff, and that he must prove it by a preponderance of evidence in order to entitle him to a recovery.

"Instruction for Defendant No. 2.

"The court instructs the jury that, even though they may believe from the evidence that the defendant was guilty of negligence, yet if they shall further believe from the evidence that the injury to the plaintiff's intestate was the proximate result of his own negligence, he cannot recover. *Sexton & Houston v. Turner*, 89 Va. 841, 15 S. E. 862.

"Instruction for Defendant No. 3.

"The court instructs the jury that contributory negligence on the part of an employé injured through the employer's negligence is the want of ordinary care and prudence without which the injury would not have occurred; and that, if the jury shall believe from the evidence that the plaintiff's intestate, Luck, was guilty of contributory negligence in running the truck over the conveyor at the time of the accident, then the plaintiff cannot recover. 7 Am. & Eng. Encyc. Law, 371, note 3.

"Instruction for Defendant No. 4.

"The court instructs the jury that where a person voluntarily enters the service of another he assumes all the risk usually incident to such employment, and is presumed to have contracted with respect thereto. And if the jury believe from the evidence that the risk in this case was of this character, and that it was open and obvious, the plaintiff is not entitled to recover and the jury must find for the defendant. *Big Stone Gap Iro. Co. v. Ketron* (Va.) 45 S. E. 741.

"Instruction for Defendant No. 5.

"The court instructs the jury that where an employé is confronted with two methods of performing work, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method, and any departure from the path of safety will prevent his recovery in the event he is injured. So that if the jury shall believe from the evidence that it was safe for the plaintiff's in-

testate to wheel his truck over the covering across the conveyor, and that it was unsafe for him to lay down a board across the conveyor and wheel his truck over said board, and that the plaintiff's intestate adopted the latter course, and was thereby injured, then the plaintiff cannot recover. *Street's Adm'r v. N. & W. Ry. Co.* (Va.) 45 S. E. 284.

"Instruction for Defendant No. 6.

"The court instructs the jury that an employé who knows the unsafe condition of the place in which he is working is not compelled to continue the work; but, if he does continue it, without exercising ordinary prudence and care for his own safety, then he must be held to have assumed not only the risks ordinarily incident to the service when he entered upon it, but such as became known to him during the progress of the work, or which were readily discernible to a person of his age and capacity in the exercise of ordinary care. So that, if the jury shall believe from the evidence that the plaintiff's intestate knew of the unsafe condition of the conveyor, then he was not compelled to continue his work about said conveyor; and if they shall believe that, so knowing, he continued his work without ordinary prudence and care for his own safety, then he assumed not only the risks incident to his work there, but also the risks which became known to him during the progress of his work or which were readily discernible to a person of his age and capacity in the exercise of ordinary care. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Ches., etc., v. Sparrow*, 96 Va. 644, 37 S. E. 302, and cases cited.

"Instruction for Defendant No. 7.

"The court instructs the jury that if they shall believe from the evidence that the plaintiff's intestate, William Luck, was in the employment of the defendant as a teamster on the yard, and that his duties as such did not require him to truck cement across the conveyor, but that the trucking by him of cement across the conveyor was a voluntary act on his part, and if they shall further believe from the evidence that while engaged in the performance of such voluntary act he received the injury complained of, then the plaintiff cannot recover, and the jury must find for the defendant. *Shen. Val. R. R. v. Lucado's Adm'r*, 86 Va. 390, 10 S. E. 422; *Va. Mid. R. R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175.

"Instruction for Defendant No. 8.

"The court instructs the jury that, where the employé's own voluntary act has placed him in perilous position, he must, in general, bear the consequence of his own recklessness or negligence. And if the jury shall believe from the evidence that the plaintiff's intestate, knowing the open conveyor to be a dangerous place, voluntarily undertook to pass over it on a temporary passway constructed

by himself, and in consequence was injured, and died from such injury, then the plaintiff is not entitled to recover. *Watson on Damages*, 107."

Patrick & Gordon, for appellant. Curry & Glenn and Brayton & Wayt, for appellee.

CARDWELL, J. The administrator of William Luck, deceased, brought this action in the circuit court of Augusta county to recover damages of the Virginia Portland Cement Company for the death of the deceased, caused, as alleged, by the negligence of the defendant.

The action is predicated on the negligence of the defendant in keeping in unsafe repair its premises where the deceased, in the discharge of his duties, was required to work, the specific negligence alleged being the failure of the defendant to keep sufficiently covered up and protected a conveyor which crossed a passageway over and along which the deceased, on the occasion of the injuries from which he died, was required to work. At the trial the plaintiff recovered a verdict and judgment for \$6,000, and this judgment is before us for review upon a writ of error awarded the defendant.

The declaration contains four counts. In the first it is clearly stated that the defendant company knowingly, etc., failed and neglected to keep said conveyor securely covered so as to furnish a reasonably safe and proper place for the plaintiff's intestate to work, and that the said intestate exercised due and proper care, and was wholly without fault or neglect on his part. The second count states that the defendant company tore up the covering over the conveyor, and the company itself, having put the conveyor in that condition, left it open and in a dangerous condition until after the accident to the deceased. In the third count, as in the first and second, the business conducted by the defendant is stated; that in the conduct of its business the defendant used a conveyor, which is described; that the deceased was engaged in trucking cement across the conveyor; that it was the duty of the defendant to provide a safe place for the deceased to work in handling the cement, etc.; and it is charged that the company was notified of the condition of the conveyor, and that it promised to put it in proper condition, and failed to do so, etc. And in the fourth count the allegations as to the business conducted by the defendant are repeated, and it is averred that the company knew of the unsafe condition of the conveyor, and failed to put it in repair, etc., in consequence of which the deceased received the injuries from which he died. So that in each of the counts it is alleged that the company had failed to perform the duty which it owed to the deceased to keep its premises in reasonably safe repair, stating in what respect the duty existed, and where in the company had failed to perform the

duty, and either charges that the company had notice of the unsafe condition of its premises in the respect stated, or sets out such facts from which it necessarily was to be inferred that the company was aware of the unsafe condition of its premises in the particulars stated in the several counts, and in all of which it is averred, though unnecessarily, that the deceased was without fault in the premises.

We are of opinion that the declaration and each count thereof was sufficient to inform the defendant of the nature of the demand made upon it; states sufficient facts to enable the court to say upon demurrer, if the facts stated were proved, whether the plaintiff would be entitled to recover; and therefore the demurrer to the declaration was properly overruled. *Hortenstein v. Va.-Car. Ry. Co.*, 102 Va. 914, 47 S. E. 996.

The circumstances under which the deceased received the injuries from which he died are as follows: The defendant company is engaged in the manufacture of cement in the county of Augusta, and in its business it is necessary to use a large amount of machinery and employ a large number of men, some of the machinery used being of a more or less dangerous character. The plant is organized into different departments, and a separate force of men are employed in these several departments, though it seems that they are not required to work in and confine themselves to the departments in which they are employed. One department is known as the "operating department," another as the "construction department," and there are several others; but it is only necessary to refer to the two departments named in this opinion.

In the operating department the cement is manufactured, and in this department is what is known as the "stockhouse," in which the cement is packed in bags and barrels for shipment. The construction department has charge of the work of making the roads, constructing buildings, and other things necessary to equip the plant and keep it in working order. The stockhouse referred to is a large building, about 250x250 feet, in which there are a number of large bins for storing cement, and in the center is a space in which the cement is handled. At either end of this building, between the bins and the outer walls, runs a passageway 4 or 4½ feet wide, and across the building at either end, at the inner line of this passageway, about 4 or 4½ feet from the outer wall, runs a large screw, about 9 inches in circumference, and known as a "conveyor." The screw runs in a trough about 14 inches square on the outside and 10 inches on the inside, and its motive power is obtained from a room in the stockhouse known as the "motor room." The cement and plaster is put in this 10-inch trough from the bins and from other openings along and over the screw, and the revolutions of the screw convey it from one

point to another in the house. Between the motor room referred to and one of the bins, numbered 13, is a space from 4 to 6 feet 2 inches (as variously stated in the testimony) wide. In passing from the center of the stockhouse through this space into the 4 or 4½ foot passageway at that end of the house, from which the cement is loaded onto a wagon at the door, the conveyor has to be crossed. The conveyor is covered by boards nailed down flush with the floor of the building, but it is necessary frequently to take up sections of this covering to get at the conveyor in order to repair it, as it is very frequently clogged up, and often prizes up the covering over it, and when it becomes choked it is often relieved by putting plaster in the cement, as some forms of cement require a mixture of plaster. On the day before the accident out of which this suit arises about 14 inches in length of the covering of the conveyor had been removed in the passageway between the motor room and bin No. 13 in order to repair the conveyor by putting in at that point what is known as a "hanger," and the conveyor was thus left exposed until after the accident on the following day.

Among other employes engaged in the stockhouse are men whose business it is to carry various materials—cement, plaster, etc.—from one point to another in the house on hand trucks, which are from 20 to 24 inches wide.

The deceased, William Luck, was a teamster on the yard of the defendant company, in charge of a two-horse wagon and team, and was assisted by one Samuel Webb in connection with the construction department. His duty was to haul the materials of various sorts used in that department. The foreman of the company over the deceased was a Mr. Teabo, and on the occasion of this accident one Cooper Irving was in charge of a gang of hands making cement work on the yard of the company. The deceased had general orders from Teabo to always go and haul cement from the stockhouse whenever called on to do so by Irving or the person in charge of the concrete work, and Irving had, just prior to this accident, put in an order with the boss of the stockhouse, Clifton, for a large amount of cement, and it was the deceased's duty, with his team, to haul it to Irving as needed.

On the morning of the accident the deceased and his helper, Webb, had been hauling staves on the yard, and had finished hauling staves between 11 and 12 o'clock. When they finished Irving said to the deceased that he wanted 10 sacks of cement as quick as he could get it, and told deceased to go to the stockhouse for it. The deceased drove immediately to the stockhouse door with his wagon and team, and he and Webb went into the stockhouse and told Clifton, who was in charge of the stockhouse, that they wanted 10 bags of cement

for the concrete work, and Clifton, stating that his men were engaged, and did not have time to truck the cement out, instructed the deceased and Webb where the cement was, and directed them to go and get it and truck it out; he (Clifton) knowing at the time that the conveyor across the passageway was uncovered, and that the cement had to be trucked out through this passageway; whereupon the deceased took a truck, went to where the cement was, and Webb loaded the truck. They proceeded along the passageway, the deceased pushing the truck, until they reached the conveyor, and, seeing that they could not get across it without some covering over the opening in it, and seeing sitting near by a board which seemed to fit the opening, and appeared to have been used for that purpose, they laid it in the opening, which it fitted, and passed successfully over the conveyor with that load of cement, but when crossing the conveyor with the second load the board moved and left the opening into which the deceased's foot passed, and his leg was ground off below the knee, resulting in a few hours afterwards in his death from the shock.

At the trial four instructions were given for the plaintiff and eight for the defendant, and exception is taken to the giving of all of plaintiff's instructions, but objection is more particularly made to the first and second, on the ground that they were misleading. It is insisted on behalf of the plaintiff that this court cannot review the instructions, because of the insufficiency of the bill of exceptions taken by the defendant to the giving of the instructions; but we do not deem it necessary to consider this objection, nor to review the instructions at length, as the court is of opinion that the objection to them is without merit. The instructions given for the plaintiff, read in connection with the instructions given for the defendant, could not have misled the jury, and fully and fairly submitted the case to the jury.

The remaining assignment of error is to the refusal of the court below to set aside the verdict of the jury as contrary to the law and the evidence.

It is contended that upon three grounds the verdict should have been set aside: First, that the deceased was a volunteer, and assumed the risk incident to the work which he volunteered to perform on the occasion of his injuries; second, that the danger of attempting to truck over the conveyor was incident to his employment, and open and obvious; and, third, that the conveyor was sufficiently covered for him to have passed over it in safety.

There is some evidence tending to show that the deceased, at the time of his injury, was doing work outside of the line of his regular employment; but the defendant's evidence admits that what he was doing he was doing under orders from Clifton, who was

in charge of the stockhouse. Clifton himself testified that he directed the deceased to get the cement and truck it out; and Irving, another witness for the defendant, says that he told the deceased to go to the stockhouse and get the cement as quickly as he could. In addition to this, it clearly appears from the uncontradicted evidence in the case that the deceased was under general orders to get and haul cement whenever needed for the construction department, and that it was the well-known and recognized practice, as well as the duty, of teamsters to go into the stockhouse and truck out cement when told to do so. So that, if the deceased was working outside of the scope of his employment, he was working under the direction of the defendant, and for its benefit, and greater care was required of the defendant toward him, under these circumstances, than if he had been working in the regular line of his employment.

On the one hand, the defendant claims that the danger to which the deceased was subjected when obeying the orders of Clifton to truck out the cement was an open and obvious danger; while, on the other hand, the claim is as earnestly made that there was no danger at all, but that the trough of the conveyor was covered up amply sufficient for the deceased to have trucked over, and that it was absolute recklessness in him in trucking over the place that was open. It is not pretended that it was not the duty of the defendant to keep this trough closed, as its own witnesses say that it was to be kept closed, and that it was in fact usually kept closed; while there is nothing in the evidence to justify the conclusion that the deceased knew that, in order to make it safe to pass over it, it was necessary to nail down and securely fasten its covering. As has already been stated, Clifton, in charge of the stockhouse, knew that the conveyor was exposed on the day before, and he knew it had not been closed up at the time he directed the deceased to get the cement and truck it out, for it is testified to that Clifton and a witness examined in the case passed over and along this passageway over the opening in the conveyor within five minutes before the deceased received his injuries. Yet he said nothing by way of warning to the deceased of the unsafe condition of the conveyor when he directed him to truck the cement wanted by Irving out. It is true that the evidence shows that hammer and nails were lying close by the opening in the conveyor, but there is no evidence, as has been said, that the deceased knew that it was necessary to fasten down any covering put over the conveyor, nor does it clearly appear that the hammer and nails were seen by him, or that they were where he could not have failed to see them. At all events, that was but a circumstance to be considered by the jury in determining the question whether the deceased was guilty of contributory negligence.

As to the contention that the conveyor was sufficiently covered over for the deceased to have passed it in safety—that is, that there was room enough for him to have trucked over it without the use of the board which he placed over the uncovered space—the evidence in the case overwhelmingly refutes the contention. In addition to the fact that this board, used by the deceased, was near the opening in the conveyor, and had been there for months before, as Clifton himself testifies, and had the appearance of having been used for the very purpose for which the deceased used it, five witnesses testified that the conveyor could not be crossed with the truck without something being put down over the open space. True, two witnesses for the defendant testified that they trucked over the conveyor the morning of this accident, but on cross-examination one of them says, "We went over a board that was already there," and the jury might have been well warranted in the conclusion that the board referred to was the very board that the deceased put down over the opening in the conveyor, especially in view of the facts shown that the board was conveniently near the opening in the conveyor, that it fitted the opening, and had the marks of truck wheels across it, as if it had been used for the very purpose that the deceased and Webb put it to. This board, or bridge, as the evidence shows, was made by fastening two boards together with a batten nailed across them, and when laid in the opening over the conveyor it came about a quarter of an inch above the floor, as did the covering on the conveyor where not taken up; but Webb, who was the only person present at the time, says that when the board was put down in the opening "it fit the place all right." Although the board, as Clifton admits, had been sitting there in the passageway for months prior to the accident, it disappeared thereafter, and was not produced at the trial, though called for. By their verdict the jury have accepted the statements of the witnesses for the plaintiff, to the effect that there was no way to truck the cement out along the passageway and over the conveyor without putting down something over the opening in it.

This is not the case of an employé voluntarily undertaking to make repairs that the employer should have made, taking the consequences of a failure to make them properly, but that of an employé undertaking to perform his duties with unsafe appliances or ways by using additional precautions. In the first-named case an employé cannot recover for injuries caused by his own negligence in using, without order to do so, appliances which he knows to be dangerously defective or out of repair, or using dangerous machinery in a perilous manner, etc.; for, as the authorities say, "Obviously he cannot recover for an injury caused by his own negligent workmanship or bad judgment, especially where he chooses to follow

his own judgment in opposition to that of the master." 1 Shearman & Redfield on Neg. § 207.

The case here comes under that line of cases referred to by the same learned authors in section 214, where it is said: "The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant foresaw, or, in the exercise of ordinary prudence, ought to have foreseen, might endanger his safety. If a servant of ordinary prudence would have believed that he could not, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing the right to complain if, while pursuing his ordinary course, under such belief, he suffers from such defect. And so, if the danger is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover for damages suffered by him while using such precautions. But, on the other hand, it is clearly the duty of a servant in such a case to use all those additional precautions which ordinary prudence, in view of the risk, would dictate; and the burden of proof would justly be laid upon him to prove that he did so. The servant loses no rights unless he comprehends and appreciates the danger, or, having the necessary capacity and information, fails to do so by his own fault. But one who comprehends the danger is not excused by his inability to realize the full extent of the injuries which may possibly result therefrom."

In all such cases, whether the servant has been guilty of negligence which is the proximate cause of his injury, is a question for the jury. As was said in *McMahon v. Port Henry Ore Co.*, 24 Hun, 48: "It would seem to be unreasonable that one who has undertaken a service which in itself has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule, and it seems to us that the plaintiff had the right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work." See, also, *N. Pac. R. R. Co. v. Egeland*, 163 U. S. 98, 16 Sup. Ct. 975, 41 L. Ed. 82.

In a note to that case, citing a number of authorities, the familiar rule is stated, viz.: "When the facts are disputed, or more than one inference can be fairly drawn from them as to the care or want of care of the plaintiff, the question of contributory negligence is for the jury." And, further, that: "When the question arises upon a state of facts on which reasonable men may fairly

arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided by the court." This is substantially the rule as laid down by this court in *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, and a number of cases following.

"A servant is, as a general rule, excusable for obeying orders in and about his master's business, when such orders are given by the master, or by one in authority over the servant as a representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience even under orders from one having authority over him. Even though there be apparent danger in obeying the master's order, yet such knowledge on the part of the servant will not defeat a recovery, if the danger is not such as to threaten immediate injury, or if the servant might reasonably have supposed that he could safely work about certain defective machinery by the use of care and caution, and if it is shown that he did use all the care incident to the situation in which he was placed." 20 A. & E. Ency. L. (2d Ed.) pp. 147, 148.

In the case at bar the only eyewitness to the accident to the deceased was Webb, who testified that he and the deceased were just as careful as they could be in trucking over the conveyor; and it is perfectly clear from the evidence that, had not the screw operating through the conveyor choked up and displaced the board laid down by Webb and the deceased, which it often did, and which was unknown to the deceased, so far as the record discloses, the board would not have been displaced, and the accident would not have happened. The defendant, however, was well aware, not only that the conveyor was open, but that it could not be safely covered without the covering being securely nailed down; and this knowledge was not communicated to the deceased by Clifton when he gave him the order to truck the cement out over the conveyor. Therefore there was no information which the deceased could have imparted to his employer, as to the condition of the conveyor, it did not already possess.

Say Shearman & Redfield on Neg. 186: "The true rule in this as in all other cases is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon the master's opinion."

The opinion by Riely, J., in *N. & W. R. R. Co. v. Ampey*, 93 Va. 133, 134, 25 S. E. 231,

says: "When the right of a servant to recover for an injury received while using defective machinery or appliances, which the master has provided for his use, is questioned because of previous notice of the defect, the mere isolated fact of risk is not the only matter to be considered. All the circumstances are to be taken into account. The law does not prescribe a rule so inflexible or unwise as that a servant must forthwith refrain from using a defective machine or appliance, or immediately quit the service of the master upon the discovery of the defect in the machine or appliance, or that he is working by the side of a negligent fellow servant, upon the pain of conferring immunity upon the master from all liability for an injury incurred in consequence of such defect or incompetency. The true test in all such cases is whether a person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk." See, also, *City of Charlottesville v. Stratton's Adm'r*, 102 Va. 95, 45 S. E. 737; *B. & O. R. R. Co. v. McKenzie*, 81 Va. 71.

In the last case, citing *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; 2 *Thomp. on Neg.* 985, 986—it is said: "The master, to be exempt from liability, must himself have been free from negligence. He is bound to use ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required, and generally to provide for the safety of the servant in the course of the employment, to the best of his skill and judgment. And if he fail in the performance of his duty in this particular, he is liable to the servant as he would be to a stranger."

"The servant, although he may know that the instrumentalities of the business are not in good repair and condition, is not thereby necessarily chargeable with negligence in remaining in the master's employ and using them, unless real danger therefrom is apparent. In all cases where there is any doubt, the question is for the jury." *Wood on Master & Servant*, § 327.

In section 388, the same author says: "In all cases where there is any conflict in the evidence, or any room for doubt as to whether the servant is chargeable with negligence by remaining in service after knowledge of the condition of the instrumentalities of the business, the question is for the jury, and the question for them to pass upon is whether a man of ordinary prudence would have regarded it as negligent to perform the particular service, in view of the circumstances." See, also, *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572.

The opinion by Buchanan, J., in *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618, says: "The questions whether the defendant was guilty of negligence in

the management of its car, or the plaintiff was guilty of contributory negligence in attempting to cross the street in front of the approaching car, under the facts and circumstances of the case, were questions peculiarly within the province of the jury. Their determination of those questions depended largely upon the credibility of the witnesses and the value or weight the jury, who saw and heard them testify, attached to the testimony of each; * * * and we cannot say that upon the whole case the evidence was plainly insufficient to sustain the verdict."

In the case at bar it is not pretended that the defendant was not negligent in leaving the conveyor in question exposed, and in failing to warn the deceased, when instructed to truck cement over it, of the danger of the situation; and whether the deceased was guilty of negligence, under all the circumstances, was a question properly and fairly submitted to the jury, and their verdict was for the plaintiff.

As to whether or not the deceased was guilty of negligence proximately contributing to his injury, the evidence, to say the least of it, was conflicting, and upon the familiar rule controlling the consideration of evidence by this court we are bound by their verdict.

The judgment of the circuit court is therefore affirmed.

KEITH, P. (dissenting). I cannot concur in the judgment of the court. Plaintiff's intestate was, in the course of his duties, required to place a number of bags of cement upon a truck and move it to a designated point. The opinion of the court states that: "The deceased took a truck, went to where the cement was, and Webb loaded the truck. They proceeded along the passageway, the deceased pushing the truck, until they reached the conveyor, and, seeing that they could not get across it without some covering over the opening in it, and seeing sitting near by a board which seemed to fit the opening and appeared to have been used for that purpose, they laid it in the opening, which it fitted, and passed successfully over the conveyor with that load of cement, but when crossing the conveyor with the second load the board moved, and left the opening into which the deceased's foot passed, and his leg was ground off below the knee, resulting in a few hours afterwards in his death from the shock." It appears further that when the order to move the cement was given the cement company knew of the condition of the passageway. The situation, then, was that the cement company was derelict in failing to exercise ordinary care to provide a reasonably safe place for their employes in which to perform their duties; but it further appears that the danger was open and obvious, that the plaintiff's intestate knew the condition of the passageway, and that it was impossible to pass over it with a

loaded truck in the condition in which he found it.

To pass the obstacle without repair involved imminent and obvious peril. A screw several inches in diameter, designed to move and capable of moving the product of the cement mill, was revolving in an open box 12 or 14 inches in width. What was his duty? He might have declined to perform the task assigned to him; he might have reported the situation to his employer, and required repairs to be made; or he could step beyond the line of his employment, assume a duty which had never been required of or intrusted to him, and himself undertake to make the necessary repairs. He resolved upon the latter course. There was a board sitting against the wall. He and his companion placed it over the aperture. One trip was made over it in safety, but in attempting to pass over it the second time the improvised cover moved and left the opening into which the deceased stepped and received the fatal injury.

The majority opinion cites section 214 of *Shearman & Redfield on the Law of Negligence*:

"The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant foresaw, or in the exercise of ordinary prudence ought to have foreseen, might endanger his safety. If a servant of ordinary prudence would have believed that he could not, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing his right to complain, if, while pursuing his ordinary course, under such belief, he suffers from such defect. And so, if the danger is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover for damages suffered by him while using such precautions. But, on the other hand, it is clearly the duty of a servant in such a case to use all those additional precautions which ordinary prudence, in view of the risk, would dictate; and the burden of proof would justly be laid upon him to prove that he did so. The servant loses no rights unless he comprehends and appreciates the danger, or, having the necessary capacity and information, fails to do so by his own fault. But one who comprehends the danger is not excused by his inability to realize the full extent of the injuries which may possibly result therefrom."

I cannot conceive of a more open or obvious danger than that which existed in this case, and by that I mean to say that not only was the defect obvious, and was in point of fact seen by the deceased, but the imminent peril incident to the defect was such as temerity itself could not be blind to. It required no foresight, but the simplest obser-

vation of an existing fact, obvious to the senses, and known to the decedent, to notify him of the peril in undertaking to pass over such an opening, inclosing a screw propelled by such a force, with a loaded truck. He saw the defect, he knew the peril, and he undertook, of his own accord, to make such repairs as would obviate the danger. Was it ordinary prudence for an employé to act beyond the scope of his authority with respect to a matter as to which he owed no duty, had no knowledge or experience, and to deal with such a situation as that which confronted the deceased? The master in this case gave no assurance. The servant acted upon his own initiative and responsibility.

McMahon v. Port Henry Ore Co., 24 Hun, 48, is relied upon in the majority opinion, and I have no fault to find with that decision. In that case it appears that the employé of the defendant was injured by the premature explosion of a blast while he was engaged in charging a hole. It appears that the plaintiff was guilty of negligence in three respects: First, in using damp, unglazed powder; second, in drilling a square, instead of a round, hole; and, third, in using an iron, instead of a copper, spoon for charging it. It was held that the mere fact that the plaintiff continued his work with knowledge of these facts did not of itself establish contributory negligence as a matter of law on his part, but only authorized the submission of that question to the jury. The court said, in the course of its opinion, that: "It would seem to be unreasonable that one who has undertaken a service, which in itself has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule. And it seems to us that the plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work."

In that case there were elements of danger, but the danger was not so imminent but that reasonable men might entertain different opinions with respect to it.

Another quotation is made by the court in its opinion from *Shearman & Redfield on Negligence*, § 186: "The true rule in this as in all other cases is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon the master's opinion."

Does it not clearly appear in this case that the servant did not rely on the master's opinion? The order to move the truck was given, and that may be said to satisfy the quotation, as giving the servant to understand that the master did not consider the

risk one which a prudent person would refuse to undertake. But the servant did not rely upon it. The risk was so clear, so obvious, so imminent; the task, indeed, so impossible of performance in the condition in which Luck found the passway—that there is no pretension that he relied upon any such implied understanding of the master's opinion as to the risk. It is plain that he exercised and relied upon his own judgment when he undertook to make the needed repairs.

Previous decisions of this court had established, as I supposed, the law upon which I rely.

In *McDonald's Adm'r v. Norfolk & Western R. Co.*, 95 Va. 98, 27 S. E. 821, Judge Riely said: "It is a general principle of the law of master and servant that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant which results from the omission to exercise such care and diligence. It is also a settled principle that a servant, when he enters the service of the master, assumes all the ordinary risks of such service. He assumes, as a general rule, all risks from causes which are known to him, or which are open and obvious, and must exercise reasonable care and caution for his own safety while engaged in the master's service. It is likewise well settled that, if the servant is injured by reason of a defect in the machinery or appliance furnished by the master for the use of the servant, or its unsuitableness, which defect or unsuitableness is known to him, and the servant, after such knowledge, remain in the service of the master, and continue to use the machinery or appliance without giving notice of the defect or unsuitableness to the master, or without any promise by the master to render the same less dangerous, he will be taken to have assumed the risk of all danger to be reasonably apprehended from its use, and is bound to exercise the care and caution which the perils of the business demand."

When the authorities speak of exercising care and caution in using defective machinery or appliances, they obviously mean the machine or appliance in the condition in which the master left it and in which the servant found it. They have no reference to any betterments or repairs which the servant, at his own suggestion and at his own peril, undertakes to make.

Section 214 of *Shearman & Redfield on Negligence* makes plain what is meant when it is said: "If the danger is one which a servant of ordinary prudence would believe could be avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover for damages suffered by him while using such precautions." The caption of the section is as follows: "Notice of Defect Without Notice of Danger Immaterial." But here it is not

denied that both the defect and the danger incident to it were known. The defect was open and obvious, and the danger not less so, and the knowledge of its existence is admitted by the effort to repair. Nor was there any specific order from the master to go on despite the defect, but only such assurance of safety as is to be inferred from the general direction to perform the service—that is, to remove the cement—the master knowing the condition of the passageway. Other than this there was no order from the master, and no assurance of safety, or promise with respect to repairs.

The cases cited in support of the text are conclusive as to its meaning. Without exception they turn upon the point that the servant was required to act quickly, without opportunity for inspection, or there was a promise to repair, or there was a contemporaneous and urgent command from the master requiring instant obedience. *Dooner v. Del. Canal Co.*, 164 Pa. 17, 30 Atl. 269; *Irvine v. Flint*, 89 Mich. 416, 50 N. W. 1008; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. Rep. 815; *Kane v. R. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Lee v. Woolsey*, 109 Pa. 124; *Griffin v. Glenn Mfg. Co.*, 67 N. H. 287, 30 Atl. 344. In not one of these cases is there a suggestion of any repair, great or small, and it is manifest that the "additional precautions" referred to in the text refer to the greater circumspection on the part of the employé.

We have held that among the unassignable duties of a master is that of exercising ordinary care to furnish reasonably safe appliances with which the work of the employé is to be performed. Suppose, in the case before us, Luck had gone to the proper officer of the cement company and had said: "There is a defect in the passway over which I am directed to move a loaded truck, and it must be repaired before I can discharge the duty imposed upon me." Let us suppose that the cement company, in the performance of its duty, had taken the plank actually used by Luck, and had made the repair in the identical manner and form resorted to by Luck, can it be doubted that the company would have been responsible for the injury which resulted? In addition to the original negligence, there would have been superadded the negligence of making an insufficient repair to a dangerous appliance. If, then, Luck, instead of making the demand of his employer, assumes the place of that employer, and undertakes to discharge one of its unassignable duties, has he not, with the assumption of the duty, taken also upon himself the burden resulting from its improper discharge?

The majority opinion says: "This is not the case of an employé voluntarily undertaking to make repairs that the employer should have made, but that of an employé undertaking to perform his duties in the face of danger, to say the most of it, by using ad-

ditional precautions. In the first-named case an employé cannot recover for injuries caused by his own negligence in using, without order to do so, appliances which he knows to be dangerously defective or out of repair, or using dangerous machinery in a perilous manner, etc.; for, as the authorities say, 'Obviously he cannot recover for an injury caused by his own negligent workmanship, or bad judgment, especially where he chooses to follow his own judgment in opposition to that of the master.' 1 Shearman & Redfield on Neg. § 207."

It would be difficult to give an illustration differentiating the act of an employé voluntarily making a repair and thereby taking upon himself the consequence of failing to make it properly from that of an employé undertaking to perform his duties with unsafe appliances by the use of "additional precautions," using those words in the sense of making alterations in or repairs to the place or appliance in use. As I understand the learned authors just cited, the "additional precautions" referred to are not in the nature of alterations, betterments, or changes in the structure of the appliances used, but greater caution and circumspection in the use of the defective appliances which the employer has provided. In the latter case, unless the danger be obvious to all—that is to say, if there may be an honest difference of opinion as to the peril involved in its use—the employé, when injured, will still be entitled to recover, if he used the defective machine in a careful and cautious manner. But an employé who finds a defect in a machine, and he, not being charged with the duty of repair, undertakes to assume such duty, then he comes within the law as stated in Shearman & Redfield, § 207, and cannot recover for an injury caused by his own negligent workmanship or bad judgment.

I am of opinion that the cement company was guilty of negligence in that it failed to exercise ordinary care in providing a reasonably safe place for the performance of the duties imposed upon its employés, but that the contributory negligence of the plaintiff's intestate was of such a character as to preclude a recovery, in that, when confronted with an open and obvious risk, a peril of the most palpable and imminent character, he voluntarily assumed to step beyond the line of his duties; that in this act he was not resorting to "additional precautions" in the use of an imperfect appliance, but was undertaking to remove the danger by repairs of his own making; that in thus acting he assumed the duty of his employer, and discharged it at his own peril; and that, as the master would have been responsible if the repair had been made by it in the identical manner adopted by the injured servant, and the latter could have recovered, he is in this case debarred of recovery, because his injury was due to his own negligent workmanship and bad judgment.

(108 Va. 414)

RIXEY v. RIXEY et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1905.)

PARENT AND CHILD—CONVEYANCES BETWEEN—PRESUMPTION OF VALIDITY—BURDEN OF PROOF—CONSIDERATION.

1. Contracts and conveyances by which benefits are secured by a parent to a child are generally presumed to be free from suspicion, and the person who claims they were procured by undue influence has the burden of proof.

2. Though there is a considerable disparity between the money consideration and the value of land conveyed by a mother to two of her daughters, it will not be set aside, at the suit of other children, where there is no evidence of fraud or undue influence, and the conveyance recites that the grantees have attended to all of the grantor's business and have cared for her, and reserves a vendor's lien to enforce a covenant that the grantees will care for and support the grantor during the remainder of her life.

Appeal from Circuit Court, Fauquier County.

Bill by James M. Rixey, as next friend of Eleanor Rixey, against Mollie E. Rixey and others, to cancel a deed. From the decree rendered, Mollie E. Rixey and Fannie A. Coles appeal. Reversed.

E. S. Turner and Munford, Hunton, Williams & Anderson, for appellants. J. K. M. Norton and Louis C. Barley, for appellee.

KEITH, P. James M. Rixey, as next friend of his mother, Eleanor Rixey, filed a bill in the circuit court of Fauquier county against his sisters, Mollie E. Rixey, Fannie A. Coles, and Tucker S. Coles, her husband, and Richard Anderson, the object of which was to have a deed from Eleanor Rixey to Fannie A. and Mollie E. Rixey annulled upon the ground that it was obtained by fraud and undue influence.

The defendants filed their answer, denying the allegations of the bill, and, upon the issues thus made, evidence was taken, and the circuit court, by its decree, set the deed aside for "inadequacy of consideration and undue influence"; and thereupon Mollie E. Rixey and Fannie A. Coles have brought the case to this court upon appeal.

At the instance of the defendants a rule was awarded requiring James M. Rixey to appear and show by what authority he instituted this suit as the next friend of his mother. Upon this subject affidavits were filed, and there was much discussion at the bar. Without intimating any opinion upon this branch of the case or upon the demurrer to the bill, but assuming that the plaintiff had a right to sue in the manner and form which he pursued, and that the demurrer was properly overruled, we shall dispose of the controversy upon its merits.

Many witnesses were examined, and their testimony is comprised in a very bulky record. Thoroughly to discuss the details of this evidence would be tedious and unconstructive. The more important facts are as follows:

Mrs. Rixey was 78 years of age when the deed in question was executed by her. She had a son, who is the plaintiff, as her next friend; a daughter, Mrs. Lake; and the appellants Mollie and Fannie, who is now Mrs. Coles. The appellants were capable and energetic business women. They looked after the affairs of their mother, who, while sound in mind, was enfeebled by the weight of years, and shielded and watched over her with affectionate interest and care. On the 27th of August, 1898, Mrs. Rixey executed a deed, which recites: "This deed made and entered into this 27th day of August, 1898, between Eleanora Rixey, party of the first part, and Fannie A. Rixey and Mollie E. Rixey, parties of the second part;

"Whereas, the said party of the first part is indebted to the said parties of the second part in the sum of three thousand (\$3000) dollars, with interest from June, 1891, which said debt is evidenced by a certain deed of trust, of record in the clerk's office of the County Court of Fauquier county, in Deed Book 1893-94, page 341; and

"Whereas, the said parties of the second part, daughters of the said party of the first part, have attended to all of the business of the said party of the first part, and have cared for and attended to her; and

"Whereas, the said parties of the second part hereby covenant and agree to and with the said party of the first part, which is evidenced by their acceptance of this deed, to provide for and support the said party of the first part for life;

"Now, therefore, this deed witnesseth: That for and in consideration of the above debt, services and covenant to support, and of the sum of five (\$5.00) dollars in hand paid the said party of the first part by the said parties of the second part, the receipt whereof is hereby acknowledged, the said Eleanora Rixey has granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto the said Fannie A. Rixey and Mollie E. Rixey, their heirs and assigns forever, with general warranty, all that certain tract or parcel of land * * * containing five hundred and twenty-five acres. * * *

"This land hereby conveyed is subject to a deed of trust to secure the sum of one thousand dollars, and there is excepted from this conveyance about eighty acres of land, conveyed by the said party of the first part to R. C. Rixey. * * *

"The said party of the first part hereby reserves a vendor lien upon the land hereinbefore conveyed, in order to secure to her an adequate support for and during her natural life."

It appears that Mrs. Rixey had theretofore made a will, to the following effect:

"Being of sound mind and memory, I, Eleanora Rixey, of Fauquier County, Virginia, do make this my last will and testament.

"1st: I wish my funeral expenses and just debts paid.

"2nd: I give to my son James M. Rixey ten dollars.

"3rd: I give to my daughter Florence V. Lake, ten dollars.

"4th: All the rest and residue of my estate, real, personal, and mixed, of whatever kind and wheresoever situate, I give, bequeath and devise to my daughters, Fannie A. Rixey and Mollie E. Rixey to them and their heirs forever.

"In testimony whereof I have hereunto set my hand and seal this 15th day of January, 1894."

Here are two solemn instruments emanating from Mrs. Rixey, one dated the 15th of January, 1894, and the other August 27, 1898, both disposing of her property in substantially the same manner. The will was, of course, revocable, but was never revoked, and has been probated as her last will and testament. The two instruments, taken together, show a fixed and settled purpose upon the part of Mrs. Rixey with respect to the disposition of her property. She was a woman of sound mind—the only infirmity under which she suffered being such as is inseparable from advancing years—and there is no evidence that either the will or the deed was procured by actual fraud or undue influence.

It is earnestly contended, however, that, by long intercourse between the mother and daughters, she had become dependent upon them, and had fallen wholly under their influence, and that they, being strong, active, energetic, and capable, exercised a dominant influence over their mother, who had become enfeebled by age.

The subject has been recently considered by this court, and the opinion of Judge Buchanan in *Burwell v. Burwell* (decided at the present term) 49 S. E. 68, renders any discussion of the law upon the subject unnecessary.

In the case just cited it is said: "There are certain relations in life, which, from the peculiar confidence necessarily subsisting, courts of equity feel bound to guard and protect. These are guardian and ward, trustee and cestui que trust, attorney and client, principal and agent, parent and child, and the like. Transactions between persons occupying such confidential relations are viewed with jealous vigilance by courts of equity. 1 Story's Eq. Jur. §§ 307 to 323.

"While the natural and just influence which a parent has over a child renders it peculiarly important for courts to watch over and protect the interests of the latter, and to set aside contracts and conveyances whereby benefits are secured by children to their parents, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, the same rule does not apply where contracts and conveyances are made by which benefits are se-

cured by the parent to the child. Instead of such contracts and conveyances being guarded with a jealous eye, they will generally be presumed to be free from suspicion, and the party who claims that they were procured by undue influence must generally prove it.

"Mr. Pomeroy says, in discussing the transactions between parent and child, that a child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts it lies upon the parent maintaining the gift to disprove the exercise of parental influence by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands upon the same footing as any other gift, and the question to be determined is whether there was a deliberate, unbiassed intention on the part of the child to give to the parent. Where the positions of the two parties are reversed—where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority—conveyances conferring benefits upon the child may be set aside. Cases of this kind turn plainly upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid." 2 Pom. Eq. Jur. § 962. "And a fortiori there is no such presumption as to a contract based upon a valuable consideration.

"In the case of Greer v. Greer, 9 Grat. 332, a man in extreme old age conveyed the whole of his estate to one of his sons; and this court held that, as he had sufficient capacity to understand what he was doing, and there was no direct proof of fraud or undue influence, the improvidence and injustice of the act, in disinheriting his other children, did not give rise to a presumption of an abuse of confidence, or justify the court in setting aside the conveyance.

"In the case of Orr v. Pennington, 93 Va. 268, 275, 24 S. E. 928, where a father, a month before his death, had conveyed substantially all of his property to one of his four children, and it was sought to set aside the conveyance upon the ground that the grantee had procured its execution by the exercise of undue influence over the grantor when his mind was weakened by the infirmities of age and disease, the rule, as stated by Mr. Pomeroy and quoted above, that such cases turn upon the exercise of actual undue influence of the child over the parent, and not upon any presumption of invalidity, was approved and followed."

In this case there is a considerable disparity between the money consideration which passed and the value of the land, but other considerations are recited. It is declared that the parties of the second part have attended to all of the business of the

party of the first part, and have cared for and attended to her; and there is a further covenant, for the enforcement of which there is the reservation of a vendor's lien upon the land—that the grantees will care for and support the grantor during the remainder of her life.

Upon the whole case, we are of opinion that the mother was capable of contracting; that in the deed culminates a purpose with respect to the disposition of her property which she had long entertained, as is shown by her will duly executed more than four years before the date of the deed; that there is no proof of actual fraud and undue influence; and that the relation between the grantor and grantees, and other circumstances of the case, are not such as to give rise to a presumption of the invalidity of the deed in question.

The decree of the circuit court allows a fee of \$500 to the attorneys who filed the bill. This action of the court was, we think, also erroneous, as there is no fund under the control of the court in this case properly applicable to that purpose.

For these reasons, we are of opinion that the decree complained of should be reversed, and the cause remanded to the circuit court, to be further proceeded with in accordance with the views herein expressed.

(56 W. Va. 675)

GOFF v. BOARD OF CANVASSERS OF ROANE COUNTY.

(Supreme Court of Appeals of West Virginia. Dec. 31, 1904.)

MANDAMUS—ELECTION OFFICERS—JURISDICTION.

1. Upon a mandamus from this court in election cases, the action of election officers may be reviewed and controlled to the same extent as upon the statutory writ of certiorari in the circuit courts.

(Syllabus by the Court.)

Application by H. F. Goff for writ of mandamus to the board of canvassers of Roane county. Writ awarded.

Pendleton & Bogges, J. G. Schilling, J. M. Harper, O. J. Chambers, Geo. F. Cunningham, and Molloyhan, McClintic & Mathews, for petitioner. T. P. Ryan and C. E. Hogg, for respondent.

POFFENBARGER, P. H. F. Goff asks a mandamus to compel the board of canvassers of Roane county to reject the ballots and certificate of the election held at precinct No. 8 of Geary District, in said county, in the election held in November last, for the reason that none of the said ballots have the signatures of the poll clerks properly affixed. Goff and W. Bailey Young had been opposing candidates for the office of sheriff of said county in said election, and a recount between them was in progress. Before said precinct was reached the bal-

lots were tampered with. Upon opening them it was found that not a single ballot had the signatures of both poll clerks on it, written in the handwriting of each. There were 184 ballots. On 169 of them both names were in the handwriting of the Republican clerk. On the remaining 15 ballots, both names were in the handwriting of the Democratic clerk. Under these circumstances, the rule announced in *Stafford v. Board of Canvassers* (just decided) 49 S. E. 384, required the rejection of the ballots and the certificate of the precinct officers as to said precinct and of the entire vote at said precinct. Instead of rejecting it, the board admitted evidence of commissioners and clerks to show that some ballots cast at said precinct had been properly signed. On this issue the evidence was conflicting, and the board arrived at the conclusion that some legal ballots had been cast, and had been abstracted and others inserted in lieu of them since the returns had been canvassed. Upon this finding the result of the election at the precinct was declared from and according to the certificate of the precinct election officers, under the rule declared in *Stafford v. Board*. It is not pretended that on the recount of said precinct a single valid ballot was before the board. They sustained the certificate upon the theory that originally it had been founded upon valid ballots.

If no ballots at all appeared, and there was evidence of tampering with the returns, there would be a presumption in favor of the certificate. The evidence of the commissioners and poll clerks as to the identity of the papers purporting to be returns is admissible, and if from such evidence it appears that the papers purporting to be the ballots used are not the ballots actually used, and it further appears that the returns have been tampered with, there would be a presumption in favor of the validity of the certificate.

It is urged that the finding of the board on the evidence as to the identity of these papers is not reviewable by this court by mandamus, because they say that would make the writ operate, not as a common-law certiorari, but as the statutory certiorari. We think, however, its scope is the same as the statutory certiorari. Mandamus in election cases, as now exercised, is of recent institution. The statute was passed long after the scope of the writ of certiorari had been broadened. This court having jurisdiction of mandamus, and it having, in election matters under the statute, the efficacy of a certiorari in a circuit court, we have the right to look to the statute giving the scope and effect of that writ. What else points the way? As the duties of election officers are almost wholly ministerial, no exercise of discretionary or quasi judicial power by them is binding on the courts having supervisory jurisdiction over them by mandamus.

Having carefully examined the evidence, we do not think the conclusion of the can-

vassers on the question of the identity of the ballots is sustained by it. The Republican poll clerk testified that it was his "recollection" that the first six or eight ballots cast had been properly signed. After examining all the ballots and finding none properly signed, he adhered to his former statement, but said he could not state positively that both clerks had signed some of the ballots. His evidence closed with this statement as to whether he might be mistaken: "It is possible that I might, but don't think I am." One of the commissioners said: "My recollection is that Mr. Osborn wrote his name and passed it to the other clerk, Mr. Pettit, but I didn't see the writing. I can't say whether the names were written that way or not." On cross-examination he said: "I didn't see the names. I wasn't close enough to see." The Democratic poll clerk said: "Each of us signed each other's names." He had no recollection of any having been properly signed. Another commissioner said: "To the best of my recollection Mr. Pettit wrote his name and Mr. Osborn's name on part of them, and the remainder Mr. Osborn wrote them himself."

From this it is apparent that the conclusion of the canvassers rests upon evidence of mere recollection, contrary to an admitted fact, namely, that one genuine signature is found upon every ballot. To sustain the finding, it must be said not only that ballots have been abstracted, but that one of the poll clerks signed both names on and substituted other ballots for those abstracted. There is not a scrap of evidence, circumstantial or other kind, indicating that either clerk had tampered with the ballots or that the signature of either had been counterfeited. The presence of these actual unimpeached signatures is a very strong circumstance in favor of the identity of the papers, and we conclude that the board erred in not giving the papers and signatures the evidential force to which they are entitled.

For the reasons aforesaid a writ of mandamus is awarded, commanding the said board of canvassers to reassemble and reject the entire vote at said precinct No. 8 of Geary district, and not count the same or any of it, and then declare the result of the said election in said county between the said candidates.

(121 Ga. 511)

SOUTHERN RY. CO. v. DUCKETT.

(Supreme Court of Georgia. Dec. 21, 1904.)

RAILROADS—FRIGHTENING HORSE—EVIDENCE.

1. The plaintiff's horse became frightened at the noise of escaping steam made by an engine of the defendant company in starting with a heavy train of cars from one of its stations, the noise thus created being neither unusual nor unnecessary. The horse, after breaking away from a boy who was attempting to hold the animal, ran some distance along a road parallel

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 1403.

to the railroad track, and then suddenly swerved from its course, and dashed headlong into the train, several cars back of the engine, and was killed by the impact. There was some conflict in the testimony as to whether the company's engineer shut off steam and checked the speed of the train as soon as he discovered that the horse had taken fright; but, whatever may have been the truth in this regard, it affirmatively appears that nothing he did or failed to do brought about or contributed to bringing about the casualty, the proximate and efficient cause of which was the fright of the horse produced by the noise made in starting the train. Such being the case, the verdict in favor of the plaintiff was contrary to law, and should have been set aside by the trial court.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Joseph Duckett against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, for plaintiff in error. W. B. Mann, J. A. Longley, and W. W. Seymour, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur.

(121 Ga. 490)

HUGHES v. McHAN.

(Supreme Court of Georgia. Dec. 21, 1904.)

MARRIED WOMAN—GOODS SOLD—ACTION FOR PRICE.

1. Where the sole and controlling issue in a case was whether, as contended by the plaintiff, he had sold goods upon the credit of a married woman, to whom he delivered the same, or whether, as she insisted, credit therefor was extended to her husband, it was prejudicial error to allow the plaintiff to testify that, contracting on her own account, she had rented rooms from him.

(Syllabus by the Court.)

Error from Superior Court, Gilmer County; Geo. F. Gober, Judge.

Action by Wm. T. McHan against Mrs. Charlie Hughes. Judgment for plaintiff before a justice. From an order of the superior court refusing to sustain a certiorari, defendant brings error. Reversed.

N. A. Morris and A. N. Edwards, for plaintiff in error. V. L. Watts, for defendant in error.

EVANS, J. This case originated in a justice's court, the same being a suit brought by W. F. McHan against Mrs. Charlie Hughes to enforce the collection of an open account. The plaintiff prevailed on a trial before a jury in that court, and the defendant thereupon took the case by certiorari to the superior court. To the judgment of the superior court refusing to sustain her petition for certiorari she excepts.

In her petition she made complaint of various rulings of the magistrate, but, as his answer does not verify the statements of fact concerning any save two of these rulings, the correctness of the judgment excepted to depends upon whether or not there

was merit in the complaint made of the two rulings of the magistrate to which he certifies. The issue in the case was whether, as contended by the plaintiff, he sold the articles of merchandise included in the account upon the individual credit of Mrs. Hughes, or whether, as she insisted, credit therefor was extended to her husband under an arrangement he had made with the plaintiff to furnish her supplies during his absence in Florida. Upon this issue the testimony was in painful conflict. Over the defendant's objection, the magistrate permitted the plaintiff to testify that "Mrs. Hughes rented some rooms from him." The purpose of this testimony was to show that the defendant had, with respect to the renting of these rooms, contracted in her individual capacity. Her objection was that he was not suing for rent, and the testimony did not illustrate the issue then being tried. The defendant then sought to rebut this testimony by introducing a receipt signed by the plaintiff, whereby he acknowledged payment of rent by her husband, but the magistrate declined to allow this receipt to be put in evidence. It is apparent that Mrs. Hughes' chances of success before the jury were thus seriously impaired. The testimony to which she objected was clearly irrelevant, and should have been excluded. It raised a purely collateral issue, which she was not permitted to meet, and its prejudicial effect upon the jury is illustrated by the verdict they returned, for the preponderance of the evidence was apparently in her favor. The court below should have allowed her another opportunity of contesting with the plaintiff the real merits of the case.

Judgment reversed. All the Justices concur.

(121 Ga. 550)

DRAKE v. BROWN MFG. CO.

(Supreme Court of Georgia. Dec. 21, 1904.)

JUDGMENT—VACATING.

1. A motion to set aside a judgment must be predicated upon some defect apparent upon the face of the record. *Sweat v. Latimer*, 46 S. E. 835, 119 Ga. 615, and cases cited. It was accordingly not error to sustain a demurrer to such a motion, based upon the ground that the movant had never been served with proper process in the suit wherein the judgment sought to be set aside was rendered, when it affirmatively appeared upon the face of the record that he had been so served.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by the Brown Manufacturing Company against D. C. Drake. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Hall, Busbee & Busbee, and J. M. Du Pree, for plaintiff in error. Whipple & McKenzie, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 534)

LEVERETT v. BULLARD.

(Supreme Court of Georgia. Dec. 21, 1904.)

EJECTMENT—DEED—PAROL EVIDENCE.

1. Parol evidence is admissible to explain ambiguities in a deed, and, when so explained, the deed is admissible as foundation for a recovery in an action of ejectment.

2. "Whenever, in a conveyance, the deed refers to monuments actually erected as the boundaries of the land, it is well settled that these monuments must prevail, whatever mistakes the deed may contain as to courses and distances." *Riley v. Griffin*, 16 Ga. 142 (15), 60 Am. Dec. 723.

3. It does not appear that there was any error in the admission or rejection of evidence, the exceptions to the charge of the court are without merit, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by Alice Bullard against F. J. Leverett. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Jenkins & Son and J. D. Kilpatrick, for plaintiff in error. Greene F. Johnson, for defendant in error.

CANDLER, J. This was a statutory action of ejectment, brought by Mrs. Bullard against her stepmother, Mrs. Leverett. The jury found for the plaintiff the premises in dispute and mesne profits. The defendant made a motion for a new trial, which was overruled, and she excepted. The parties claimed under a common grantor, W. C. Leverett, father of the plaintiff, and husband of the defendant. The deed relied upon by the plaintiff contained a description by metes and bounds which was manifestly erroneous, inasmuch as it would be impossible, by following the courses laid out, to get back to the point from which the description started. The plaintiff contended that the ambiguity in the deed arose from the fact that the scrivener, by a clerical error, described one of the lines as running in a northeasterly direction to a rock corner, when he should have described it as running in a northwesterly direction to that point. The questions for our determination are whether the description in the plaintiff's deed was so vague and uncertain as to render it inadmissible in evidence, whether parol evidence was admissible to explain the ambiguity and establish the true boundaries of the land sought to be conveyed by the deed in question, and whether certain charges of the court of which complaint is made were erroneous.

We are clear that parol evidence was admissible to explain the ambiguity in the deed, and that, as thus explained, the deed was admissible as a muniment of title upon which the plaintiff could base a recovery. "Where the question whether a given deed is good as color of title depends upon whether it covered the land in dispute, and its terms are in

this respect ambiguous, parol evidence is admissible to show that it did in fact apply to such land." *Mayor of Chauncy v. Brown*, 99 Ga. 766, 26 S. E. 763. The jury were amply warranted in finding that if, indeed, the draftsman of the deed under which the plaintiff claimed used the word "northeasterly" by mistake for "northwesterly," the land conveyed by the deed was the same as that described in the declaration. The termination of this line was a rock corner, which was clearly identified by different witnesses for the plaintiff. "If capable of identification, artificial monuments and old marks will generally control conflicting calls for courses and distances." 5 Cyc. 921, and cases cited in note 11; *Riley v. Griffin*, 16 Ga. 142 (15), 60 Am. Dec. 723. If this evidence was admissible, then—as we hold that it was—the description in the plaintiff's deed, as aided thereby, was sufficiently definite to constitute the basis of a recovery in an action of ejectment, for it is well settled in this state that a deed will not be declared void for uncertainty so long as the intention of the grantor can be ascertained. The doctrine, "Id certum est quod certum reddi potest," here applies. See *Andrews v. Murphy*, 12 Ga. 431; *Gress Lumber Co. v. Coody*, 94 Ga. 520, 21 S. E. 217; *Mayor of Chauncy v. Brown*, 99 Ga. 766, 26 S. E. 763; *Tumlin v. Perry*, 108 Ga. 520, 34 S. E. 171; *Horton v. Murden*, 117 Ga. 72, 48 S. E. 786; *Brice v. Sheffield*, 118 Ga. 123, 44 S. E. 843. These are only a few of many cases that might be cited in support of the ruling here made.

On the examination of the defendant as a witness in her own behalf it appeared from her testimony that the family of the plaintiff had for a time occupied the premises in dispute, but that they left at the request of Leverett, the common grantor of the parties. Counsel for the plaintiff objected to this testimony as irrelevant, and the court ruled: "You can show by the witness that they left, and left at the request of Mr. Leverett. I will let the evidence go in to that extent, and no further." In her motion for a new trial the defendant complains that the court erred in thus restricting the evidence, insisting "that said evidence should have been admitted for all purposes, and especially for the purpose of showing that W. C. Leverett claimed the right of adverse possession of the property," etc. We fail to see what cause for complaint the defendant has. The evidence was admitted for what it was worth, and there was nothing in the ruling made by the trial judge to prevent counsel from drawing whatever inference he chose from the evidence as given. While the judge used the language, "I will let the evidence go in to that extent, and no further," he in no sense restricted its probative force.

Error is also assigned upon the refusal of the judge to allow a witness to answer a stated question set out in the motion for a new trial; but, while the answer expected

¶ 2. See *Boundaries*, vol. 3, Cent. Dig. §§ 12, 13.

from the witness was set forth in the motion, it does not appear that like information was given to the judge at the time the ruling was made, and for this reason we cannot consider this ground. *Freeman Co. v. Mencken*, 115 Ga. 1017 (2), 42 S. E. 369; *Grant v. Noel*, 118 Ga. 258 (2), 45 S. E. 279.

The remaining grounds of the motion complain of alleged error in the charge of the court. They are, in our opinion, without merit. The charge to the effect that, if the jury should find that the plaintiff's deed covered the land in dispute, the deed to the defendant from the same grantor, which was 10 years subsequent to it in date, would not establish a superior outstanding title in the defendant, stated a correct principle of law. After title passed out of the grantor to Mrs. Bullard, it could not vest again by prescription in him, or those claiming under him adversely to the plaintiff, until after 20 years' adverse possession. The other extract from the charge to which exception is taken was quite long, and contained a statement of numerous principles of law, some of which, to say the least, were undeniably correct. The complaint against the charge seems to be that the court left it to the jury to determine the disputed issue as to the description of the land conveyed by the plaintiff's deed, instead of undertaking to settle the question as matter of law without the aid of the jury. It is always, of course, the province of the court to determine the legal effect of a written instrument; but we are not aware of any law which requires or authorizes a judge to settle a disputed question of fact as to the intention of the grantor in a deed where the description therein is ambiguous. The evidence for the plaintiff warranted the finding in her favor, and the verdict was not contrary to law.

Judgment affirmed. All the Justices concur.

(121 Ga. 539)

MCWHORTER v. O'NEAL.

(Supreme Court of Georgia. Dec. 21, 1904.)

WILL OF MARRIED WOMAN—DEATH OF HUSBAND—REVOCATION—REPUBLICATION—JURISDICTION.

1. Where a married woman made a will, her husband died, and she subsequently remarried, the will, under Civ. Code 1895, § 3347, was revoked. See *Ellis v. Darden*, 12 S. E. 652, 86 Ga. 368, 11 L. R. A. 51.

2. The contract made subsequently to the second marriage, between the husband and wife, did not amount to a republication of the will, as it was wanting in the formalities essential to the making of a will. What are the rights of the parties under this contract cannot be decided in the probate court, but may be determined in a court having jurisdiction of that question.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by B. F. McWhorter against Joshua O'Neal. Judgment for defendant, and plaintiff brings error. Affirmed.

James Davidson and James B. & Noel P. Park, for plaintiff in error. Saml. H. Sibbey, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 524)

TANNER v. LEE.

(Supreme Court of Georgia. Dec. 21, 1904.)

PAYMENT—APPLICATION—NOTICE TO CREDITOR.

1. If, without notice of another's claim there-to, a creditor receives money from his debtor in payment of a pre-existing debt, the true owner cannot thereafter compel such bona fide creditor to account therefor.

2. The evidence was conflicting as to whether the plaintiff had notice of defendant's title to money previously paid, but was sufficient to sustain a finding in plaintiff's favor.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by W. C. Lee against Viney Tanner. Judgment for plaintiff, and defendant brings error. Affirmed.

Viney and her husband, Jacob, Tanner were indebted to the plaintiff, Lee. The wife's debt was represented by a note, and that of the husband by an account, and also by a mortgage. Lee brought suit against the wife on the note. She pleaded payment of a certain sum, for which she claimed credit. Her evidence tended to show that she had given her husband certain money, with instructions to hand the same to the plaintiff as a payment on the note. The husband testified that he let the plaintiff know that the money belonged to his wife, but instructed him to put part as a credit on the note and part as a credit on his own mortgage; that he received a receipt, which he had lost. It appeared that the account was the oldest claim. The plaintiff denied that he had any notice that the money belonged to the wife, and testified that when the husband brought the money he first instructed it to be applied on the mortgage, but, after some conversation, consented that it should be applied on the account. There was a verdict for the plaintiff for the full amount of the note sued on, and a motion for a new trial on the ground that the verdict was contrary to the evidence.

E. T. Moon, for plaintiff in error. Isaac Jackson and D. J. Gaffney, for defendant in error.

LAMAR, J. If, when the cash was received and applied as a credit on the debt of the husband, the plaintiff had notice that the money actually belonged to the wife, she would have been entitled to a verdict on her plea of payment. If, however, he had no

such notice, but took the money bona fide as a part payment on a pre-existing debt, then she was not entitled to the credit claimed, nor to a judgment against him for the amount so received. If the creditor's title to this money could be thus defeated without proof of notice of the defendant's interest therein, so likewise could the title of the defendant to the same money be attacked. The result would be that, if any link in the chain of ownership between herself and the mint was invalid, she could be called on to account by the last true owner. It is manifest that any such rule would be utterly destructive of the quality of currency which has been attached by law as an incident peculiar to money and negotiable paper, alone, of all other property. Money not only has no earmarks, but is currency, passing by delivery from hand to hand. It may be accepted in good faith, without any obligation to examine the holder's title, or to inquire the source from which he got it. One can give a better title thereto than he himself has, and one who receives it bona fide for a consideration may retain it as against the true owner. But it is said this principle does not apply to the payment of a pre-existing debt; that the creditor, on being obliged to return another's money unlawfully paid by the debtor, is in no worse position than he was before; that he still has his claim against the debtor, and may proceed to enforce it. And there are some decisions which seem to sustain this contention; certainly as to the case of negotiable instruments when they are used as collateral, or payment on pre-existing debts. But the contrary view has been adopted in this state. In *Gibson v. Conner*, 3 Ga. 51, it was said that the weight of authority was to the contrary, and that a note taken in payment of a pre-existing debt before due, and without notice of the maker's equity, can be enforced against him. See, also, *Kaiser v. U. S. Nat. Bank*, 99 Ga. 259, 25 S. E. 620; *Partridge v. Williams' Sons*, 72 Ga. 807. By the same principle one who receives money bona fide for a consideration, as in payment of a pre-existing debt, gets a title thereto good as against the true owner. The individual hardship must yield to the general rule, and to the necessity of preserving intact the right to accept money bona fide, without an inquiry as to the source from which it came. Besides, the payment may have lulled the creditor into nonaction. Relying thereon, he may have lost the opportunity to collect by means which were not resorted to because he thought the debt had been fully or partially paid. These considerations, along with the credit on the existing debt, furnish a sufficient consideration to support the transfer of title, and enable the creditor without notice of her claim to retain the same against the defendant. Civ. Code 1895, § 3538; *Cloud v. Kendrick*, 82 Ga. 730, 9 S. E. 1084; *Newhall v. Wyatt*, 139 N. Y. 452, 34 N. E. 1045,

36 Am. St. Rep. 712; *State Nat. Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149. Nor is the rule different under Civ. Code 1895, § 2488, because the money belonged to a wife, and the payment was made by the husband to satisfy a debt due by him to the plaintiff. *Chason v. Anderson*, 119 Ga. 495, 46 S. E. 629.

The evidence as to notice by the plaintiff of the wife's title was conflicting. It was, however, sufficient to sustain the finding in his favor, and there was no error in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 548)

EATON et al. v. BARNES.

(Supreme Court of Georgia. Dec. 21, 1904.)

EXPRESS TRUST—VALIDITY—EVIDENCE.

1. Under the allegations of the plaintiffs' petition the trust therein attempted to be set up was an express one.

2. All express trusts must be created or declared in writing.

3. Inasmuch as the petition does not show that the trust cannot be established by written evidence, the petition is not demurrable because it fails to allege that the trust was created or declared in writing.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by T. B. Eaton and others against Joseph Barnes. Judgment for defendant, and plaintiffs bring error. Reversed.

Westmoreland Bros. and F. M. Hughes, for plaintiffs in error. Saml. H. Sibley, for defendant in error.

SIMMONS, C. J. An equitable petition was filed against Barnes by Eaton and others, the plaintiffs being the children and only heirs at law of Wm. G. Eaton. The petition alleged that Wm. G. Eaton had owned a certain tract of land, and had, on February 15, 1895, conveyed the same to the defendant to secure an indebtedness of \$375, which sum he owed the defendant. The conveyance was made by a deed absolute on its face, but "upon the following trusts and conditions: The said Joseph Barnes was to hold the title to said property to secure him in the payment of the said sum of three hundred and seventy-five dollars, without interest. He was authorized to sell the same after the death of said Wm. G. Eaton, and, after deducting from the proceeds of said sale, the said three hundred and seventy-five dollars, without interest, he was to pay over to the plaintiffs, the children of the said Wm. G. Eaton, the remainder of the proceeds of the sale of said tract of land, giving to each of said children an equal proportion thereof." Wm. G. Eaton died on May 11, 1895, intestate, owing no other debts except that to Barnes; and there has been no administration upon the estate.

Barnes had never sold the land, which at the time of the filing of the petition, June, 1904, was of the value of \$3,000. The petition further alleged that Barnes denied that he held the property upon any trust or condition, but claimed the absolute title, and was about to sell it for much less than its real value. The petitioners prayed that the deed to Barnes be declared to be a trust deed; that the court appoint a new trustee or a receiver, and order him to sell the property; and that the proceeds of the sale, after the payment of costs and after paying to defendant \$375 and the amount he had paid for taxes upon the land, be paid to petitioners. To this petition defendant demurred upon several grounds. The court below sustained the demurrer, and the petitioners excepted.

1. The allegations of the petition show that the trust therein set up is express, and not implied. There was a distinct agreement made between the parties as to what should become of the land after the death of the grantor. The agreement did not contemplate any redemption of the land, but the land was to be sold. The proceeds of the sale, after the payment of the debt of the grantee, were not to go to the grantor or his estate, but to his children in equal shares. Such a trust is clearly within the definition of an express trust as given in Civ. Code 1895, § 3152: "Express trusts are those created and manifested by agreement of the parties." On the other hand, "Implied trusts are such as are inferred by law from the nature of the transaction or the conduct of the parties." Civ. Code 1895, § 3152. The trust described in the petition was not such a one as would be inferred by law "from the nature of the transaction or the conduct of the parties," but was an express trust.

2. Under Civ. Code 1895, § 3153, "all express trusts must be created or declared in writing."

3. While the trust must have been created or declared in writing, it was not necessary for the pleader to so allege in the petition. *Brown v. Drake*, 101 Ga. 130, 28 S. E. 606; *Walker v. Edmundson*, 111 Ga. 454, 36 S. E. 800; *Tallaferro v. Smiley*, 112 Ga. 62, 37 S. E. 106. From the trend of the argument of counsel here the trial judge evidently sustained the demurrer upon the ground that the trust was an express one, and could not be established by parol. As to whether the petitioners intend to rely solely upon parol evidence, we are not informed. So far as the pleadings disclose, they may have writings which will be competent evidence to make out their case upon this point. They do not have to allege how they expect to prove their case. Upon demurrer it must be presumed, where the contrary does not appear, that the proof will be such as is required under the statute of frauds. The trial judge therefore erred in sustaining the demurrer. Whether the petitioners have any

competent evidence with which to establish the alleged trust is a matter which can be tested upon the trial.

Judgment reversed. All the Justices concur.

(121 Ga. 513)

COLLINS v. CITIZENS' BANK & TRUST CO.

(Supreme Court of Georgia. Dec. 21, 1904.)

BUILDING ASSOCIATION—LOANS—BIDS—USURY—FORECLOSURE—EVIDENCE.

1. The Tennessee statute requires competitive bids for loans made to members by building associations, but such bid may be in writing.

2. The contract was within the scheme of a building and loan association proper, and not usurious on its face.

3. There was no formal plea of usury, and the payments claimed in the defendant's plea were in fact allowed by the plaintiff.

4. The rulings as to the admission of evidence objected to were immaterial, since they could not, in any event, have changed the result.

5. The plaintiff made out a prima facie case by the introduction of the note and mortgage. This cast the burden upon the defendant, which he failed to carry, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Floyd County
W. M. Henry, Judge.

Action by the Citizens' Bank & Trust Company, trustee, against J. A. Collins. Judgment for plaintiff, and defendant brings error. Affirmed.

In August, 1892, Collins made to the Citizens' Bank & Trust Company of Tennessee a mortgage in trust for the purpose of securing a promissory note payable to the Atlas Savings & Loan Association of Tennessee, chartered as a building and loan association under the laws of Tennessee. In addition to the promise to pay the principal sum, this note also promised to pay certain amounts for each week for dues, interest, and premiums. The trust company instituted, in the superior court of Floyd county, proceedings to foreclose the mortgage for the balance due. The rule nisi issued. By an amendment the plaintiff made proffer and an exhibit of the constitution, charter, and by-laws of the Atlas Savings & Loan Association. The defendant answered, denying the allegations of the original petition, and that he was the owner of any of the capital stock of the Atlas Savings & Loan Association, and averred that it was not a building and loan association pure and simple, but that it had devised a scheme under the form of a building and loan contract for exacting usurious interest. There was also attached a list of payments made by the defendant, and a statement in the plea that "upon an accounting he believes he has paid the original loan, the interest due upon it, and a sum in excess of those charges." The plaintiff introduced the note, the charter, by-laws, and constitution contained in the book furnished to the defendant, and the act of the Tennessee Leg-

islature on the subject of a building and loan association, from which it appeared that the premium bid by borrowing stockholders for the preference or priority of loans may be paid in installments, not as a part of the loan, and not as interest, but as a means of determining which one of the shareholders shall receive a loan whenever there are a number of stockholders who may simultaneously desire to effect a loan. The plaintiff also introduced the application of the defendant for membership, and constituting Rood his attorney and agent to sign the rules and by-laws, which the plaintiff also agreed to abide by. The defendant objected to the admission of the by-laws signed by Rood and to the proof of the charter; and in several assignments of error raised the point that under the Tennessee statute the bid for the loan could only be in person, and there was evidence that defendant's bid had been made in writing, and that such written bid had been read and accepted at a meeting for the sale of money. The plaintiff proved and admitted payments equal to or in excess of those set out in the defendant's plea. The president of the building and loan association testified at length as to the method on which its business was conducted. There was a verdict for the plaintiff. A motion for a new trial was overruled, and the defendant excepted.

Henry Walker, for plaintiff in error. W. J. Neel, for defendant in error.

LAMAR, J. (after stating the foregoing facts). Had the loan been an advance of money between an ordinary lender and borrower, the evidence shows that the amount paid by the defendant would have satisfied the principal and interest thereof. But the defendant's note promised to pay the debt, interest, dues, and premiums under a building and loan contract, the scheme of which was considered in *Kirklin* against this same association, 107 Ga. 313, 33 S. E. 83, and where a contract substantially like the one here involved was held not to be usurious. That question, however, is really not in the case, because the defendant filed no formal plea of usury. *Hawkins v. Americus B. & L. A.*, 96 Ga. 209, 22 S. E. 711; *Pattison v. Albany B. & L. A.*, 63 Ga. 377; *Tillman v. Morton*, 65 Ga. 386. The payments claimed by him were allowed. He objected to the method of proving the charter, and, had there been a plea of usury, the question would have been important in testing the corporate powers. But he dealt with the association as a corporation, and was estopped from denying its corporate existence. Civ. Code 1895, § 1862. The contract, being one within the scheme of a building and loan association proper, was authorized by the general statute of Tennessee under the laws of which the Atlas Association was chartered. This statute was introduced in evidence. We find nothing in that statute, or in any decision

from the courts of Tennessee produced to us, requiring anything more than competitive bids for the sale of the money by the association to the members. Indeed, we find a recent ruling that a written bid is sufficient under the statute. *Hughes v. Farmers' Ass'n* (Tenn. Ch.) 46 S. W. 362. The testimony is that the money was cried at open meeting; that the defendant, through another, presented his written bid, which was accepted. The rulings complained of as to the admission of testimony could in no way work a reversal, since such evidence was not essential to plaintiff's case. It made out a prima facie case on introducing the note. The burden was then cast upon the defendant. This he failed to carry. If the evidence objected to had been excluded, it would have still left this burden on the defendant. The case may be a hard one for him, but it arises from the form of the contract he made, and his agreement to pay a high premium to an association of which he was a member. These premiums, in local associations conducted at small expense, the member got back in the shape of dividends. And, where the scheme is the same, the member is theoretically supposed to get the same dividend on stock held by him in the larger, but more expensively conducted, associations. The fact that this theory is rarely realized in practice in and of itself alone furnishes the courts no authority to relieve against the hard bargain.

Judgment affirmed. All the Justices concur.

(121 Ga. 516)

RAMEY et al. v. O'BYRNE et al.

(Supreme Court of Georgia. Dec. 21, 1904.)

APPEAL — BILL OF EXCEPTIONS — AMENDMENT — DEMURRER TO PETITION.

1. Where a suit was brought by certain persons as receivers of the Southern Mutual Building & Loan Association, and, in a bill of exceptions sued out by the defendant, the plaintiffs are described as receivers of the Southern Mutual Loan Association, the error in description may be corrected from the record by amendment in the Supreme Court.

2. Where a writ of error is sued out by one party who is entitled to except, an amendment may be made in the Supreme Court, adding as plaintiffs in error the names of all other persons who were co-parties with the plaintiff in error in the court below, and who may appear from the record to be proper or necessary parties plaintiff in error.

3. A judgment overruling a demurrer to a petition is proper matter for direct exception, as a ruling which would have been final "if it had been rendered as claimed" by the defendant.

4. The statutory action in this state for the recovery of real property is a mixed action; being partly an action *ex delicto*, but mainly to recover possession of the land. It is in no sense an action *ex contractu*.

5. It follows that it is not permissible for the grantee in a security deed to join in the same action a suit against the widow of the deceased grantor to recover the land described in the deed, and a suit against the administrator of the grantor's estate to recover a judgment on the debt secured by the deed.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Wm. Henry, Judge.

Action by M. A. O'Byrne and others, receivers, against Mrs. Wm. Ramey and others. Judgment for plaintiffs, and defendants bring error. Reversed.

This was an action instituted by J. A. Anderson and M. A. O'Byrne as receivers of the Southern Mutual Building & Loan Association. The petition alleged, in substance, as follows: On November 26, 1894, William Ramey executed to the building and loan association a deed to a described tract of land to secure a loan. Ramey has since died, and E. P. Treadaway has been appointed administrator of his estate. There is now due on the debt of Ramey to the association a named sum. Mrs. William Ramey, widow of William Ramey, has since February 5, 1897, been in possession of the land described in the deed, receiving the rents and profits, and refuses to surrender possession to plaintiffs. Mrs. Ramey and Treadaway, as administrator, refuse to pay the balance of the debt to the association, although the same is past due. The prayers were (1) that writ of possession issue in favor of the plaintiffs to the land described in the deed; (2) that they have judgment against Mrs. Ramey for rents and profits since January 1, 1897; (3) "that, if the equity of the case demands, that they have judgment against E. P. Treadaway, administrator as aforesaid, for their debt, principal and interest, with * * * a special lien against the premises described"; (5) that process issue against Mrs. Ramey and Treadaway, as administrator. Pending the action, Anderson (one of the plaintiffs) died, and Weaver, as co-receiver, was made a party plaintiff in his stead. Mrs. Ramey demurred to the petition on the grounds of misjoinder of parties defendant and misjoinder of causes of action, in that plaintiffs sought to unite in one suit an action *ex delicto* against Mrs. Ramey, to wit, the recovery of land, and an action *ex contractu*, to wit, a recovery against the administrator on the debt of his intestate. There were also special demurrers to certain paragraphs of an amendment to the petition. The court struck one of the paragraphs of the amendment, and overruled the other grounds of the demurrers. Mrs. Ramey excepted. Upon the call of the case in this court, the defendants in error moved to dismiss the writ of error (1) because the association of which they were receivers is described in the bill of exceptions as "The Southern Mutual Loan Association of Atlanta, Ga.," and in the petition as "The Southern Mutual Building & Loan Association of Atlanta, Ga."; (2) because E. P. Treadaway, as administrator, is not a party to the bill of exceptions; and (3) because the judgment complained of is not matter for a direct bill of exceptions, but only for exceptions *pendente lite* in the trial court until a final judgment in the case is render-

ed. In response to the first and second grounds of the motion to dismiss, counsel for the plaintiffs in error moved to amend the bill of exceptions by the record, to correct the misnomer in the description of the loan association, and to make E. P. Treadaway, as administrator, a party plaintiff in error with Mrs. Ramey.

Max Meyerhardt and Halsted Smith, for plaintiffs in error. Denny & Harris, for defendants in error.

COBB, J. 1. Misnomers in the description of parties to a writ of error are not necessarily fatal. If the variance is not substantial, and it is clear that the party referred to in the bill of exceptions and the record is the same, a dismissal will not result. *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794, 43 S. E. 52; *Fussell v. Dennard*, 118 Ga. 270 (4), 45 S. E. 247. It need not be determined whether the variance in the present case is so substantial as to work a dismissal if left uncorrected. While a writ of error cannot be amended so as to strike out the name of one person and substitute that of another, who was the real party in the trial court (*Arnold v. Wells*, 6 Ga. 380 (3)), a misnomer in the description in the bill of exceptions of one who was a party in the court below may be corrected by amendment. *Dupon v. McLaren*, 63 Ga. 470; *White v. Cook*, 73 Ga. 164 (1). See, also, *Civ. Code* 1895, § 5570. The motion to amend the bill of exceptions so as to correct the description of the loan association of which the plaintiffs were receivers will be granted.

2. It is settled from the earliest history of this court that, where a writ of error is sued out by one entitled to except, an amendment may be made in the Supreme Court for the purpose of adding as coplaintiffs in error all parties in the court below whom the record shows could have united in suing out the writ of error; and this, too, without giving notice to the parties so added. *Carey v. Giles*, 10 Ga. 1 (7); *McNulty v. Pruden*, 62 Ga. 135 (1); *Sharp v. Findley*, 71 Ga. 654 (6); *Culver v. Mullally*, 94 Ga. 644, 21 S. E. 895 (1); *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755 (1); *Western Union Tel. Co. v. Griffith*, 111 Ga. 551, 36 S. E. 859 (1); *Macon Nav. Co. v. Schofield*, 111 Ga. 881, 36 S. E. 965 (1), and citations. Parties so made may unite with the original plaintiff in error in the assignments of error which he has made, or they may sever and seek to uphold the judgment. *Carey v. Giles*, *supra*; *Steele Co. v. Laurens Co.*, *supra*; *Western Union Tel. Co. v. Griffith*, *supra*. A writ of error sued out only by a person not entitled to except is void, and cannot be amended so as to insert as a plaintiff in error the name of a person who would have been entitled to sue out the writ. *Swift v. Thomas*, 101 Ga. 89, 28 S. E. 618 (2). See, also, *Berendt v. McHugh*, 121 Ga. —, 48 S. E. 691. The amend-

ment making Treadaway, as administrator, a party plaintiff in error, will be allowed.

3. The third ground of the motion to dismiss the writ of error is obviously without merit. A party may, in this state, except either to a final judgment adverse to him, or to one which would have been final "if it had been rendered as claimed" by him. Civ. Code 1895, § 5526. To the latter class of judgments belongs a ruling overruling a demurrer to a petition. *Central R. Co. v. Denison*, 83 Ga. 266, 9 S. E. 788 (2). See, also, *Savannah Ry. Co. v. Renfro*, 115 Ga. 774, 42 S. E. 88 (1), and *Long v. State*, 118 Ga. 319, 45 S. E. 416 (1), which related to the overruling of a demurrer to an indictment.

4, 5. As we construe the petition, it undertook to set forth two causes of action—one against Mrs. Ramey for the recovery of land of which she was in possession, and another against the administrator of the estate of Ramey for the recovery of a judgment on a debt due by his intestate, with a prayer that the judgment be made a special lien on the land in possession of Mrs. Ramey. The petition, therefore, was subject to the objection that it contained "distinct and separate claims * * * against different persons." Civ. Code 1895, § 4938. The Code also provides that all claims arising ex contractu may be joined in one action, and that all claims arising ex delicto may be so joined. Civ. Code 1895, § 4944. By implication from this section, as well as by express provision of the section first cited, claims belonging to the two different classes cannot be joined.

The writ upon which the action of ejectment was founded was a mere action of trespass, in which damages only were recoverable. *Tyler on Ejectment*, p. 34; *Cumming v. Butler*, 6 Ga. 91. Afterwards, under the action of ejectment, the land, as well as damages, could be recovered. Chitty speaks of this action as a mixed action. 1 Chitt. Pl. 125. This court has said that ejectment "is not strictly an action for a tort, but is a mixed action—partly and nominally for a tort, but mainly to try title to land." *Lopez v. Downing*, 46 Ga. 120. The fact that in this state, since the act of 1834, mesne profits are recoverable, does not change the nature of the action, for mesne profits are in the nature of damages, and other damages may be recovered in the action for trespasses committed while the defendant was in possession. *Cunningham v. Morris*, 19 Ga. 583, 65 Am. Dec. 611; *Ezzard v. Mining Co.*, 74 Ga. 523, 58 Am. Rep. 445.

Our statutory action for the recovery of real property is the successor of the old action of ejectment, and follows it in many important respects. The difference is mainly in procedure, being a simpler and more direct method of accomplishing the same purpose. In it mesne profits may be recovered, as well as such other damages as could have been recovered in the old action. See, in this connection, 10 Am. & Eng. Enc. Law

(2d Ed.) p. 472. The statutory action, therefore, may also be characterized as a mixed action. It is certainly not, under any view of it, an action ex contractu, and cannot be joined with such an action. We think, therefore, that the court erred in overruling that ground of the demurrer which set up that the petition sought to set forth two separate and distinct causes of action against different persons.

We do not, however, think that there was a misjoinder of parties defendant. If a simple action of ejectment had been brought against Mrs. Ramey as the tenant in possession, and the administrator had claimed an interest in the land, he could have been made a party defendant by simply serving him with a copy of the petition, and he would have been bound by the judgment. Civ. Code 1895, § 5001. If this is so, there would seem to be no good reason why he might not have been sued jointly with the tenant in possession in the first instance. On the other hand, if the suit had been simply to recover a judgment against the administrator on the debt due by his intestate, with a special lien on the land, Mrs. Ramey, as the widow and heir at law of the intestate, would not have been a necessary, even if a proper, party defendant. The petition, however, does not join Mrs. Ramey and the administrator as defendants to either cause of action, but undertakes merely to set up a separate and distinct cause of action against each of them alone.

The defendants in error asked that, in the event of a reversal, direction be given that they be allowed to amend so as to relieve the petition of any infirmity that may be therein. As the demurrer was overruled, and the case will not be dismissed until the remittitur is entered and the judgment of this court made the judgment of the trial court, no such direction is necessary, but the plaintiffs are at liberty to amend at any time before a judgment of dismissal is entered. See *Cooper v. Brewing Co.*, 113 Ga. 3, 38 S. E. 347, and citations.

Judgment reversed. All the Justices concurring.

(121 Ga. 477)

BLUMENTHAL v. STATE.

(Supreme Court of Georgia. Dec. 20, 1904.)

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS—LARCENY.

1. There is a difference between fact and evidence tending to establish a fact.

2. In his charge the judge may define what are the elements going to make up an offense, and instruct the jury that, if they find from the evidence that the facts constituting these elements are established, they may find the defendant guilty.

3. But the trial judge may not go from general to the particular, and so charge in reference to the testimony as to intimate whether the facts constituting the elements of the crime have or have not been established. Civ. Code 1895, § 4334.

4. There was no error in the charge as to how the state was to prove that the defendant knew the goods were stolen, it appearing from the succeeding sentence that the jury were instructed and must have understood that positive and direct evidence of such knowledge need not be adduced, but that it might be inferred from circumstances. *Cobb v. State*, 76 Ga. 684.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

H. Blumenthal was convicted of crime, and brings error. Reversed.

Twiggs & Oliver, for plaintiff in error. W. W. Osborne, Sol. Gen., and E. H. Abrahams, Sol. Gen. pro tem., for defendant in error.

LAMAR, J. 1-3. There is a difference between fact and evidence tending to establish a fact, though it may not be possible to lay down any rule by which the line separating the two may be distinguished in determining the power of the judge to refer thereto. It has been held that the judge need not confine himself to the abstract, but may instruct the jury with reference to the concrete. *Pennaman v. State*, 58 Ga. 336. To that end, and for the purpose of making a helpful charge, he may define what are the constituent elements of the offense named in the indictment, and thereupon instruct the jury that, if they find from the evidence that facts constituting these named elements have been established beyond a reasonable doubt, they may return a verdict of guilty. But section 4334 of the Civil Code of 1895 prohibits the use of any language which even intimates the court's opinion as to what has or has not been proved as to these elements or by them. In the present case, after charging in general terms what were the elements of the offense, and what class of circumstances might be considered, the judge might have told the jury that they could consider the character of the articles pawned, and the sex of the person offering them. But he went from the general to the particular, and charged: "In this case the articles pawned were pants, and the parties pawning them were negro girls. You can consider whether negro girls wear pants. These are some of the circumstances which you should consider in determining the guilty knowledge of the defendants." The very force and pertinence of the intimation requires the grant of a new trial. *Moody v. State*, 114 Ga. 449, 40 S. E. 242; *Rawls v. State*, 97 Ga. 187, 22 S. E. 529; *Davis v. State*, 91 Ga. 167 (2), 17 S. E. 292; *Bradley v. State*, 121 Ga. 201, 48 S. E. 981. It is very clear that the jury could not have been misled by the charge that the state need not prove that the defendant knew that the goods were stolen. The context and the succeeding sentence showed that the court meant only that positive and direct evidence of such knowledge need not be adduced, but that it might be in-

ferred from the circumstances. The judge then proceeded to enumerate what might be considered by the jury in determining this question. His charge is supported not only by the absolute necessity in such cases, and the utter impossibility of making out a case without relying on circumstantial evidence, but also by the express ruling in *Cobb v. State*, 76 Ga. 684.

Judgment reversed. All the Justices concur.

(121 Ga. 488)

WATKINS et al. v. GILMORE.

(Supreme Court of Georgia. Dec. 20, 1904.)

WILLS—DEVISE—ASSENT OF EXECUTOR—RIGHTS OF REMAINDERMAN—PAYMENT OF DEBTS.

1. The assent of the executor to a devise of lands perfects the inchoate title of the devisee.

2. Where land is devised to one for life, with remainder over to another, the executor's assent to the devise for life inures to the benefit of the remainderman, and at the termination of the life estate the remainderman may take immediate possession of the property, unless the will shows a different intention.

3. The assent of the executor, "when once given, is, in general, irrevocable, although the assets may prove insufficient to pay the debts."

4. Where, under the executor's assent to a devise for life with remainder over, the remainderman, after the death of the life tenant, becomes entitled to the immediate possession of the land, such land is no longer any part of the estate of the testator, nor subject to be sold to pay debts of such estate; and the ordinary has no power or jurisdiction to order the land sold as part of the estate. In such case, although the ordinary has granted an order of sale, the executor, having no title or right to the land, cannot recover it from the remainderman, or from a third party, whether the latter have good title or not.

(Syllabus by the Court.)

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by J. B. Watkins and others against H. F. Gilmore. Judgment for defendant, and plaintiffs bring error. Affirmed.

Y. A. Wright and Jno. R. L. Smith, for plaintiffs in error. Lane & Park and B. P. Bailey, for defendant in error.

SIMMONS, C. J. In February, 1890, J. B. Watkins and S. J. Hale qualified as the executors of A. M. Watkins. By his will the testator had devised all of his property to his wife for life, and after her death to his children for life, with remainder over in fee to their children; the will providing that, if any child should die without child or children, then his portion should go to the surviving children of the testator and the children of deceased children. The executors assented to the devise to the widow, and at her death assented to the devises to the children, dividing the land, and making each child a deed to his or her part. G. W. Watkins was one of the children, and took possession of a portion of the land under the

¶ 3. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1163.

assent and deed of the executors. He was subsequently adjudged a bankrupt, and his property sold, one of his brothers being the purchaser. This brother sold the land to the defendant in error. The executors, on their application, had in the meantime been discharged. G. W. Watkins died, never having had any child or children, and the executors then applied, for reappointment as executors. They were reappointed by the ordinary in July, 1902. They then applied to the ordinary for leave to sell certain lands, including those which had been assigned to G. W. Watkins, and the ordinary granted an order giving such leave in September, 1902. This order of sale recited that the lands reverted to the estate of the testator by the death of G. W. Watkins. The executors then instituted suit against Gilmore, the defendant in error. Upon the trial of the case the above facts were proved, and the trial judge granted a nonsuit. To this the plaintiffs excepted.

1, 2, 3. Under the facts above stated, we think the nonsuit was correct. After the death of the widow, the first life tenant, and the assent of the executors to the devise to the second life tenant, G. W. Watkins, the latter's title to the life estate became perfect. This assent of the executors not only served to perfect the life tenant's inchoate title to the life estate, but inured to the benefit of the remaindermen provided for in the will. The life tenant having left no children, the remainder went to his brothers and sisters who were in life, and to the children of his deceased brothers and sisters. Upon his death these remaindermen were entitled to the immediate possession of the land. The only exception to this rule is as provided, in section 3105 of the Civil Code of 1895, which declares: "The assent of the executor to a legacy to the tenant for life inures to the benefit of the remainder-man. Remaindermen, at the termination of the life estate, may take possession immediately. If, however, the will provides for a sale or other act to be done for the purpose of, or prior to, a division, the executor may recover possession for the purpose of executing the will." In the will now under consideration there is no provision for a sale by the executors, nor is there any hint that any other act shall be done by them for the purpose of or prior to a division of the property. The assent of the executors perfected the inchoate title of the devisees. 2 Woer. Am. L. Adm. *993; Whorton v. Moragne, 62 Ala. 201; Lillard v. Reynolds, 25 N. C. 366; Alexander v. Williams, 2 Hill (S. C.) 522; McMullin v. Brown, 2 Hill's Eq. 457; Lyon v. Vick, 14 Tenn. 42. The assent of the executors perfected the title of both the life tenant and the remaindermen, and at the termination of the life estate the remaindermen were entitled to take immediate possession. This assent, "when once given, is, in general, irrevocable, although the assets

may prove insufficient to pay the debts." 2 Woer. Am. L. Adm. *993. By assenting to the devise the executors lost all control and interest in the land. If there were unpaid creditors, they might follow the land into the hands of the devisees, or have their remedy against the executors personally for assenting to the devise before paying the debts. Id. It was argued here by counsel for the plaintiffs in error that the executors should recover because a division was to be made at the death of the life tenant. Doubtless a division was necessary, but the will does not provide that such division shall be made by the executors, but merely that the remaindermen shall take in equal shares. There is no intimation in the will that it is the duty of the executors to make the division among the remaindermen after the death of the life tenants. The remaindermen became tenants in common, and Civ. Code 1895, § 4786, provides for a division of land held in common. Under this section the division may be had without any interference from the executors. On the whole case, to the present point of development, the decision in *McGlawn v. Lowe*, 74 Ga. 34, is direct and controlling authority. Under the ruling in that case it is clear that the executors cannot recover unless the case is changed by the fact that they had an order from the ordinary granting them leave to sell.

4. Does the ordinary's order to sell change the case? At the time the ordinary granted the order and recited therein that the land had reverted to the estate of the testator, the land had not reverted, and was no part of the estate. The assent of the executors perfected the inchoate title of the devisees, and at the death of G. W. Watkins the remaindermen had the right to take immediate possession. This land was no part of the estate, and the order to sell it was void for want of jurisdiction. Such order, being void, could be attacked anywhere, and at any time. The title to the land having passed out of the estate into the devisees, the executors have no right to recover it as part of the estate. The ordinary's order to sell cannot give the estate any title to the land, nor give the executors any right to recover it when it is no part of the estate. Whorton v. Moragne, 62 Ala. 201. That order may have adjudicated as against the world that it was necessary to sell land of the estate to pay debts or for distribution, but it did not vest in the estate the title to any land which was no part of the estate. After the assent of the executors and the death of the life tenant, the land in controversy was the property of the remaindermen, and the title vested in them as completely, as against the estate and the executors, as though it had never formed any part of the estate. The order to sell the land as part of the estate could not change the title, nor give the executors the right to recover land which was

not part of the estate, nor subject to sale by the executors to pay debts or for distribution. Whether the defendant had title was immaterial. The evidence of the plaintiffs showed an outstanding title in the remaindermen, and the grant of the nonsuit was proper.

Judgment affirmed. All the Justices concur.

(121 Ga. 531)

WHITLEY v. JAMES et al.

(Supreme Court of Georgia. Dec. 21, 1904.)

REAL ESTATE AGENT—SALE—AUTHORITY—RATIFICATION—KNOWLEDGE OF FACTS—ACQUIESCENCE.

1. Where a purchaser is charged with notice that an agent is only authorized to sell for cash, a sale on credit may be treated as void by the principal.

2. A conveyance by an agent authorized to sell, if made to a corporation of which he is president and a stockholder, may likewise be treated as void by the principal.

3. But the agent actually having a power to sell, the sale under such circumstances was not absolutely void, but could be validated by the principal.

4. Ratification will result, by operation of law, from the principal's acquiescence in such sale for an unreasonable length of time after notice of the agent's conduct.

5. If there were special reasons why the principal did not know of such sale, or if there be facts excusing the delay in bringing the suit, the same should be specially averred, in order to prevent the defendant, by demurrer, from taking advantage of the acquiescence implied from the nonaction for long lapse of time.

6. Such acquiescence will be implied where it appears that the purchaser entered under a recorded deed in 1889, and remained in possession until 1903, when the suit was brought for the recovery of the real estate.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Geo. F. Gober, Judge.

Action by T. R. Whitley against J. S. James and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This was an equitable petition against the Douglasville Mineral Land & Improvement Company, Georgia Western Cotton Mills, New Century Cotton Mills, and J. S. James, for the recovery of certain land, cancellation, removal of cloud, and for an accounting. The petition alleged that James was the attorney of Gen. Gordon and Gen. Colquitt to sell their interest in land lying in Douglas county, with power to make deeds thereto and receive the money therefor, "but said power did not authorize him to sell for anything except cash." It was alleged that by deed dated January, 1889, and recorded May 27, 1889, a sale was made to the mineral company, of which James was president; that the land passed by successive conveyances to the Georgia Western Cotton Mills and to the New Century Cotton Mills, of each of which James was president; that the New Century Cotton Mills was in possession of the land at the time of the suit; that no payments had ever been made to Gen. Gor-

don for his interest in the land; and that the several corporations each knew of the agent's want of authority to sell, except for cash. It also appeared that on February 12, 1903, Gen. Gordon executed an instrument by which he transferred to Whitley all of his interest in certain lands in Douglas county, "said lands having been sold or transferred by J. S. James. This quitclaim deed is to convey to T. R. Whitley all my interest arising from any sale of said land in as full and complete a manner as I held the same." The agreement further provided as to the disposition to be made of "all moneys arising from any settlement he [Whitley] may make with J. S. James." There was a somewhat similar agreement from the heirs of Gen. Colquitt, but the plaintiff dismissed his suit in so far as there was any right of action based on this latter transfer or conveyance. The petition contained a detailed statement of the facts and circumstances on which the plaintiff relied, but the foregoing is all that is necessary to a consideration of the controlling points in the case. There were general and special demurrers. The court sustained the same in so far as the petition sought any recovery against the three corporations, with the result that James was left as the sole defendant. He filed no exceptions to the judgment retaining him as a defendant, and the plaintiff, Whitley, excepted to the judgment striking the other three parties.

J. D. Kilpatrick, Felder & Rountree, and B. G. Griggs, for plaintiff in error. Roberts & Hutcheson and J. S. James, for defendants in error.

LAMAR, J. (after stating the foregoing facts). 1. The petition alleged that the unauthorized credit sale was made by the agent in 1889, that the deed was recorded in the same year, and that the defendant corporations had been in possession from that date until April, 1903, when the present suit was filed—a period of 14 years. If the original purchaser knew, or was charged with notice, that the agent was exceeding his authority in making a sale on credit instead of for cash, this would put the conveyance where it could be treated as void at the option of the principal. Civ. Code 1895, § 3021. Compare *Loveless v. Fowler*, 79 Ga. 135, 4 S. E. 103, 11 Am. St. Rep. 407; *Lumpkin v. Wilson*, 5 Helsk. 555.

2. If, on the other hand, the sale is attacked because the agent of the vendor was also president or agent of the purchaser, the effect of the dual agency would authorize the principal to repudiate the transaction. Civ. Code 1895, § 3010; *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674; *Moore v. Casey*, 116 Ga. 28, 42 S. E. 258; *Story on Agency* (8th Ed.) § 211.

3. But whether the attack is because of the dual agency, or of a violation of the instructions, the sale was not absolutely void, so

as to be incapable of ratification. The agent actually had the power to sell. There was at least an attempted execution of the power, and the principal could waive the violation of instructions or the results of the inconsistent positions. The ratification, whether soon or late, was the equivalent of an original command, and cured any defect in the execution of the power. The ratification must, of course, be with knowledge of the material facts; nor would the principal be required to repudiate the act of his agent immediately upon the discovery that there had been anything which rendered the sale voidable. But if, after knowledge of what the agent had done, the principal made no objection for an unreasonable time, a ratification would result by operation of law. What is a period long enough to bring about such a result would usually be a question for the jury, depending upon the peculiar circumstances of each case. But in proceedings to recover the land and set aside the deed the pleadings of the principal may themselves allege enough to show a ratification results as matter of law. In the analogous case of voidable sales to himself by an administrator, it has been held that failure to repudiate for seven years will raise the presumption that the owner acquiesces in the irregular and voidable sales. Advantage can be taken of such lapse of time by a demurrer. Civ. Code 1895, § 3775; Griffin v. Stephens, 119 Ga. 139, 46 S. E. 66, and citations. If there be a good and sufficient explanation as to why the principal did not know of the transaction, or had been unable to discover it, or if there be an excuse for delay in bringing the suit, these facts would have to be specially averred in order to prevent the defendant from taking advantage of the acquiescence implied by nonaction for a long lapse of time. Whether, therefore, the statute of limitations be treated as a bar to the remedy, or raising a presumption of payment, the demurrer was properly sustained. The purchaser took possession in 1889. This was itself some notice, and, when followed by continued possession under a deed recorded for 14 years, with nothing to explain why the principal did not know, or could not learn by the exercise of ordinary care, of what had been done, the case was within, and not without, the rule. The period was long enough to raise the presumption of acquiescence in the act of the agent. Such acquiescence validated the deed. The validation conveyed the title completely to the purchaser. The claim for purchase money is barred, there being no averment of a written or sealed promise to pay the purchase price. Hays v. Callaway, 58 Ga. 288 (2).

These conclusions make it unnecessary to consider the effect of the recitals in the transfer or conveyance to Whitley. They are strengthened, however, by a consideration of the recital therein as to the "land sold by James." This itself goes far to indicate a

ratification of the sale, but with a transfer of the principal's claim for what would be an accounting. But while the question was argued, the record does not present any question as to whether, under Civ. Code 1895, § 3079, this claim could be assigned, for James did not except to the judgment retaining him as a party defendant, and that dismissing the corporations was proper.

Judgment affirmed. All the Justices concur.

(121 Ga. 479)

MOORE v. SMITH.

(Supreme Court of Georgia. Dec. 20, 1904.)

ACTION FOR SERVICES—QUANTUM MERUIT—EVIDENCE—ACTION AGAINST EMPLOYER'S WIDOW—PLEADING.

1. Properly construed, the petition sought a recovery on a quantum meruit for services performed.

2. Where a father employs another to care for and nurse his invalid child until the latter's death, promising to give for the services thus rendered a portion of his (the father's) estate, and the father dies before the son, the person thus employed has a claim, based on a quantum meruit, against the father's estate for the value of the services performed during the father's lifetime.

3. An action of the nature above indicated may be maintained against the father's widow if it appears that there is no administration on the estate, that there are no debts due it except the claim sued on, that the widow is sole heir, that she is in possession of all of the property of the estate, and that she took possession without notice of any existing debt due by the estate.

4. Failure to allege in the petition that the widow took possession of the estate without notice of any existing debt should be taken advantage of by special demurrer, and does not render the petition subject to a general demurrer.

5. It is not permissible to amend a petition setting forth a cause of action of the nature above indicated, by seeking to recover upon an express contract made with the widow after her husband's death to pay a given sum for the services which the plaintiff was employed by the father to perform.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Mollie Smith against S. E. Moore. Judgment for plaintiff. Defendant brings error. Reversed in part.

Mrs. Smith brought an action against Mrs. Moore (formerly Mrs. Price), alleging, in substance, as follows: The defendant is indebted to the plaintiff in the sum of \$1,725, besides interest. In 1883 Dr. Price, who was then the husband of the defendant, employed the plaintiff to nurse his and defendant's invalid minor child; agreeing to pay the plaintiff a stated compensation per week for her services. After the plaintiff had remained in Dr. Price's home for one year under the aforesaid agreement, Price contracted with the plaintiff that, if "she would remain with them and take care of the said minor son (Tom) of Price and defendant until his death, petitioner should share his estate equally with said son and the said defendant." The plaintiff faithfully complied with her part

of this contract, and took care of the child until 1902, when the child died, "which was then a full performance of her part of said agreement and contract." Dr. Price died in 1897, "and the said defendant, well knowing said contract, ratified the said contract and agreed that it should be carried out," and plaintiff continued to nurse the child, which services were accepted by the defendant. The estate of Dr. Price is worth over \$5,000, and the plaintiff is entitled to the sum aforesaid, which the defendant is in possession of and refuses to pay. The plaintiff previously sued out an attachment to enforce the payment of the sum due her, and had the same levied upon described property. Garnishments were also served upon named persons. If for any reason the plaintiff is not entitled to specific performance, she alleges that her services were worth \$1,720, and she prays judgment for that sum, to be satisfied by a sale of the property attached, and for a judgment against the garnishees. The defendant demurred to the petition on the ground that it set forth no cause of action against her; the cause of action, if any is set forth, being against the estate of Dr. Price, and no reason is set forth why suit is brought against the defendant. The court allowed the plaintiff, over objection of the defendant that it set forth a new cause of action, to file an amendment to the petition, alleging that there were no debts due by the estate of Price except the one sued on, and no necessity for administration; the only parties interested being the parties to this suit. The amendment further alleged that, after the defendant took possession of the property of the estate, she agreed that, if plaintiff would continue to care for the minor child during his life, she should have half of the property which the defendant had received from her husband's estate. It is alleged that the plaintiff performed the services in question upon the faith of this agreement, and that the defendant has become liable to the plaintiff for the value of one-half of the property of the estate, for which judgment is prayed. The court overruled the demurrer, and the defendant excepted; assigning error upon this judgment and upon the allowance of the amendment.

R. J. & J. McCamy, for plaintiff in error.
W. E. Mann and Shumate & Maddox, for defendant in error.

COBB, J. 1. While the words "his death," occurring in that part of the petition where the second contract with Price is first referred to, are ambiguous, and should, under the rule, be construed most strongly against the plaintiff, still, when the whole petition is considered together, we think it is clear that the plaintiff intended to allege that she was employed by Price to render services to the son during the son's lifetime. The subsequent allegation that when the son died

the contract was fully performed seems to make this clear. The cause of action attempted to be set forth in the original petition was not on the contract, but on a quantum meruit for the value of services rendered. The contract was alleged merely as matter of inducement.

2. If, therefore, the suit had been brought against a legal representative of Price's estate, a cause of action would have been set forth, as for a quantum meruit, for services performed during Price's lifetime; it appearing that Price is dead, and that consequently specific performance cannot be had. See *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270; *Id.*, 90 Ga. 581, 16 S. E. 349; *Banks v. Howard*, 117 Ga. 94, 96, 43 S. E. 438.

3. The Code provides that, upon the death of a husband without lineal descendants, the widow is his sole heir, and that she, upon the payment of his debts, if any, may take possession of his estate without administration. Civ. Code 1895, § 3355 (1). The Code also provides that: "If the estate has been distributed to the heirs at law, without notice of an existing debt, the creditor may compel them to contribute pro rata to the payment of his debt." Civ. Code 1895, § 3422. By implication and analogy from these sections, where a husband dies, and his widow takes possession of his estate, a creditor of the husband might maintain an action on his debt directly against the widow, upon proof that the widow was sole heir and in possession of the estate, that there was no administration on the estate, that his claim was the only debt due by the estate, and that the widow took possession without notice of any existing debt due by the estate. The cases of *Johnson v. Champion*, 88 Ga. 527, 15 S. E. 15, and *McElhanev v. Crawford*, 96 Ga. 174, 22 S. E. 895, recognize the creditor's right to bring suit against the widow under such circumstances. See, also, in this connection, *Towns v. Mathews*, 91 Ga. 546, 17 S. E. 955. The widow is not, in such a case, to be regarded as the "personal representative" of the estate for all purposes, but she is so far its representative as to authorize the creditor to sue her under the circumstances above set forth. While the creditor can require administration, the law will not compel him to do so, when he can, by a suit against the widow, have adjudicated the rights of all persons interested in the estate. This rule avoids circuity of action. If an administrator were appointed, it would be necessary for him to recover possession from the widow, and then the creditor must obtain judgment against him. The law favors directness. Here the result is the same, whichever method is adopted. The creditor's claim must at last be satisfied out of property to which the widow would otherwise be entitled, and the law will not require three proceedings—one in the court of ordinary, and two in other courts—where the same

result can be accomplished by one. The recovery against the widow should be restricted to services performed during the lifetime of Dr. Price. Of course, the plaintiff might maintain an action against the widow on a contract made by her for the performance of services to the son after the father's death. As we have construed the original petition, there is no effort to recover on such a contract. The allegations and prayers are broad enough to include services rendered after the death of the father, but the petition seeks a recovery against the widow only as the representative of the estate. The fact that the plaintiff may have prayed for the recovery of too large a sum will not result in the dismissal of the petition, but on the trial the recovery should be limited to an amount which would represent the value of services performed in nursing and caring for the child during the lifetime of his father.

4. If the widow have notice of an existing debt of her husband's, she cannot take possession of his estate, and, if she does so, she is a wrongdoer. Under such circumstances she might be sued as executrix in her own wrong for thus dealing with personality, but in no other way could an action be maintained against her as the legal representative of the estate. The petition should, therefore, have alleged that the widow did not have notice of the debt sued on when she took possession of the property of the estate. There is no such allegation in the petition. Nor does it allege that the widow did have such notice. It is necessarily to be inferred from the allegations that the widow knew of the contract between Dr. Price and the plaintiff, and of the rendition of the services by her. But it does not appear from the petition that when the widow took possession she knew that the plaintiff had an unsatisfied claim against the husband, which was "an existing debt" against his estate. The plaintiff should have alleged distinctly that the widow did not know this, but the failure to do so did not render the petition subject to general demurrer, but only to a special objection, which was not made.

5. So much of the amendment as sought to complete the cause of action outlined in the petition by showing that there were no other debts and no necessity for administration, and that the widow was in possession, was properly allowed. But that portion of the amendment which sought to set up the contract with the defendant, made after her husband's death, ought to have been rejected. It was clearly open to the objection made to it, that it set forth a new cause of action; and it was subject to the further objection that it sought to recover against the defendant as an individual, whereas in the original petition she was sued as the representative of the estate. Such an amendment as the one sought to be made was not allowable even in an attachment case. Dissection will be given that so much of the

amendment as related to the contract made with the defendant be stricken.

Judgment affirmed in part, and in part reversed, with direction. All the Justices concur.

(121 Ga. 541)

McWHORTER v. CHENEY.

(Supreme Court of Georgia. Dec. 21, 1904.)

HOMESTEAD—INVASION OF RIGHTS—ACTION TO MAINTAIN—LIMITATIONS.

1. The wife of a head of a family may prosecute any appropriate remedy to prevent interference with her homestead interest.

2. Being under no legal disability to institute and maintain an action for the invasion of her homestead rights, she must assert her cause of action within the period of limitation.

3. Plaintiff's right to sue existed from the beginning of the alleged fraud, as she does not disclaim knowledge of the fraud, and the reasonable deduction from her petition is that she had contemporaneous knowledge of the various acts alleged to be fraudulent. A delay to sue for 18 years renders her demand stale.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Suit by S. H. Cheney against W. P. McWhorter. Judgment for plaintiff, and defendant brings error. Reversed.

An equitable proceeding was brought by Mrs. Sarah H. Cheney against W. P. McWhorter. In her petition the plaintiff set forth the following statement of facts: On September 25, 1869, her husband, E. R. Cheney, had set apart to him, as the head of a family, a homestead in a certain (described) tract of land in Greene county for the benefit of his family, consisting of petitioner and several minor children. He died on March 21, 1902, leaving her the sole beneficiary of the homestead, his youngest child having attained his majority on September 13, 1896. About the year 1881, E. R. Cheney desiring to run an account with the defendant, and the latter being unwilling to credit him without security, an arrangement was made between them whereby Cheney brought a petition for leave to sell the homestead property for the ostensible purpose of reinvesting the proceeds in lands in Jackson county, and in pursuance of an order obtained from the court granting leave to sell executed and delivered to McWhorter a deed conveying to him the homestead premises for a recited consideration of \$1,000. By this arrangement Cheney obtained credit at the store of McWhorter, and became indebted to him from year to year until 1884. McWhorter having then declined to make further advances, a supplemental petition was filed by Cheney, asking the leave of the court to reinvest the proceeds of the alleged sale to McWhorter in certain lands in Oglethorpe county. After the prayer of this supplemental petition had been granted by an order of the court, petitioner "joined

¶ 2. See Homestead, vol. 26, Cent. Dig. § 892.

with her said husband in a deed to said land of date November 28, 1884, which deed" was duly recorded, conveying "the premises aforesaid to W. P. McWhorter for a consideration therein recited of twenty-five hundred dollars." In point of fact, "McWhorter parted with only \$366.68 in actual cash at the time said second deed was made, and the remainder of the consideration stated therein was a settlement of the open account and other debts which had been made by her said husband to said McWhorter," including certain security debts which her husband had assumed; among them a debt of some \$600, which had been charged against him in settlement of an open account due McWhorter by J. S. Cheney, an adult son of petitioner and E. R. Cheney. The deed first above referred to "was made in execution of a plan devised or participated in by the defendant, W. P. McWhorter, having for its object the obtaining by him of homestead property as security for debts then in existence and thereafter to be contracted, and not for the purpose of bona fide purchasing said property"; and the "deed and conveyance of date November 28, 1884, was made to said McWhorter in settlement of debts or obligations due at the time to him by said E. R. Cheney, and said deed was not made in good faith for the purpose of conveying to him homestead property for the purpose of reinvesting the proceeds thereof." The petition of plaintiff's husband for leave to sell and reinvest was filed with the full knowledge of McWhorter, "in compliance with an agreement which had already been entered into between [them], whereby said McWhorter was to make advances to said Cheney, and take the deed to the land as security," and the petition presented to the court "deliberately and intentionally misrepresented the truth of the transaction." Both of the orders obtained from the court, as well as the deeds made in pursuance thereof, "were in execution of a scheme and device entered into for the purpose of deliberately setting aside and undoing the homestead which had been granted for the benefit of petitioner and her minor children, and for the evasion and setting aside of the rights guaranteed to petitioner in said homestead by the laws and Constitution of this state." The defendant "having participated in said scheme, the same is a fraud; the deeds made to him in pursuance thereof are fraudulent, null and void, and he has no shadow or right of title to said property, or the possession thereof, as against the homestead rights of petitioner." The defendant went into possession of the property in the year 1886; has since enjoyed the rents and profits thereof, of the yearly value of \$300, and is liable to account therefor. No part of the \$366.68 paid in cash by McWhorter to plaintiff's husband was in fact reinvested by the latter in other property, and petitioner has received no

benefit from the payment of that amount, but has been deprived of her entire interest in the homestead property and its income. The prayers of the petition were (1) that the deeds made to McWhorter be canceled as fraudulent, and of no effect; (2) that the collusive sale of the homestead premises be declared void for fraud; (3) that plaintiff be granted a decree providing for her occupancy and enjoyment of the homestead premises for the remainder of her natural life; (4) that she have judgment for mesne profits for the time defendant had been in possession of the premises; and (5) that she be granted such other relief as the facts entitled her to receive. The defendant filed a demurrer to the petition. The plaintiff was then allowed to amend, over the defendant's objection, by setting up the following additional facts: The defendant was a merchant at the time the transactions mentioned in plaintiff's petition took place, and he kept correct and complete books. These books, which are still in his possession, and which were recently examined, with his consent, by petitioner's attorney, will disclose the "truth of petitioner's case." W. R. Wilson, the guardian ad litem appointed by the court when the homestead order to sell was granted, is in life. "Said McWhorter therefore has in his possession every fact and all the evidence he needs, and the ascertainment of the truth will not be more difficult because of delay, and he is not hurt because suit was not instituted sooner." During the life of plaintiff's husband he "refused to bring this suit, and when petitioner's sons attempted to bring it for her he objected thereto, and prevented the same." The defendant has always realized that his claim to the land is "defective"; has never repaired or improved the property, though fully able to do so, "because he anticipated this suit"; and as the minor children of petitioner and her husband arrived at age the defendant "endeavored to obtain deeds from them to their interests in this land, thereby indicating knowledge that he had no valid title thereto." After the allowance of this amendment, the defendant renewed his demurrer, but the court overruled the same. Exception is taken both to the allowance of the amendment and to the judgment overruling the demurrer to the petition as amended. The demurrer was based upon the general ground that the petition was without equity, and also upon a number of special grounds, one of which presented the objection that "the petition shows such laches in the petitioner as that she should not be relieved."

Saml. H. Sibley, for plaintiff in error.
James Davidson and James B. & Noll P. Park, for defendant in error.

EVANS, J. (after stating the facts). The first proposition to be determined in solving the rights of the plaintiff is whether the wid-

ow of the head of a family, who is the sole beneficiary under a homestead, is affected by the ordinary rules of limitation as applied to the recovery of her interest in the homestead property. It would seem that, if the wife of the head of a family could assert her rights under the homestead by filing a claim in her own name (*Connally v. Hardwick*, 61 Ga. 501), she could prosecute any other appropriate remedy to prevent interference with her homestead interest (*Eve v. Cross*, 76 Ga. 693). Certainly, upon the refusal of the head of the family to sue, she could maintain an action for any deprivation of benefit to which she might be entitled under the homestead. *Pritchett v. Davis*, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298. The general rule is that limitation runs against all persons who are not under disability to sue. The wife or widow of the head of the family, being under no legal disability to institute and maintain an action for an invasion of her homestead rights, must assert her rights within the period of limitation. The plaintiff's cause of action accrued upon the fraudulent sale of the homestead, and her right to sue began as soon as she knew of the fraud, or by reasonable diligence could have known of it. She waited 18 years after the alleged fraudulent sale before instituting her suit. She insists that, even if the statute of limitations was applicable, her cause of action is not stale, because the defendant's possession of the land originated in fraud, and that no length of time could ripen such fraudulent possession into a prescriptive title. It is undeniably true that possession originating in fraud can never ripen into prescription; and, if the present suit was to recover the land, the defendant could not plead a fraudulent possession for more than seven years as a bar to a recovery against the true title. The plaintiff does not claim the title to the land, but only a usufruct therein, and her suit is brought to cancel the title of McWhorter as fraudulent, and to recover the mesne profits since he has been in possession, and to procure a decree for the use and occupation of the homestead premises during her life. As her husband joined with petitioner in the deed sought to be canceled, it would seem that his estate ought to be in some way represented in the litigation before his deed is vacated. Until the deed from plaintiff's deceased husband to McWhorter is legally vacated, the title to the reversion is in McWhorter. The deed may have been ineffectual to convey the homestead interest because of the alleged collusive conduct of McWhorter and plaintiff's husband; but it did convey the husband's reversionary interest, the homestead being taken out under the Constitution of 1868. *Huntress v. Anderson*, 110 Ga. 427, 35 S. E. 671, 78 Am. St. Rep. 105. Assuming, however, that petitioner, who is the sole remaining beneficiary of the homestead, is seeking to cancel the sale to the defendant as

a means of recovering her beneficial interest, if the cancellation of such sale is not a condition precedent for her recovery, then she could maintain so much of her action as sought to recover her usufruct interest without formally vacating her husband's deed to the homestead estate; that is to say, if the defendant's title is not a good one—is void as against her—it would not estop her recovery of her right to the possession of the homestead property during her life. Thus construed, her action is to recover her usufruct interest in the homestead (which is the right of possession of the homestead land during her life) and damages for withholding that right since 1886, which are alleged to be the mesne profits of the land, and her action is maintainable without making the personal representative of her deceased husband a party. *Pritchett v. Davis*, supra.

Petitioner does not allege her ignorance of the fraud at the time of its commission, nor at any subsequent time. From her petition it is clearly inferable that she was cognizant of the fraud from its inception. She signed the deed of 1886, and McWhorter went into possession that year. If there was no reinvestment, she must have known it from the beginning. Besides, she alleges that, as her children would arrive at majority the defendant would attempt to get deeds from them, and that her youngest child arrived of age more than seven years before the bringing of her suit. The only excuse offered for this long delay of 18 years is that "her husband refused to bring the suit, and when petitioner's sons attempted to bring it for her he objected thereto, and prevented the same." This allegation does not amount to a charge of duress on the part of the husband; and, even if it did, McWhorter is not alleged to be responsible therefor. Her right to sue, from all the allegations of the petition, existed from the beginning of the alleged fraud, as she does not disclaim knowledge of the fraud and the reasonable deductions from her pleadings is that she had contemporaneous knowledge of the various acts alleged to be fraudulent.

In another part of this opinion it was pointed out that this was not an action of ejectment; that the title in reversion was not involved, but the suit was for the recovery by the sole beneficiary of a homestead usufruct and damages in the way of mesne profits for interference with her enjoyment of the homestead property. The demurrer does not set up prescription on the part of the defendant, but attacks the case as made by the petition as a stale demand. Now, it is a familiar doctrine that not only do the various limitations apply equally to all courts, but, in addition, courts of equity may interpose an equitable bar whenever, from lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights. Civ. Code 1895, § 3775. Eighteen years have elapsed since the alleged fraud was com-

mitted. The husband is dead, and the ascertainment of the truth made more difficult. Equity follows the analogy of the law, and even in suits to recover land, when fraud is charged, it has been held that "the period of limitations applicable to an action * * * for the fraud is the same as that which would apply to an action for the land, to wit, seven years from the discovery of the fraud." *Cade v. Burton*, 35 Ga. 280. "If the defendant has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action, the period of limitations shall run only from the time of the discovery of the fraud." Civ. Code 1895, § 3785. The statute of limitations is a statute of repose. When a person is defrauded, and has knowledge of the fraud, the law expects him to ask redress, if at all, within the period of limitation. If he waits for a longer period, he is bound by his laches. The petition does not charge the defendant with any conduct the effect of which was to debar or deter her from sooner bringing suit. We therefore conclude that the cause of action set out in the plaintiff's petition was a stale demand, and the court should have sustained the demurrer thereto.

Judgment reversed. All the Justices concur.

(121 Ga. 484.)

CENTRAL OF GEORGIA RY. CO. v. MORRIS.

(Supreme Court of Georgia. Dec. 20, 1904.)

MASTER AND SERVANT—ASSAULT BY SERVANT.

1. A railroad company is not liable in damages for an assault and battery committed upon an intruder on its premises by an agent or employé who at the time was acting, not within the scope of his employment, but wholly outside of the general authority with which he had been clothed by the company.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by T. C. Morris against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. Branham and McHenry & Maddox, for plaintiff in error. Seaborn & Barry Wright, for defendant in error.

EVANS, J. The error assigned in the bill of exceptions sued out in this case is that the court below overruled a demurrer to the plaintiff's petition as amended at the trial. The allegations of fact upon which the plaintiff sought to recover were substantially as follows: On October 5, 1902, plaintiff went onto the platform of defendant's freight depot, at the request and invitation of a policeman of the city of Rome, for the purpose of pointing out to the policeman a man in the company's employ whom the policeman de-

sired to arrest for a violation of an ordinance of that city. While standing on the platform, the plaintiff was approached by one J. C. O'Dell, "an employé of defendant in the capacity of trainmaster," who said to him, "I told you not to come around here again, bothering my men," or words of similar import; meaning that he had told plaintiff not to bother the employés of the defendant who were under his direction and control, and implying that plaintiff was at the time bothering an employé who was under his control and direction. After so addressing plaintiff, O'Dell violently assaulted him and threw him off the platform into the street, a distance of four feet, in the presence of many bystanders, and in a place fully exposed to view by the public, and O'Dell at the same time cursed and abused plaintiff. The said "J. C. O'Dell was an employé of defendant in capacity of trainmaster, as aforesaid, whose duty was to exercise a general supervision over all trainmen and operators, and to report all neglect of duty on the part of employés." The assault upon plaintiff was made because he had come there for the purpose of pointing out to the policeman an employé and trainman who was under the control of O'Dell, and "said O'Dell was acting in his capacity as trainmaster, as aforesaid, and not in his individual capacity." The plaintiff was greatly embarrassed and humiliated by the unlawful and violent battery committed upon him, and his feelings were thereby wounded, and he asks for \$2,000 damages.

It is unnecessary to set forth the special grounds of the defendant's demurrer, for, in the view we take of the case, the general demurrer to the plaintiff's petition should have been sustained.

The plaintiff did not go upon the premises of the company at its invitation, express or implied, but upon the invitation of a policeman. There is no pretense that the plaintiff had any business to transact with the company. In this respect the case differs very materially from those of *Christian v. Ry. Co.*, 79 Ga. 460, 7 S. E. 216; *Columbus & R. Ry. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411; and *Ga. R. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565. Accordingly the company owed to the plaintiff no affirmative duty of protection against an unprovoked assault by one of its employés, and cannot be held liable in damages for a battery committed by an agent or employé who acted outside of the scope of his authority and upon his individual responsibility. *Ga. R. Co. v. Wood*, 94 Ga. 124, 21 S. E. 288, 47 Am. St. Rep. 146; *Lynch v. R. Co.*, 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810. The plaintiff was a mere intruder, and the company had a right to insist upon his departure. If he persisted in remaining, the company could lawfully use such force as was reasonably necessary to eject him from its premises. *Hammohd v. Hightower*, 82 Ga. 290, 9 S. E. 1101. This

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 1217, 1219, 1221, 1225, 1231; *Railroads*, vol. 41, Cent. Dig. §§ 902, 906.

right could be exercised by any agent to whom the company had delegated the power to exercise it; the company being responsible, of course, for any abuse of such power by its agent. But it does not appear that O'Dell, the employé who assaulted the plaintiff, was an agent to whom the company had delegated its right to eject intruders from its premises. We are informed by the plaintiff's petition that O'Dell was assuming to act, not in his individual capacity, but in his capacity as trainmaster. His official designation does not warrant the inference that he was placed by the company in charge of its premises, and had either express or implied power to determine who were intruders, and to protect the company's interests by ejecting persons whom he believed came there for the purpose of bothering the employes placed under his control and direction. Therefore that he assumed to act in his official capacity, rather than as an individual, cannot be regarded as sufficient to render the company liable for his actions. The important thing to be considered, and that upon which the right of the plaintiff to recover depends, is whether or not O'Dell acted within the scope of the business for the transaction of which he was employed. As to this all-important matter, the plaintiff simply alleges that the trainmaster's "duty was to exercise a general supervision over all trainmen and operators, and to report all neglect of duty on the part of employes." There is in the petition no hint that O'Dell was held out by the company as an agent authorized to deal in its behalf with the general public in any manner whatsoever, or to perform for it any service save that of exercising a general supervision over a particular branch of its internal affairs. The company had a right to thus limit the field of his usefulness. It was not bound to appoint him its "casual ejector." That it ever, in point of fact, clothed him with authority to take any action with respect to persons coming upon its premises, at or without its invitation, does not appear. The plaintiff's petition is lacking in one of the essential ingredients necessary to a cause of action against the defendant company for the tort complained of, and should have been dismissed on general demurrer.

Judgment reversed. All the Justices concur.

(121 Ga. 487)

ATLANTA & W. P. R. CO. v. LOVELACE.

(Supreme Court of Georgia. Dec. 20, 1904.)

RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS—NEW TRIAL—REVIEW.

1. After instructing the jury that plaintiff and defendant railroad company were bound to exercise the same degree of care to prevent a collision between plaintiff's team and defendant's engine on a public crossing, it was not erroneous for the court to add to such instruction: "But one is not bound to anticipate negligence when the law commands diligence for

his protection at the hands of another." The duty of exercising care to avoid the consequences of another's negligence does not arise until such negligence exists, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Western & Atlantic R. Co. v. Ferguson*, 39 S. E. 808, 113 Ga. 708, 54 L. R. A. 802.

2. It was not erroneous for the court to refuse to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his powers of hearing and seeing before going on the track. *Macon Railway & Light Co. v. Barnes* (Ga.) 49 S. E. 282. What an ordinarily prudent man would do under the circumstances is a question for the jury.

3. The requests to charge, in so far as they were sound and pertinent, were fully covered by the instructions given, in which the law applicable to all the issues in the case was accurately and specifically given to the jury.

4. Grounds of a motion for a new trial not approved by the trial judge will not be considered by the Supreme Court.

5. The evidence authorized the verdict, and the refusal of a new trial was not erroneous.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action by L. B. Lovelace against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Arthur Heyman, Dorsey, Brewster & Howell, A. H. Thompson, and R. A. S. Freeman, for plaintiff in error. F. P. Longley and E. S. Longley, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 487)

ATLANTA & W. P. R. CO. v. LOVELACE.

(Supreme Court of Georgia. Dec. 20, 1904.)

RAILROADS—ACCIDENT AT CROSSING.

1. This case is controlled by the rulings made in *Atlanta & West Point R. Co. v. L. B. Lovelace* (Ga.) *ubi supra*.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action by L. T. C. Lovelace against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Arthur Heyman, Dorsey, Brewster & Howell, A. H. Thompson, and R. A. S. Freeman, for plaintiff in error. F. P. Longley and E. S. Longley, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 587)

BERRY et al. v. JORDAN et al.

(Supreme Court of Georgia. Dec. 21, 1904.)

CONFLICTING STATUTES—AFFIDAVIT OF ILLEGALITY—NOTICE.

1. When there are two conflicting sections in a Code, and both are derived from legislative

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 1169.

acts, that section prevails which is derived from the later act, such being considered the last expression of the lawmaking power on the subject.

2. When an affidavit of illegality is returned to a county court for trial, no notice of the time and place of hearing need be given to the party filing the affidavit.

3. There was no error in refusing to grant the injunction.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by A. B. Berry and others against W. F. Jordan and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. T. Davidson, for plaintiffs in error. W. F. Jenkins & Son and F. Jordan, for defendants in error.

COBB, J. Upon the foreclosure of a mortgage upon personalty an execution for \$110.50 was issued, returnable to the county court. The defendant interposed an affidavit of illegality, and the papers were returned to the county court for trial. At the next succeeding quarterly term of the court, which was more than 10 days after the papers had been returned, the case was called, and, there being no appearance for the defendant, the affidavit of illegality was dismissed. The execution was proceeding, when the defendant filed a petition praying for an injunction to restrain a sale of the property. The ground upon which the injunction was sought was that at the time the affidavit of illegality was dismissed the defendant had not been given 10 days' notice of the time and place of the hearing of the illegality. The injunction was refused, and the applicant excepted.

1. The county court, as organized under the act of 1872 (Acts 1871-72, p. 288), was not a court holding its sessions at stated times or terms. Suit was begun by a summons, which not only stated the nature of the plaintiff's demand, but also fixed the "time and place in the county" for the trial; the judge being expressly authorized to hold the court at the courthouse, or any other place in the county. The term of the court was not fixed by law, but it was fixed by a summons in each case. It was therefore necessary, under such a scheme, that when an affidavit of illegality was interposed the time and place of hearing should be fixed by the judge, and the act provided that no illegality should be disposed of until the county judge had given "ten days' notice of the time and place of hearing." The act of 1879 (Acts 1878-79, p. 132) made radical changes in the constitution, jurisdiction, and procedure of the county court. It declared that the court should be held at the courthouse, or where the superior courts are usually held in the county; and that the court should hold its sessions monthly and quarterly, according to the character of the case to be tried. It was provided that when

an affidavit of illegality was filed the case arising thereon should not, as against the plaintiff in execution, be forced to trial until he or his attorney shall have had 10 days' notice of such defense being made. The present Code requires the court to be held at the courthouse, unless impracticable from any cause, when the same may be held at some other place in the county site, after the prescribed notice has been given. Civ. Code 1895, § 4181. Under the original scheme, when the law fixed no time or place for the hearing of any case, but both were to be fixed by the judge as each case arose, notice of the time and place of hearing to both parties was necessary. But when the law fixed both the time and place for the hearing of every case that could come before the court, no notice as to either is necessary to be given to a party who is the movant in the case. The law charges him with notice when he files his proceeding, and therefore the only notice necessary under the new law is to the one against whom the proceeding has been brought. Hence the law provides that when an illegality is filed the case shall not be forced to trial until the plaintiff in execution has had 10 days' notice of the defense—not of the time and place of hearing, but of the fact that such defense has been filed. When an illegality has been interposed to the levy of an execution, it is the duty of the officer to return all the papers for trial to the next term of the court from which the execution issued, and the case stands for trial at the first term. Civ. Code 1895, § 4738. The provision of the Act of 1872 in reference to giving 10 days' notice of the time and place of hearing of illegalities appears in the present Code. Civ. Code 1895, § 4206. And the provision of the Act of 1879, which prevents an illegality case from being forced to trial as against the plaintiff in execution, also appears in the Code. Civ. Code 1895, § 4201. It seems that the conflict between the two sections in reference to this matter is no less than the conflict between the two schemes in the different acts. The conflict in the two sections being irreconcilable, and both being derived from legislative acts, the section which is taken from the act of the later date is to be deemed the law, as being the last legislative expression on the subject. *Lamar v. Allen*, 108 Ga. 165, 33 S. E. 958. Applying this rule, the procedure prescribed in section 4201, which is taken from the Act of 1879, and is entirely consistent with the scheme of that act, is the law to be followed, and the rule laid down in the last sentence of section 4206, which is derived from the Act of 1872, and is wholly inconsistent with the scheme of the later county court act, is no longer of force. There was no error in refusing to grant the injunction prayed for.

Judgment affirmed. All the Justices concur.

(121 Ga. 511)

HARRIS v. DALY.

(Supreme Court of Georgia. Dec. 21, 1904.)

CERTIORARI—ANSWER OF JUSTICE—SALE—RESCISSION—ACTION ON NOTE—JUDGMENT.

1. The answer of the justice of the peace, though brief, verified the statements of fact in the petition for certiorari.

2. Rescission involves the obligation to restore the status, unless the subject-matter of the sale is worthless.

3. Regardless of whether the evidence sustained the verdict, a new trial should have been granted. It appears that the defendant was not only relieved of liability on the note sued on, and obtained a judgment for the return of the money previously paid, but was also allowed to retain in her possession the property conveyed by the plaintiff under the rescinded contract.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by Ella Harris against Martha Daly. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Harris sued Mrs. Daly in a justice's court on a note for \$15, representing the balance due on the purchase of a Jersey cow which had been sold for \$30, with a cash payment of \$15. The defendant filed a plea which was equivalent to one of rescission on the ground that the quality, condition, and value of the cow had been misrepresented. There was conflicting evidence as to what representations had been made, and as to what were the condition and value of the cow when received, and whether the defendant had acted promptly, or notified the plaintiff of her election to rescind only after the purchase-money note became due, and there had been a refusal of the demand for payment thereof. In the suit on the note the verdict was adverse to the plaintiff, the jury finding "for the defendant fifteen dollars." Nothing was said as to what should be done with the cow. The plaintiff applied for a writ of certiorari. The petition was divided into numbered paragraphs, the testimony of each witness being included in separate paragraphs. The answer of the justice was extremely brief. After the formal beginning, it proceeds as follows: "Replying specifically to the allegations in said petition respondent says: First. Absolutely true. Second. Substantially correct. Third. The evidence as near as I could state it from memory. Fourth. Evidence as given on trial. Fifth. See nothing to change." At the hearing in the superior court the certiorari was overruled, and the plaintiff excepted.

W. H. Odell and R. J. & J. McCamy, for plaintiff in error. W. E. Mann, for defendant in error.

LAMAR, J. (after stating the facts). In the argument here it was contended that on the authority of *Colbert v. State*, 118 Ga. 302, 45 S. E. 403, the certiorari was properly

overruled. It was insisted that the answer of the justice did not verify the petition, nor was there otherwise any statement of what occurred on the trial. The defendant made no motion to dismiss because the answer was insufficient, though he did traverse the return in so far as it related to the testimony of the witness Orr. On this traverse the justice filed a supplemental answer setting out more in detail the testimony of this witness. The original answer of the justice was brief, but it substantially verified the allegations in the petition. There was no suggestion, as in *Colbert v. State*, 118 Ga. 302, 45 S. E. 403, that the officer was unable to remember whether it was correct or not. Some of the paragraphs are absolutely verified. The only one which is even subject to criticism is that relating to the evidence referred to in the third paragraph, as to which the justice answered that it contains "the evidence as near as [he] could state it from memory." This was not a statement that he could not recollect the testimony, but, rather, that his memory of what transpired corresponded with that of the defendant. Civ. Code 1895, § 4648. The petition being, therefore, verified, it could not have been overruled for want of a proper answer.

The record presents no question as to the sufficiency of the pleadings, or as to the right of the defendant to rescind. But from the verdict it appears not only that the plaintiff was not allowed to recover on the note, but that the jury found that she should repay the defendant the amount previously received on account of the purchase of the animal. So far as the pleadings and verdict show, the defendant is relieved from liability on the note, gets back the amount paid on account of the purchase, and also retains the animal. There is no suggestion that it was worthless. In any view of the case, a new trial should have been ordered. Rescission involves the necessity of restitution of parties to the condition before the contract was made. Civ. Code 1895, §§ 3711, 3712.

Judgment reversed. All the Justices concur.

(121 Ga. 491)

MOCALMAN v. STATE.

(Supreme Court of Georgia. Dec. 21, 1904.)

BASTARDY—INDICTMENT—EVIDENCE—INSTRUCTIONS—NEW TRIAL—EXCLUSION OF EVIDENCE.

1. The demurrer to the indictment was properly overruled.

2. Upon a trial under an indictment charging the accused with the offense of bastardy, evidence that he had previously been tried under an indictment charging him with the seduction of the mother of the bastard child, and found guilty of the offense of fornication, was irrelevant and inadmissible.

3. Where the magistrate who presided at the preliminary hearing of a bastardy proceeding signed entries made on the warrant to the effect that, after evidence heard, the accused was required to give the bastardy bond, in terms of

¶ 2. See Sales, vol. 43, Cent. Dig. §§ 303, 304.

the law, and that, having failed and refused to do so, he was recognized in a given sum to the superior court, such entries were admissible as original evidence on the subsequent trial of the accused under an indictment for bastardy founded upon such bastardy proceedings.

4. The court did not err in instructing the jury that the warrant and the entries thereon were in substantial compliance with the statute in such cases provided.

5. Testimony of a witness that the bastard child resembled the accused was inadmissible. (Candler, J., dissenting.)

6. Testimony of the mother of the child that after she became pregnant she sent word to the accused to come and marry her, as he had agreed to do, and of her father that he carried such message to the accused, was irrelevant and inadmissible.

7. When, in a motion for a new trial, error is assigned upon the exclusion of evidence offered to impeach a witness by proof of contradictory statements previously made, it should appear from the motion itself that the proper foundation for the introduction of such evidence was laid.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

F. E. McCalman was convicted of crime, and brings error. Reversed.

Griffith & Weatherly, for plaintiff in error. S. Holderness, Sol., R. D. Jackson, James Beall, and H. A. Hall, Sol. Gen., for the State.

FISH, P. J. Felix E. McCalman was indicted for the offense of bastardy. The indictment, so far as material here, was as follows: "For that the said Felix E. McCalman on the 23d day of September, 1903, in the county aforesaid, being the father of a bastard child born to S. E. Chance, and upon a lawful warrant sued out in said case in said county before W. B. Chandler, a justice of the peace in and for said county, charging him, the said Felix E. McCalman, with the offense of bastardy, and upon the trial of said warrant before said W. B. Chandler, justice of the peace in said county, and having been required in terms of the law by said W. B. Chandler, justice of the peace aforesaid, to give a bond, with good and sufficient security, in the sum of seven hundred and fifty dollars, payable to S. J. Brown, ordinary of said county, to be used in the support, maintenance, and education of the child until it arrives at the age of fourteen years, and also the expense of lying in with said child, boarding, nursing, and maintenance while the mother is confined by reason thereof, did fail and refuse, contrary to the laws of said state, the good order, peace, and dignity thereof." Sarah E. Chance, the mother of the child, was the prosecutrix. The indictment was demurred to upon the following grounds: That it alleged no offense against the accused; did not allege when a bastard child was born to the prosecutrix; did not set out the age of the child, nor allege whether it was over or under the age of 14 years on September

23, 1903, or at the time when the indictment was found; did not allege that the accused was the father of a bastard child born to the prosecutrix, nor that the accused was the father of a bastard child at the time the indictment was found; did not allege that the accused was required to give bond in terms of the law, nor what or whose child the accused was required to give bond to support, etc.; did not allege that the child for whose support, etc., the bond was required, was a bastard; did not allege that the accused was required to give bond for the support, etc., "of any certain specified child"; did not allege for whose or what child the bond for lying-in, etc., expenses was required, nor who the mother was that was confined, or was to be confined; and because the indictment alleged that the bond was required for lying-in expenses, though it appeared that the child was already born; and because it alleged "'a lawful warrant sued out in said case,' without alleging what case [was] referred to." The demurrer was overruled, and the accused excepted pendente lite. The trial resulted in a verdict of guilty. The accused moved for a new trial, which was refused, and he excepted; assigning error upon the overruling of such motion, and also upon his exceptions pendente lite.

1. There was no merit in any of the grounds of the demurrer. We deem it unnecessary to deal specifically with any of these grounds. Suffice it to say that the indictment not only stated the offense charged in the terms and language of the Penal Code, and so plainly that the nature of the offense could be easily understood by the jury, but set out all the averments of fact essential to constitute the offense with sufficient particularity to enable the accused to make his defense.

2. The indictment for bastardy was found at the October term, 1903, of Carroll superior court. It charged that the accused refused to give the bond required by the statute, September 23, 1903, and that he was then the father of the bastard child. It did not allege when the child was begotten. The court, over the objection of the accused, permitted the state to put in evidence an indictment, found at the April term, 1901, of said court, charging the accused with having seduced the prosecutrix on July 22, 1900, with a verdict thereon, rendered in the superior court of the county, finding him guilty of fornication. It does not appear from the record when the verdict was rendered. The objection urged to the admissibility of this evidence was that it was irrelevant and immaterial. The objection was well taken, and the evidence should have been excluded. The verdict that the accused was guilty of the offense of fornication with the prosecutrix fixed no particular time when the offense was committed, as the jury that tried that case might have found the accused guilty of fornication upon evidence showing

that he committed the offense with the prosecutrix at any time within the statute of limitations prior to the finding of that indictment. And there was nothing to show that the child referred to in the bastardy proceedings was the result of the fornication for which the accused was found guilty. This being true, such indictment and the verdict thereon could throw no light whatever upon the issues in the bastardy case. In *Davis v. State*, 58 Ga. 170, it was held: "That the defendant was acquitted on a former trial for fornication and adultery with the mother of the alleged bastard is not a good plea of *autrefois acquit* to an indictment for bastardy." If in such a case the accused could not put in a verdict of acquittal for the purpose of showing that he had not had sexual intercourse with the mother of the alleged bastard, then, of course, the state should not be allowed to put in a verdict of guilty, under such circumstances, to show that the accused had had sexual intercourse with the mother.

3. The court admitted in evidence, over the objection of the accused, a warrant sworn out by the prosecutrix, charging him with bastardy, together with the entries thereon, signed by the magistrate before whom the preliminary investigation was had. These entries were as follows: "After hearing the evidence in the above-stated case, the said Felix E. McCalman is hereby required to give a bond, with good and sufficient security, in the sum of \$750, payable to S. J. Brown, ordinary of said county, to be used in the support, maintenance, and education of the child until it arrives at the age of fourteen years, and also the expense of lying in with said child, boarding, nursing, and maintenance while the mother is confined by reason thereof." "The said Felix E. McCalman refusing and failing to give the security required in the above judgment, as provided by law in such cases, it is hereby ordered that he, the said Felix E. McCalman, give a bond, with security in the sum of \$200, for his appearance at the October term, 1903, of Carroll superior court, to answer whatever charges the grand jury of said county may prefer against him for the failure to make said bond or give said security." It appears that several objections were made to the admissibility of this evidence, but the only one referred to in the brief of counsel for the plaintiff in error is that the entries on the warrant were not the highest and best evidence that the magistrate required the accused to give a bastardy bond, and that he was recognized to the superior court; the contention of counsel being that the judgment on the docket of the magistrate should have been offered in evidence. We presume the other objections made to the admissibility of this evidence were abandoned in view of the rulings made in *Parsons v. State*, 97 Ga. 73, 24 S. E. 845. We do not think that the objection insisted on here was meritorious. Pen. Code

1895, § 293, provides: "Justices, and notaries public who are ex officio justices of the peace, shall keep separate dockets of all civil and criminal causes disposed of by them, which dockets shall show: (1) The actual disposition of each case. (2) An itemized bill of costs charged or collected, and from whom collected. (3) For what officer and service each item is charged. The justices and notaries public shall lay their dockets before the grand juries of their respective counties on the first day of each term of the superior court, for inspection." It has been several times held that the proper method of proving that a particular judgment was rendered by a justice of the peace in a civil case is the introduction of the justice's docket, with the judgment entered thereon. *Scott v. Bedell*, 108 Ga. 205, 33 S. E. 903. The proceeding before a justice of the peace, when a warrant has been issued by him against one sworn to be the father of a bastard child, requiring that such person be brought before him, that he may determine, upon an investigation of the matter, whether such person shall be required to give the bond prescribed by the statute in such cases, and to recognize such party to the superior court in the event a bond should be required, and there shall be a failure and refusal to give it, is in the nature of a criminal proceeding. Upon the hearing in such a proceeding, the justice of the peace acts as a court of inquiry. *Hyden v. State*, 40 Ga. 476. Upon the hearing before a court of inquiry, if the evidence, in the opinion of the officer holding such court, is sufficient to authorize the binding over of the accused to the superior court, it is the duty of such officer to make out a commitment, which shall be delivered to the officer in whose custody the prisoner is placed, to be delivered, with the prisoner, to the jailer; and the memorandum of the commitment shall be entered on the warrant, and the warrant and all other papers in the case shall be forwarded to the clerk of the superior court, or other court having jurisdiction of the crime, to be delivered to the solicitor general. Pen. Code 1895, § 924. The entries made on the warrant in this case, requiring the accused to give the bastardy bond, and, in default thereof, recognizing him to the superior court, were in the nature of a commitment, or at least memoranda of the action of the magistrate in the case, and were made that the solicitor general, when the warrant should be placed in his hands, should have evidence of the action of the magistrate in the proceedings before him. In *Parsons v. State*, 97 Ga. 73, 24 S. E. 845, an entry on a warrant for bastardy, reciting that the accused had failed to give the bond as required by law, and directing that he be imprisoned in jail, in default of his appearance at the trial court to answer to the charge of bastardy, was treated as a commitment, and it was held that the accused was bound to take notice of and act upon the

requirement made of him as recited in such entry.

4. One ground of the motion for a new trial alleges that the court erred in instructing the jury as follows: "The state has introduced in evidence a warrant taken out before W. B. Chandler, Justice of the peace, with all the entries thereon. This warrant and the proceedings thereon are substantially in accordance with the statutes in such cases made and provided." The assignment of error on this charge was that it contained an expression of opinion by the court to the jury as to what had been proved in the case. This exception was not meritorious. The court merely instructed the jury that the papers were substantially as the law required.

5. During the argument of counsel for the state, the accused, by his counsel, moved to rule out the testimony of the prosecutrix that the bastard child, of which the accused was alleged to be the father, was just like him, upon the ground that it was irrelevant and inadmissible. The court overruled this motion. A motion to rule out is not too late, if made before the case is finally submitted to the jury. *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52. In a bastardy case, the testimony of a witness that the child looks like, or resembles in appearance, the person charged to be its father, is not admissible. *Eddy v. Gray*, 4 Allen (Mass.) 435; *Keniston v. Rowe*, 16 Me. 38; *United States v. Collins*, 1 Cranch (O. C.) 592, Fed. Cas. No. 14,835; *Jones v. Jones*, 45 Md. 144; *Shorten v. Judd*, 56 Kan. 43 (4), 42 Pac. 337, 54 Am. St. Rep. 587; 2 Enc. of Ev. 253; 5 Cyc. 663. See *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588, where, in a well-considered opinion, the cases on the subject are collected and considered.

6. The prosecutrix testified: "He [the accused] told me that, if I would let him have sexual intercourse with me, that, if he hurt me, to just send him word, and he would come immediately and get me; and I sent him word, and he did not do it." The accused objected to her testifying, "I sent him word, and he did not do it." The father of the prosecutrix was permitted to testify that, when he ascertained that his daughter was pregnant, he carried word to the accused of the fact, and stated to him that she wanted him to come and marry her, as he had agreed to do. The accused objected to this testimony of the prosecutrix and to this testimony of her father upon the ground it was irrelevant and immaterial. We think the objections well taken, and the evidence should have been excluded.

7. Complaint was made in the motion for a new trial of the refusal of the court to admit in evidence specified extracts from the stenographer's report of the testimony of the prosecutrix given upon the trial of the accused for seduction. The purpose for which this evidence was offered was stated

to be the impeachment of the prosecutrix, who had testified in the present case. In this connection a witness for the accused testified "that he heard the testimony of the prosecutrix on the trial of the seduction case, and that the report offered was her correct testimony on the trial of said case, and that on the trial of the bastardy case at a former trial, when a mistrial was had, * * * the prosecutrix admitted that said part of said record was her testimony on the trial of the seduction case; that she admitted that she testified on the trial of the seduction case as set out in said record; and that the record prepared by the stenographer was a correct record." The testimony given by the prosecutrix in the trial now under review, which was claimed to be in conflict with what purported to be her testimony set out in the stenographer's report offered in evidence, was set out in the motion for a new trial. It nowhere appeared in the motion, however, that the proper foundation was laid for the impeachment of the prosecutrix in this manner, by reading or submitting to the prosecutrix the extract from the stenographer's report, and then asking her if she did not testify on the trial of the seduction case as set out in such extract. Without such foundation having been laid, the evidence was inadmissible; and for this reason, if for no other, this ground of the motion for a new trial was without merit. *Taylor v. Morgan*, 61 Ga. 46; *Smith v. Page*, 72 Ga. 539; *Georgia Railroad & Banking Co. v. Smith*, 85 Ga. 530, 11 S. E. 859. This court will not search through the brief of evidence contained in the record to ascertain whether or not the proper foundation was laid for the introduction of impeaching evidence. It should appear in the ground of the motion complaining of the exclusion of the evidence offered to impeach the witness.

Judgment reversed. All the Justices concur.

CANDLER, J. (specially concurring). I concur in the judgment of reversal, but not in all the reasoning by which that conclusion is reached in the opinion delivered by the Presiding Justice. In my opinion, evidence that a bastard child resembles in appearance the person charged to be its father is admissible, where the points of resemblance are pointed out, and should be submitted to the jury for what it is worth. Often it may be of little probative value, but that is a matter for the jury, and not the court. It is a circumstance, and I am at a loss to understand in what respect it differs from any other circumstantial evidence. A man may have strongly marked physical characteristics, and the fact that a child of which he is alleged to be the father has those characteristics may be very high evidence of his guilt of the charge of bastardy. At all events, courts cannot say, as a matter

of law. that it proves nothing. A jury has as much right to say whether a red-headed, blue-eyed, hook-nosed baby is the child of a man with those same features as it has to establish the identity of a man charged with murder by means of his physical characteristics. See 1 Gr. Ev. § 14a.

(121 Ga. 506)

MARTIN v. NICHOLS et al.

SAME v. NICHOLS.

(Supreme Court of Georgia. Dec. 21, 1904.)

WRIT OF ERROR—BILL OF EXCEPTIONS—LANDLORD'S LIEN—CONTESTING CLAIM—TRIAL—CONTINUANCE.

1. Error was sufficiently assigned in each bill of exceptions. There were two cases disposed of by the superior court, and a bill of exceptions in each case was necessary to review each adverse judgment. The motion to dismiss the bills of exceptions on the grounds of insufficient assignment of error, and that two bills of exceptions had been sued out in one and the same case, is denied.

2. The issue raised by the filing of an affidavit of a contesting creditor to a landlord's lien for supplies, as provided in Civ. Code 1895, § 2816, is triable at the term of court succeeding the filing of the contesting affidavit.

3. It is error to refuse a first continuance when it is shown that the party is ill, and his counsel states in his place that he cannot safely go to trial without the presence of his client. (Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Proceedings between F. M. Martin and Z. T. Nichols and others and between F. M. Martin and Z. T. Nichols to determine the priorities between an execution and a landlord's lien. From the judgment, Martin in both cases brings error. Reversed.

James B. Conyers, for plaintiff in error. Geo. H. Aubrey and T. C. Milner, for defendants in error.

EVANS, J. Three justice's court *fi. fas.* in favor of F. M. Martin and against Sam Fletcher were on November 5, 1903, levied by A. S. Herrin, a constable, on a quantity of cotton, cotton seed, corn, and fodder which had been grown by the defendant in *fi. fa.* upon land belonging to Z. T. Nichols. On December 10th Nichols filed with the clerk of the superior court of Bartow county an affidavit to foreclose a landlord's lien for supplies furnished to Fletcher during the year 1903, and on the same day an execution was issued upon this affidavit. The execution was then placed in the hands of Herrin, the constable, with written notice to hold up all funds which might then be or which might thereafter come in his hands by reason of any process against Fletcher. Subsequently, on December 19th, the constable brought to sale the property levied on under the three justice's court *fi. fas.* above mentioned. On January 11, 1904, the constable was called

on by Nichols to pay him, out of the proceeds of the sale, the amount of his demand against Fletcher. The constable declined to do so, and on the following day a rule was issued against him at the instance of Nichols. To this rule the constable answered that he was advised and believed that the three *fi. fas.* under which he sold the property constituted a lien on the fund in his hands, and he accordingly prayed that Martin, the holder of these *fi. fas.*, be made a party to the proceeding, and be given an opportunity to file his intervention, setting up his claim to the fund. On January 20th the court passed an order, *ex parte*, reciting that, as it appeared Martin was interested in the fund to be distributed, he was thereby made a party to the proceeding, "with leave to file an intervention in said case before said case [was] heard," and directing that he be served with a copy of the order, unless service should be acknowledged by him. He did acknowledge service on January 25th. On the same day, Martin, under the provisions of Civ. Code 1895, § 2816 (6), as a creditor of Fletcher, filed with the clerk of Bartow superior court a counter affidavit, with a view to resisting the enforcement of the execution which had been issued on the affidavit of Nichols to foreclose the landlord's lien asserted by him against Fletcher, their common debtor. The case made by the filing of this counter affidavit was entered on the issue docket of the July term, 1904, of that court. On the 26th of January, during the regular January term of the court, the proceeding commenced by the money rule against the constable was called for trial. Counsel for Martin made a motion to continue the case on the ground that he was not ready for trial, he being unable to attend court on account of sickness. In support of this motion, proof was made of the illness of Martin, and of his inability to attend court, and his counsel stated in his place as an attorney that he "could not go safely to trial without his client, whom he needed as a client, and might need as a witness also." The court overruled this motion to continue the case. Counsel for Martin then produced and called the court's attention to the counter affidavit hereinabove referred to, and counsel for Nichols thereupon insisted that the court take up the case made by the filing of this counter affidavit, announcing that he wished to demur to the same. Objection was interposed by Martin's counsel, who directed the attention of the court to the fact that the case made by the filing of the counter affidavit was returnable to the July term, 1904, of the court, and who insisted that the court had at the January term no jurisdiction to hear and pass upon that case. The court nevertheless allowed counsel for Nichols to present a demurrer to the counter affidavit, and, after hearing argument thereon, sustained the demurrer and ordered the counter affidavit stricken. After the rendition of this

judgment, the case made by the rule against the constable was taken up by the court, and counsel for Martin filed an intervention in which he attacked, on substantially the same grounds set forth in his counter affidavit, the claim of landlord's lien on which the execution in favor of Nichols was based. This intervention was then demurred to by Nichols, and the court sustained his demurrer. Counsel for Nichols introduced in his behalf evidence of the foreclosure of his lien for supplies furnished to Fletcher, and counsel for Martin introduced the three justice's court *fi. fas.* under which he claimed the fund in court. On this evidence the presiding judge entered up a judgment awarding the fund to Nichols. Two bills of exceptions were sued out by Martin. In one, he excepted to the action of the court in taking up and disposing of the case made by the filing of his counter affidavit in resistance to the foreclosure of Nichols' alleged landlord's lien; in the other, error was assigned upon the overruling of his motion to continue the rule proceeding, as well as upon the various other rulings made against him in that case, and exception was taken to the judgment awarding the fund in controversy to Nichols.

1. In this court, counsel for Nichols moved to dismiss both writs of error, insisting that Martin had sued out two bills of exceptions in one and the same case; that in certifying one the trial judge had necessarily divested himself of all jurisdiction; and that, as it was impossible to tell from an inspection of the two bills of exceptions which of them had first been certified, it did not affirmatively appear that this court had jurisdiction to entertain and pass upon either. There is no merit in this contention. As appears from the foregoing statement of facts, the court below called and disposed of two distinct and separate cases. First, the case made by the rule issued against the constable was taken up, and Martin's counsel made a motion to continue it, which motion was overruled. Then, before proceeding with the trial of this case on its merits, the court suspended the trial thereof long enough to dispose of the demurrer which counsel for Nichols stated he wished to interpose to the counter affidavit filed by Martin, the filing of which inaugurated an altogether different case, to which the constable was not a party, and which was returnable to a subsequent term of the court. After sustaining this demurrer, the court again took up the other case, and rendered final judgment therein. There were two cases, both of which were finally disposed of; and it was necessary that the losing party should, in order to bring under review the various adverse rulings of which he complains, sue out a separate bill of exceptions in each case. As another ground for dismissing the two writs of error, counsel insisted that in neither of the bills of exceptions was there a sufficient assignment of error to the judgment awarding the fund

to Nichols. There could not properly be any assignment of error on this judgment in the bill of exceptions, in which complaint is made of the striking of Martin's counter affidavit, for, in the case to which that bill of exceptions refers, no such judgment was rendered. The exception to that judgment made in the other bill of exceptions was that the "court erred in awarding said fund to said landlord's lien *fi. fa.* in favor of Z. T. Nichols against Sam Fletcher," and that the "court erred in not awarding said fund to the three common law *fi. fas.* in favor of F. M. Martin against said Sam Fletcher." This certainly was a sufficiently specific assignment of error. *Holst v. Burrus*, 79 Ga. 111, 4 S. E. 108.

2. When the landlord sued out his special lien for supplies furnished his tenant, the creditor of the tenant had a right to file his affidavit contesting the existence and amount of the lien. Civ. Code 1895, § 2818. Upon the filing of the creditor's affidavit, the landlord's process ceased to be final; it became mesne process, and the lien affidavit and execution and the creditor's affidavit became pleading. The statute declares that the issue thus formed shall be tried as other causes. Civ. Code 1895, § 2816 (6). The issue was not joined until the filing of the creditor's affidavit, which was not done until after the sitting of the court at which the case was tried. The trial by disposing of the case on demurrer to the creditor's affidavit was premature. The case was not triable at the term when the court disposed of the creditor's affidavit on demurrer. The case originated after the session of the court, and was returnable to the succeeding term, and the court was without jurisdiction to hear and determine the issue made by the pleadings before the term to which the case was returnable. Irrespective of the merits of the demurrer or the sufficiency of the creditor's affidavit, the court erred in determining the case at a term prior to the one to which the case was returnable and triable. For this reason, the judgment of the court dismissing the affidavit must be reversed.

3. In the other case, a motion to continue was made because of the illness of Martin, the contesting creditor. The fact of the illness was shown by proof, and counsel stated in his place his inability to go to trial without the presence of his client. No counter showing was made. The court overruled the motion to continue, sustained the demurrer to Martin's intervention, and awarded the fund to the movant. The court erred in refusing to continue the case. Martin had been formally made a party to the rule against the constable to distribute the money. He had a right to file an intervention setting up his claim to the fund at any time prior to the trial. Being a party to the cause, he had all the rights of a party, one of which was to move for a continuance on legal grounds. His motion fulfilled every requirement of

the statute (Civ. Code 1895, § 5131). And it was error to overrule the same. It is no reply to say that the intervention filed by the absent party was fatally defective, and should have been stricken on demurrer. If the party had been present, he might have been able to amend by supplying the necessary averments to his intervention. The erroneous overruling of Martin's motion for a continuance rendered all subsequent proceedings in the case nugatory. The case is remanded for another trial.

Judgment in each case reversed. All the Justices concur.

(121 Ga. 527)

BULLARD BROS. v. BANK OF MADISON.

(Supreme Court of Georgia. Dec. 21, 1904.)

BANKS—POWERS AND DUTIES OF CASHIER— PAYMENT OF DRAFTS.

1. A promise by the cashier of a bank, made without consideration to the drawer of a draft, to pay the same out of funds of a customer on whom the draft is drawn, and who has been credited with the proceeds of negotiable paper which he, as owner, transferred to the bank, is not enforceable against the bank unless the customer assents that the bank shall make such an application of the funds so placed to his credit.

(a) The court fully and fairly covered by its charge every issue raised by the pleadings which the plaintiff had a right to have the jury pass upon, and the verdict in favor of the defendant was warranted, if not demanded, by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by Bullard Bros. against the Bank of Madison. Judgment for defendant, and both parties bring error. Judgment on main bill of exceptions affirmed, and cross-bill of exceptions dismissed.

W. B. Wingfield, F. Jordan & Son, and Q. L. Williford, for Bullard Bros. Foster & Butler, for Bank of Madison.

EVANS, J. During the cotton season of 1896, Bullard Bros., a firm doing business at Machen, Ga., engaged in buying cotton on commission. Under an arrangement made with J. D. Tweedy, a cotton buyer of Madison, Ga., Bullard Bros. shipped cotton to him, receiving a commission of 25 cents per bale. It was customary for that firm to pay for cotton purchased by it with a draft drawn on Tweedy in favor of the seller, and for Tweedy to honor the draft as soon as he received the cotton, or a bill of lading therefor. At the beginning of the season Bullard Bros. took out bills of lading in the name of the firm as consignor, but later adopted the course of having them made out in the name of Tweedy as consignor, as well as consignee. On receiving a bill of lading covering a particular shipment, Tweedy would go to the Bank of Madison, and indorse and surrender to it the bill of lading, afterwards substituting therefor another bill of lading covering

a shipment of cotton to one of his customers, which the bank would attach to a draft drawn on such customer for the amount of the purchase price he had agreed to pay. In this way the Bank of Madison, which made advances to Tweedy on the security of the bills of lading indorsed to it, placed itself in a position where it could pay for Tweedy drafts drawn on him by Bullard Bros. and other parties making sales to him. Near the close of the cotton season, Tweedy became involved. The bank declined to make further advances to him, and a number of drafts which had been drawn on him by Bullard Bros., and which the holders had sent to the bank for collection, were either protested for nonpayment, or returned by the bank with the statement that the same could not be collected. Subsequently Bullard Bros. were compelled to settle with the holders of these drafts. The purpose of this suit was to require the bank to refund to Bullard Bros. the amount so expended.

As showing the liability of the bank, the following allegations were made in the plaintiff's petition: The drafts were received by the bank for collection, and were by it presented to Tweedy for payment, who drew and delivered to the bank his check on it for the aggregate amount called for by these drafts. At the time Tweedy had on deposit in the bank a sufficient sum of money to cover his check, and it was accepted by the bank in payment of the drafts. The bank subsequently honored numerous other checks drawn on it by Tweedy; had in its possession the bills of lading covering the cotton in payment of which the drafts were given, having demanded these bills of lading from Tweedy when he gave his check in payment of the drafts; and subsequently, by virtue of Tweedy's transfer to the bank of these bills of lading, came into possession of the cotton, and received the proceeds thereof on a resale to one of his customers, well knowing that the cotton had not been paid for, and that the aforesaid drafts had been drawn against it.

At the trial of the case the plaintiff offered an amendment to the petition, which the court allowed over the objection of the defendant. In this amendment the following additional allegations were made: The change in the mode of shipping cotton to Tweedy, whereby bills of lading were taken out in his name as consignor, instead of in the name of Bullard Bros., was made at the instance of the bank, and upon the faith of its statement that it "was paying for Tweedy's cotton," and could not protect Bullard Bros. unless the cotton was shipped as directed, but could and would protect that firm provided its shipping directions were complied with. Bullard Bros. relied on this promise and undertaking on the part of the bank, and shipped cotton to Tweedy accordingly, looking to the bank to protect the firm in its cotton dealings with Tweedy. In view

of this promise and undertaking, the cotton shipped to Tweedy "was quasi trust cotton," and the bank was under legal obligation to pay drafts drawn on him for the purchase price thereof, and could not appropriate the cotton, or the proceeds thereof, to other indebtedness of Tweedy. The legal effect of the bank's undertaking was "to make it, as far as petitioner's cotton was concerned, Tweedy's paymaster or trustee," and the bank was "in good conscience and law obliged to appropriate the money arising from the sale of cotton shipped said Tweedy by" Bullard Bros. to drafts which that firm drew on him for the purchase price, and could not, "without a breach of trust, appropriate it to extrinsic debts due it by said Tweedy." On December 11, 1896, S. H. Bullard, a member of the firm, "came to the city of Madison for the purpose of collecting on bills of lading for something like sixty-one hundred dollars worth of cotton which had been purchased by petitioner and shipped to J. D. Tweedy. * * * Said bills of lading were delivered to H. T. Shaw, cashier of the Bank of Madison, who paid to petitioner thereon the sum of fifty-five hundred dollars, and inquired of S. H. Bullard whether or not said payment was in full for all cotton represented by said bills of lading. * * * S. H. Bullard replied in the negative, stating to said Shaw that there was outstanding against said cotton small drafts amounting to about \$125, and for what was known as the 'Deiter cotton'; so that there were then outstanding drafts for something over \$200. S. H. Bullard further stated that the draft representing the purchase price of the Deiter cotton "was to be sent to a gentleman in New York, and would not be presented for payment until it could be transmitted to New York, and from there back to Madison"; and Shaw then "accepted said bill of lading, and said it would be all right; that when said draft was presented it would be paid." This draft, which was drawn in favor of one Huntington, was one of those which Bullard Bros. had to pay, as stated in the original petition. During the course of the same conversation Shaw asked Bullard how much more cotton his firm expected to buy for Tweedy, and Bullard replied, "Between seventy-five and one hundred bales, as this was about all there was left at and around Machen." Bullard also mentioned the names of certain parties from whom his firm expected to buy some 50 bales, and told Shaw that the members of his firm "would not come again to Madison to collect on their bills of lading, but would draw on J. D. Tweedy for" the cotton as it was purchased. "Shaw said that was all right. He did not say that he would not pay the drafts as he had been doing; on the contrary, he said, in addition to 'that was all right,' that J. D. Tweedy was getting along nicely; that he (Shaw) had succeeded in keeping him from speculating, and he was making money." For the price of the cot-

ton subsequently purchased and shipped to Tweedy the drafts referred to in the original petition as having been drawn on Tweedy after December 11th, and as having been returned to the holders with notice of dishonor, were given by Bullard Bros. to the parties from whom the cotton was bought, and with whom that firm was thereafter forced to settle. By another amendment to the petition the plaintiff alleged that "Shaw was cashier of the Bank of Madison, and acting within the scope of his authority as such cashier, and had authority to make the statements and enter into the transactions" above set forth.

A trial was had on the merits, the defendant bank having, by its answer, denied all liability to respond to the plaintiff. In view of the evidence submitted pro and con, the court declined to leave to the determination of the jury any issue save as to the liability of the defendant with respect to its dishonor of the Huntington draft, drawn on Tweedy by Bullard Bros. in payment of the Deiter cotton, which the plaintiff claimed the bank had, on December 11th, expressly agreed to pay on presentation. The jury decided this issue in favor of the bank. The plaintiff made a motion for a new trial, therein complaining of the refusal of the court to submit other issues to the jury, and assigning error upon certain portions of the charge of the court. The motion for a new trial was overruled, and the plaintiff excepted. A cross-bill of exceptions, in which complaint was made of the allowance of the first amendment to the petition, was thereupon sued out by the defendant bank, which also therein assigned error on the overruling of a demurrer it had made to the petition as amended. As we have reached the conclusion that the judgment denying the motion for a new trial should be affirmed, it is unnecessary to further deal with the cross-bill of exceptions.

The record before us discloses the following facts: The president of the bank informed one, if not both, of the members of the firm of Bullard Bros., that the only way in which that firm could protect itself in its dealings with Tweedy was to follow the usual custom of attaching to drafts drawn on him the bills of lading representing the cotton shipped to him. The reply received was to the effect that Bullard Bros. could not adopt this course, as it was necessary for Tweedy to control the cotton and resell it to his customers before actual payment by substituting for the bills of lading sent to him by Bullard Bros. other bills of lading which he could attach to drafts drawn on such customers. At the beginning of the season Bullard Bros. took out bills of lading in the name of the firm as consignor, and sent them direct to Tweedy. The bank declined to advance Tweedy on these bills of lading until he procured the indorsement of Bullard Bros. thereon, indicating that firm's

assent to his transfer of the same, and delay was occasioned by the necessity of returning the bills of lading to Bullard Bros. for indorsement. Both Tweedy and the bank urged Bullard Bros. to avoid this delay by having the bills of lading issued in the name of Tweedy as consignor as well as consignee. The bank did assure Bullard Bros. that, if this plan was pursued, the bank would be in a better position to protect the interests of the firm, because it could make advances to Tweedy at once on the bills of lading sent to him, and he would thus be enabled to pay the drafts drawn on him for the cotton as they were presented. But the bank entered into no agreement with Bullard Bros., with or without consideration, whereby the bank was to guaranty the payment of drafts drawn by the firm on Tweedy to pay for cotton shipped to him. Nor was the cotton so shipped in any sense "quasi trust cotton." On the contrary, Bullard Bros. sold to Tweedy on credit, contemplating that he should deal with the bills of lading as his own, and transfer the same to the bank, and trusting to him to raise funds with which to meet the drafts drawn on him. In other words, the bank had the right, under the circumstances, to treat Tweedy as the owner of the cotton, to accept it as security for advances made to him, and to make payment out of the funds deposited to his credit in such manner as and to whomsoever he might direct, irrespective of the source from which such funds were realized. This being the real truth of the matter, as conclusively shown by the evidence, the court certainly did not err in refusing to submit to the jury any of the plaintiff's contentions to the contrary raised by the pleadings. The court also properly declined to call on the jury to determine whether or not, at the time the dishonored drafts were presented to Tweedy for payment, he had on deposit sufficient funds to meet the same, and the bank accepted his check in payment of these drafts. The evidence discloses that the allegations in the plaintiff's petition in this regard had no foundation in fact.

As to whether or not the cashier of the defendant bank really agreed to pay the Huntington draft on presentation, the evidence was conflicting. But, however this may be, it does not appear that at the time the promise was alleged to have been made Bullard Bros. had any ownership of or control over the bills of lading representing the cotton for which that draft was given. The only conclusion warranted by the testimony is that these bills of lading had been surrendered to and belonged to Tweedy at the time the bank advanced money thereon, and that the advance was made to him, and

not to Bullard Bros. There was no evidence that he assented to or contemplated payment of the draft out of the proceeds of these particular bills of lading. The court, however, charged the jury, in effect, that, if they believed such an arrangement was made by Bullard with the cashier of the bank, and that Tweedy assented thereto, the bank would be liable for the amount of the Huntington draft if it was returned to the holder with notice of dishonor; but, if the understanding between Tweedy and Bullard was that out of the proceeds of the \$6,100 worth of bills of lading, the bank should pay Bullard only the amount of \$5,500 received by him, then the difference would belong to Tweedy, and the bank was bound to credit his account with that amount, and to apply it to any purpose Tweedy might thereafter direct. This charge was certainly as favorable to the plaintiff as the plaintiff had any right to demand or expect. The plaintiff failed to sustain the theory on which the petition was evidently based, viz., that the bills of lading belonged to Bullard Bros., and were surrendered to the bank on condition that the Huntington and other outstanding drafts would be paid on presentation out of the proceeds. Unless Bullard Bros. owned or controlled the bills of lading, of (if they belonged to Tweedy) he assented to the payment by the bank of the outstanding drafts, the alleged promise of its cashier to pay them on presentation was wholly without consideration, and in no sense binding on the bank on the doctrine of estoppel, or upon any other theory of liability. The plaintiff's evidence was at fault, not the charge of the court.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed. All the Justices concur.

(120 Ga. 1028)

MOORE v. STATE.

(Supreme Court of Georgia. Aug. 12, 1904.)

APPEAL—DIVIDED COURT—AFFIRMANCE.

1. This case being for decision by a complete bench, of six Justices, who are evenly divided in opinion, the judgment stands affirmed by operation of law.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County.

One Moore was convicted of crime, and brings error. Affirmed.

H. L. Patterson, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 421.

(121 Ga. 433)

GEORGIA IRON & COAL CO. v. ALLISON
et al.

(Supreme Court of Georgia. Dec. 20, 1904.)

**EJECTMENT—EVIDENCE—MESNE PROFITS—
PLEADING—FRACTIONAL RECOVERY—
APPEAL—AFFIRMANCE.**

This was an action of ejectment. The plaintiffs relied upon paper title to an undivided four-fifths interest in the land sued for, and upon more than seven years' adverse possession under color of title to the entire tract. They showed a grant of the land from the state to Henry P. Thomas in 1836; devise by will of Henry P. Thomas (who died in 1863) to his wife, Ellen E. Thomas, for life, with remainder to their six children (two of whom died in the lifetime of their mother, one with and the other without issue); conveyance in 1889 by the four surviving children to Ellen E. Thomas of their undivided interests in the land; and a deed by Ellen E. Thomas in 1890 to one of the plaintiffs, by which she sought to convey the entire fee. The evidence as to the continuity of the possession of the plaintiffs, and as to whether one of the tenants, during the period of that possession, held as the agent of the plaintiffs or the defendant, was somewhat conflicting. The defendant relied upon a chain of deeds beginning in 1866, and possession thereunder by their predecessors in title prior to the conveyance to the plaintiffs. The court directed a verdict for the plaintiffs for the entire tract sued for, and left the question of mesne profits to the jury, who found for the plaintiff \$250. **Held:**

1. The evidence demanded a verdict for the plaintiffs for a five-sixths undivided interest in the property; but, the evidence upon which it was sought to establish a claim to a prescriptive title to the remainder not being free from conflict, the jury should have been allowed to pass upon that claim. *King v. Sears*, 18 S. E. 830, 91 Ga. 539 (7).

2. There was some evidence to support the finding of the jury as to mesne profits.

3. The fact that the plaintiffs are suing for the entire fee does not prevent them from recovering an undivided fractional part. *Wolfe v. Baxter*, 13 S. E. 13, 86 Ga. 706. And in a case like the present, where there is evidence to sustain the contention of the plaintiffs that they are entitled to the entire fee, it is not necessary that they amend their pleadings in order to recover a fractional interest.

4. As the evidence demanded a finding for the plaintiffs for a five-sixths undivided interest in the land, and as the only effect of sending the case back for a new trial would be to prolong the litigation as to the remaining one-sixth, the judgment will be affirmed, provided the plaintiffs will write off from the verdict directed in their favor a one-sixth undivided interest in the land, and also one-sixth of the amount found by the jury in their favor as mesne profits; otherwise the judgment will be reversed.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by J. T. Allison and others against the Georgia Iron & Coal Company. Judgment for plaintiffs, and defendant brings error. Affirmed on conditions.

John W. & Paul F. Akin, for plaintiff in error. J. M. Neal and John T. Norris, for defendants in error.

CANDLER, J. Judgment affirmed on condition. All the Justices concur.

¶ 2. See Ejectment, vol. 17, Cent. Dig. § 372.

(121 Ga. 500)

NEAL LOAN & BANKING CO. v. CHAS
TAIN, Treasurer.

(Supreme Court of Georgia. Dec. 21, 1904.)

**MANDAMUS TO COUNTY—REMEDY AT LAW—ES-
TOPPEL—COUNTY WARRANT—FAILURE
TO REGISTER—PLEADING.**

1. The petition was good as against a general demurrer.

2. Where suit is brought against a county on warrants drawn by the ordinary, and the county demurs on the ground that the plaintiff's remedy, if any, is by mandamus against the county treasurer, and the suit is dismissed on this ground, the treasurer will not be heard, when subsequently made the defendant in a petition for mandamus to require him to pay the warrants, to urge that the plaintiff has a complete remedy at law, other than by mandamus.

3. Failure to register a warrant drawn by the ordinary of a county may subordinate the payment of the warrant to that of others duly registered, but it does not render the warrant void.

4. An order drawn by the ordinary of a county on the treasurer for the payment of a debt due by the county is evidence of an adjudication by the ordinary that the amount stated in the order is due, and the treasurer cannot go behind this judgment, except for fraud or mistake as to the amount of the indebtedness.

5. The orders which it was sought to require the treasurer in the present case to pay designated with sufficient particularity the fund upon which they were drawn.

6. The law will presume that, in the drawing of a county warrant, all the officers concerned therewith have performed their duty, and a petition for mandamus seeking to require the payment of the warrant by the treasurer need not so allege. The contention that such is not the case is matter for answer, and not demurrer.

(Syllabus by the Court.)

Error from Superior Court, Fannin County; Geo. F. Gober, Judge.

Petition by the Neal Loan & Banking Company against J. D. Chastain for writ of mandamus. From an order denying the writ, plaintiff brings error. Reversed.

Westmoreland Bros., for plaintiff in error. Thos. A. Brown, O. R. Du Pree, and J. Z. Foster, for defendant in error.

CANDLER, J. This was a petition for mandamus filed in the superior court of Fannin county by the Neal Loan & Banking Company against Chastain, as treasurer of that county; seeking to compel him to pay certain warrants drawn on him by the ordinary of the county in favor of Golucke, and transferred to the bank. A mandamus nisi was issued on the petition, but on the hearing the application for a mandamus absolute was refused, and the plaintiff excepted.

The petition alleged that on July 7, 1900, Wilson, the then ordinary of Fannin county, made and delivered to Golucke a certain order on the treasurer of the county, "whereby he adjudged that there was due said Golucke, and whereby he directed said treasurer to pay said Golucke, the sum of two hundred and fifty dollars, in part payment for the plans and specifications of the new courthouse of said Fannin county; said amount to be paid out of the taxes of said county

specially levied for that purpose, and to be collected during the year 1900; said order bearing interest from date at 7 per cent. per annum"; that on August 22, 1900, the ordinary made and delivered to Golucke & Co. another order, "whereby he adjudged that the county of Fannin was indebted to said J. W. Golucke & Co., and whereby he directed the treasurer of said county to pay to said J. W. Golucke & Co., or order, the sum of four hundred and fifty-eight ⁴⁰/₁₀₀ dollars, in full for balance due for plans and specifications for the county courthouse of Fannin county, and directed that the same be paid out of the county funds to be raised by taxes for the year 1900; and said judgment and order provided that the same should bear interest at the rate of eight per cent. from the date thereof until paid." It was alleged that subsequently to the dates on which these orders were issued, and before they became due, they were transferred for value to the plaintiff bank by the payees; that in the latter part of the year 1900, and after the special tax referred to had been collected, petitioner presented the orders to the treasurer of Fannin county for payment, which was refused, and that the treasurer still refuses to pay the orders, although he has in his hands as treasurer, or should have, funds applicable to their payment. It was further alleged that the amounts represented by the two orders constitute a part of the indebtedness of the county incurred in the erection of a new courthouse building at Blue Ridge, in Fannin county, for the payment of the cost of which a special tax was levied by the ordinary as provided by law; that the tax was collected and paid into the county treasury in an amount more than sufficient to pay the judgments; and that the refusal of the treasurer to pay them is contrary to law. The petition set up that the plaintiff had no adequate remedy at law, except by mandamus, and alleged that on April 18, 1903, it filed suit in the city court of Atlanta against J. W. Golucke and the county of Fannin, asking for a judgment on the two orders, and that the suit was dismissed on a special demurrer filed by the defendant county on the ground that the plaintiff's remedy was by petition for mandamus against the treasurer of that county, rather than by suit on the orders. The petition was duly verified, and copies of the orders were attached as exhibits. The treasurer filed no answer, but demurred on the following grounds: (1) The petition sets forth no cause of action. (2) The plaintiff has a complete and adequate remedy at law. (3) The petition does not show that either of the orders which constitute the cause of action has been registered as required by law, or recorded on the minutes of Fannin county, or other records of that county. (4) It does not show that either of the orders is based upon any contract entered into by the ordinary of Fannin county, or any other person

in behalf of the county. (5) It does not show that either of the orders is based upon any contract in writing entered on the minutes or other records of the county. (6) Neither one of the orders designates upon what particular fund it is drawn, and out of which payment is to be made. (7) The petition does not show that the issuing of either of the orders was authorized by law. (8) It does not show that any consideration moved from the payee to the county for the issuing of either of the orders. (9) It does not allege any amount in the hands of the defendant applicable to the payment of either of the orders. (10) It does not show that the defendant has now, or has ever had, in his charge, any funds applicable to the orders, or any part of either of them, over and above all other claims having priority as to payment to said orders. (11) It does not allege any amount of money in the hands of the defendant for any purpose. (12) It does not show that any amount of money was collected in Fannin county in the year 1900, or any other year, as taxes. (13) It does not show what per cent. of taxes was levied by the ordinary for the payment of the orders, or either of them, nor does it show that the ordinary issued any order, and entered it upon his minutes, which specified the per cent. of taxes levied for such purpose for the year 1900 or any other year; nor does it show that a copy of the orders was ever advertised by the ordinary for 30 days, or any length of time, in the manner prescribed by law, within the limits of the county; nor does it show that a copy of such an order was furnished the tax collector. (14) It does not show any contract of the ordinary, entered or recorded on his minutes, authorizing the issuing of either of the orders. After hearing argument on the petition and demurrer, the court passed an order, the legal effect of which was to sustain the demurrer and dismiss the petition, and it is to this order that the plaintiff now excepts.

1, 2. The first and second grounds of the demurrer are general in their nature, and a careful reading of the petition satisfies us that they are entirely without merit. In treating them, we will also dispose of most of the grounds which are special in form. As to the first ground, an examination of the petition shows that there is certainly enough alleged to authorize the judge, in the absence of an answer, to enter a judgment requiring the treasurer to pay the orders. It was alleged that these orders were issued in payment for services rendered the county in the preparation of plans and specifications for a new courthouse; that they were issued by the proper authorities of the county; that demand for payment had been made and payment refused; and that mandamus was the only remedy available to the plaintiff. To meet the second general ground, the plaintiff set up the demurrer

to its suit in Fulton county filed by the county of Fannin, by means of which the county had procured the dismissal of the suit on the ground that the plaintiff's remedy was by mandamus against the treasurer. It is well settled that one cannot in one court set up matter from which he receives a benefit by an adjudication in his favor, and in a subsequent action repudiate his position taken in the first. In other words, courts of justice will not allow a party to blow hot and cold. He cannot say when sued in one court that the plaintiff's only remedy is by mandamus against the treasurer, and, after obtaining an adjudication in his favor, claim, when mandamus is brought against the treasurer, that that remedy will not lie. It does not make any difference that the suit in the city court of Atlanta was against the county, while the defendant in the present action is the treasurer, for, in a very real sense, and to all intents and purposes, the defendant in each action is the same.

3. It was not necessary for the petition to allege that either of the orders had been registered, nor that they had been recorded on the minutes of the ordinary of Fannin county, or any other public record. These were duties which the law required the ordinary to perform, and it will be presumed, until the contrary is shown, that he performed them. Registry with the treasurer is a requirement of law, which, if not complied with, may cause payment to be deferred to that of other orders duly registered; but the failure to register the orders would certainly not render them void, nor would it be any excuse for their nonpayment if, at the time of their presentation, or at any other time prior to the bringing of the suit, there were any funds in the hands of the treasurer arising from the taxes collected for the purpose of paying for the erection of the courthouse. If no such funds were in his hands at that time, the fact should be set up by answer. It is not matter for demurrer.

4. It was likewise unnecessary for the petition to allege that the orders were based upon any contract entered into between the county authorities and the architect to whom they were made payable, first, because, in the absence of evidence to that effect, the law will not presume that the ordinary violated his duty by issuing an order for payment for services without having contracted for those services; and, second, because the treasurer cannot go behind the judgment of the ordinary directing the payment of the sums set out in the orders, nor set up any want of authority in the ordinary to issue them, unless he can show that they were fraudulent, or that the ordinary made a mistake as to the amount adjudged to be due. *Shannon v. Reynolds*, 78 Ga. 761, 3 S. E. 653. We think it clearly appears upon the face of the orders that the ordinary acted

within his jurisdiction. The orders are evidence of his judgment, and are as conclusive as any other judgment of that court upon matters devolving upon the ordinary of the county. In the case of *Coleman v. Neal*, 8 Ga. 560 (2), it was held that, "after an order granted by the inferior court on the county treasurer, to pay a creditor of the county so much money, it is not in the power of the treasurer to defend himself for causes existing prior to the granting of the order." See, also, *Beall v. State*, 9 Ga. 367.

5. The sixth ground of the demurrer raises a question about which we are not so clear. There is no doubt that the second order designates with sufficient certainty the particular fund upon which it is drawn, and out of which payment is directed to be made. The first is not so definite, but we are inclined to hold that it also points out the fund upon which it is drawn. Taking the order and the allegations of the petition together, we are satisfied that there is enough in the two to require an answer to the petition. The petition alleges that the order was drawn on a special fund raised by taxes levied in 1900 for payment for the courthouse of Fannin county. The two orders show that they were drawn to pay for the plans and specifications prepared by the architect for the courthouse. There was but one fund out of which the orders could be paid, and, while the first one was not technically accurate, still we are not prepared to hold that it was void for failing to definitely point out the fund on which it was drawn. If the treasurer did not have in his hands at the time of the presentation of these orders sufficient money to pay them, or if sufficient money had not come into his hands, to the credit of the courthouse fund, at the time of bringing suit, an answer to that effect would have protected him; but this was matter for answer, and not for demurrer.

6. What has been already said applies also to the 7th and 8th grounds of the demurrer. The 9th, 10th, 11th, 12th, 13th, and 14th grounds are equally without merit. It was not necessary that the petition show the particular amount collected for the payment of charges against the county, growing out of the erection of a new courthouse. It did allege the levy and collection of a special tax for this purpose, and that the treasurer had, or should have had, in his hands, from the collection of that tax, an amount sufficient to pay it. A reading of the petition will show that, as a matter of fact, the 10th paragraph of the demurrer is not true. It was not necessary to allege the specific amount collected. The law will presume that the ordinary levied the tax for the payment of this indebtedness, that he levied such a per cent. as would raise a sufficient amount to discharge the claim, that the tax collector performed his duty and collected the tax, and that the money was paid into his hands. He

had no legal right to pay the money out for any other indebtedness than that growing out of the erection of the courthouse, and the law will presume that these several officers performed their duties, unless the contrary is shown. The law also required the ordinary to advertise the levy, and the same presumption as to the performance of this duty will obtain.

We have thus dealt in detail with the numerous grounds of the demurrer, for the reason that the order dismissing the petition and refusing to make the mandamus absolute does not show upon what ground it was based, and it has thus been necessary to treat of every ground that the judge had before him. A great part of the demurrer was composed of matter which could only be properly set up in an answer. As we have shown, so much of it as was properly matter for demurrer was not legally sufficient, and should not have been sustained.

Judgment reversed. All the Justices concur.

(121 Ga. 561)

NEWBERRY v. TENANT.

(Supreme Court of Georgia. Dec. 21, 1904.)

APPEAL—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS—DISMISSAL.

1. A statement in a bill of exceptions that "plaintiff excepts to said verdict and judgment as being contrary to law" is not a valid assignment of error, and will not be considered by this court. *Rodgers v. Black*, 25 S. E. 20, 99 Ga. 142.

2. A direct bill of exceptions to a ruling made pendente lite, which does not assign error upon any final judgment, will not be entertained by this court. *Kibben v. Coastwise Dredging Co.*, 48 S. E. 830, 120 Ga. 899.

3. Accordingly, where the only attempt to assign error upon a final judgment was ineffective for the reason stated in the first headnote above, and every other assignment of error was in the form of a direct exception to a ruling made pendente lite, the writ of error must be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Early County; H. O. Sheffield, Judge.

Action between Elizabeth Newberry and C. J. Tenant. From the judgment, Newberry brings error. Dismissed.

W. C. Worrill, R. H. Sheffield, and Shepard Bryan, for plaintiff in error. A. G. Powell, for defendant in error.

CANDLER, J. Writ of error dismissed. All the Justices concur.

(121 Ga. 555)

MILLEDGEVILLE WATER CO. et al. v. EDWARDS.

(Supreme Court of Georgia. Dec. 21, 1904.)

WATER COMPANIES—CONTRACTS WITH SUPERINTENDENT—VALIDITY—MUTUALITY.

1. The superintendent of a waterworks company had apparent authority to make contracts generally on behalf of the company with its customers, though in reality his authority was limited by the rules and by-laws of the company

to the making of contracts at the regular rates charged for water. These rates were generally known to the public, but the limitation on the authority of the superintendent was not. The plaintiff made a special contract with the company, through the superintendent, knowing that the rate charged him was lower than that usually charged by the company, but not knowing and not being chargeable with knowledge of the superintendent's lack of authority in this respect. *Held*, that the contract, being within the apparent authority of the superintendent, which the company held him out to the world as possessing, was binding on the company.

2. A contract by the terms of which a waterworks company agrees to furnish water to a consumer at a greatly reduced rate—the consumer agreeing on his part to lay his own pipe and put in his own fixtures, at an expense of several hundred dollars, and to allow the company to tap his pipe for the purpose of supplying other customers with water—is not void for lack of mutuality, even though the consumer be under no obligation to take the water for any given length of time. Especially is such a contract binding on the company when it is executed on the part of the consumer.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by J. M. Edwards against the Milledgeville Water Company and another. Judgment for plaintiff. Defendants bring error. Affirmed.

See 42 S. E. 417.

Hines & Vinson and Hall & Wimberly, for plaintiffs in error. Allen & Pottle, for defendant in error.

CANDLER, J. Edwards conducted a dairy and truck farm about two miles from the center of the city of Milledgeville. The Milledgeville Water Company, a corporation, supplied water, for a consideration, to that city and its residents. Wilson, since deceased, was superintendent of the Milledgeville Water Company. Edwards' residence was more than a mile from the nearest main of the water company. Edwards claims that in the year 1897 Wilson solicited him as a customer of the water company; that he realized the great advantage to him of an unlimited supply of water, especially in the operation of his dairy, but was not willing to subscribe to the regular rates charged by the company; and that finally, at the urgent solicitation of Wilson, he entered into an oral agreement with the water company, through Wilson, as its agent, by the terms of which he was, at his own expense, to lay pipes from his residence to the nearest main of the company, make the necessary connections, and supply his own plugs, faucets, and other materials, while the water company agreed, on its part, to furnish him water during the term of its contract with the city of Milledgeville at a rental of \$12.50 per annum. He alleges that he fulfilled his part of the contract, by laying the pipes and making the connections as agreed, at an expense to him of several hundred dollars; that recently the water company has served notice upon him that it will no longer furnish him with water

at the rate stipulated by his contract, but will exact of him a much higher rate, in default of the payment of which it will cut off his supply of water; and that to deprive him of his water supply would greatly injure his business, while the exaction of a higher rate would be in violation of the contract into which it entered. He alleges that the water company is insolvent and unable to respond in damages, and he prays for an injunction against the water company and Whitaker, its present superintendent, to restrain them from disconnecting his pipes from their water main, and from interfering with his use of the water under the terms of the contract alleged. The water company denies that such a contract was made, or, if sought to be made, that Wilson had any authority to make it. It admits that for several years Edwards has been getting water from it for \$12.50 per annum, but claims that this was the regular rental for two faucets, and that, when it ascertained from an inspection of the premises that Edwards was using more than that number of faucets, it immediately notified him that he must pay an additional amount therefor, or suffer his supply to be cut off. It contends that Mrs. Edwards, and not Edwards, owned the premises where the water was supplied, and that the written consent of the owner did not accompany the application for water, as required by its rules, and this is set up in bar of the relief sought. It denies all the material allegations made by Edwards, and insists that an injunction should not be granted. It is now before this court as plaintiff in error in a bill of exceptions to the judgment of the superior court of Baldwin county, which, after a jury trial resulting in a verdict for the plaintiff, enjoined it as prayed.

The motion for a new trial contains 26 grounds, many of which raise practically the same question. We will take up two questions which, in our opinion, constitute the vital issues in the case, viz., whether or not, under the evidence, the jury were authorized to find that Wilson, the superintendent of the water company, had the power to make for it a contract of the nature of the one under consideration; and if, having that power, he made the contract claimed by the plaintiff, whether or not that contract was unilateral and unenforceable for lack of mutuality.

It was not denied that Wilson was a general agent of the defendant company. His duties, as stated by the secretary of that company, were "to collect the rents and make contracts as prescribed in books of rules and regulations, and to look after the operation of the plant." Many, if not most, of the contracts made by the defendant, were in his name and by his authority. It was contended, however, that his authority to contract in the name of the company was limited to the rates, rules, and regulations prescribed by the company, and that he had no power to contract to furnish water at a lower rate than

those laid down in the regulations by which he was bound. This contention was amply supported by evidence for the defendant. It does not appear, however, that this restriction of his authority was known to the plaintiff, or that he was in any way chargeable with notice of it. Nor does it appear that the public were on notice as to who fixed the rates to be charged for water. The public were not warned that his powers were limited. On the contrary, the matter seems to have been locked in the corporate bosom—a secret known only to directors and general officers, most of whom resided in the distant state of Pennsylvania. Assuming that the contract was unauthorized, there can be no question as to ratification, for the evidence is all to the effect that, as soon as it was discovered that Edwards was using a greater number of faucets than that for which he was being charged on the books of the company (a fact which was not shown to have been imparted by Wilson to the officers of the company, and which they appear to have discovered only upon an inspection of the plaintiff's premises after the death of Wilson), he was notified without delay that he must pay the regular rate in the future. Aside from the question of ratification, however, if Wilson was held out to the world as an agent with general powers to contract in the name of the defendant, and no notice was given of any restriction on those powers, and, on the faith of his known relations to the company, Edwards entered into a valid contract with the company through his agency, in the fulfillment of which he incurred an expense which he otherwise would not have incurred, the principal would be held to the contract, regardless of the fact that the agent exceeded his authority. It is a well-settled principle of the law of agency that a principal is bound by the acts of his agent within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Enc. L. (2d Ed.) 989; City Bank v. Kent, 57 Ga. 283; Blaisdell v. Bohr, 77 Ga. 381. As we have already shown, Wilson was the general agent of the water company—held out to the public as one having authority to sign contracts in its behalf. On the other hand, the public were also on notice as to what the regular rates of the company were, and the plaintiff himself knew that he was making a contract for water at a lower rate than that granted the general public. In other words, he made a special contract with a general agent. By a "special contract" we do not mean to say that he knew that he was making a contract outside the authority of the agent, for, if that were true, the discussion would end right there; but he knew that the usual and regular rates were being varied for his benefit. The decision of this branch of the case, then, turns upon the single question whether or not the knowledge of Edwards as to the

regular and usual rates charged by the company, and that these rates were being varied for his benefit, was sufficient to put him on inquiry as to the authority of the agent to so vary them. As Wilson was held out to the world as an agent having general powers to contract in behalf of the defendant company, and as he was admitted to have had general supervisory powers over the operation of the plant, we are constrained to answer this question in the negative. The case of *Harris v. Central R. Co.*, 91 Ga. 317, 18 S. E. 159, is not, we think, in conflict with what we now hold. In that case two subordinate agents of a railroad company—one a soliciting agent, and the other a station agent—contracted with the plaintiff to relieve him from the operation of a general rule which was well known to the plaintiff. The limited authority of the agents was obvious, and the plaintiff knew that the rule in question was promulgated by the general authorities of the company. The facts of that case differentiate it easily from the case at bar.

2. On the question whether the alleged contract was void for want of mutuality we have no difficulty. "A consideration is valid if any benefit accrues to him who makes the promise, or any injury to him who receives the promise." Civ. Code 1895, § 3657. According to the plaintiff's testimony, he was put to an expense of between \$600 and \$700 in laying pipe from his residence to the point of connection with the defendant's main, providing water fixtures, and otherwise carrying out his part of the agreement. Certainly this was an injury that accrued to him. Furthermore, he gave the defendant company the right to tap his line of pipe, thus affording it the opportunity to supply other customers in the vicinity of his residence. With equal certainty, this was a benefit accruing to the water company. There is a broad distinction to be observed between this case and the case of *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998. There it did not appear that the plaintiff was put to any expense whatever in fulfilling his part of the agreement. Here, as we have seen, the case is altogether different. There the plaintiff could be held to nothing under his contract. Here the plaintiff is bound to keep down his pipes so long as the company is willing to furnish him with water at the agreed rate, even though he is not bound to continue taking the water. Indeed, it is extremely doubtful if this question can now be made by the water company, for, when this case was here before, on exceptions to the sustaining of a demurrer to the plaintiff's petition (*Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417), it was held that, "for the purpose of obtaining the injunction prayed for, the petition stated the terms, scope, and extent of the contract with sufficient fullness and certainty." The evidence for the plaintiff on the present

hearing fully substantiated the allegations of his petition. It having been decided, therefore, when the case was here before, that a valid contract was declared on, and that contract having since been proved as alleged, no question can now be raised as to its lack of mutuality.

The grounds of the amendment to the motion for a new trial, 26 in number, consist in assignments of error upon the admission of evidence, the refusal of the court to charge as requested, and certain extracts from the charge as given. To treat of each of these grounds separately would consume unnecessary time and space, especially as the case has been disposed of on its substantial merits, upon uncontradicted evidence, by what has been said in the foregoing. The charge of the court as to the presumption of authority when the bare fact of agency is shown was undoubtedly erroneous, and, if the case turned upon a disputed issue of fact involving this question, a new trial would necessarily result. But the error in this charge, and whatever error there may have been in other rulings complained of, did not affect the merits of the decision reached, for, as already shown, the essential facts upon which the verdict and judgment were based were undisputed.

Judgment affirmed. All the Justices concur.

(108 Va. 870)

MCCUE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 26, 1905.)

GRAND JURORS — DISQUALIFICATION — PLEA IN ABATEMENT — JURORS — COMPETENCY — WITNESSES — IMPEACHMENT — CRIMINAL LAW — INSTRUCTIONS — SPECIAL PROSECUTION — TRIAL — NEWSPAPERS — APPEAL — CONSTITUTIONAL LAW — WRIT OF ERROR.

1. That a member of the grand jury was disqualified may be set up by plea in abatement to the indictment, and the issue thus made is to be tried by a jury.

2. That the replication filed by the commonwealth to a plea in abatement setting up facts disqualifying a grand juror concluded with an offer "to verify" instead of "to the country" is immaterial after verdict.

3. The trend of recent decisions is in the direction of limiting, rather than extending, the disqualification of jurors by reason of mere opinion. To have the effect of disqualifying a venireman, his opinion must be substantial, and not a mere impression which will not interfere with his fairness.

4. Section 3351, Code 1904, relating to the method of contradicting an adverse witness called by a party, applies to criminal as well as civil cases.

5. An instruction upon a point covered by other instructions is properly refused.

6. The right of the public prosecutor to have associated with him an attorney to assist in the prosecution is well established, and so long as such attorney keeps within proper bounds he is not open to criticism before the jury.

7. The safer and better practice is to exclude newspapers from jurors in a criminal case, but an accused cannot object to the fact that they were read when he made no protest at the time.

& A review by an appellate tribunal is no part of "due process of law."

9. It is the practice, and by section 3466 of Code made the duty, of the Court of Appeals to deny a writ of error in a criminal case when of opinion that the judgment is plainly right.

Error to Corporation Court of City of Charlottesville.

One McCue was convicted of murder, and petitions for writ of error. Denied. Petition for rehearing denied.

J. I. Lee, J. Tinsley Coleman, and Walker & Sinclair, for petitioner.

KEITH, P. Petitioner was indicted by a grand jury in the corporation court of the city of Charlottesville on September 19, 1904, for the murder, on the 4th of September preceding, of his wife, Fanny M. McCue. At a subsequent term of the court he was tried upon this indictment, and on the 5th day of November the jury found him guilty of murder in the first degree. The court sentenced him to be hanged, and he thereupon applied to this court for a writ of error, which was refused, the court being of opinion that the judgment complained of was plainly right. At a subsequent day a supplementary petition was filed, asking the court to rehear its judgment refusing the writ of error, and upon the original and supplemental petitions the case is now before us for consideration.

The first assignment of error is to the judgment of the corporation court upon a plea filed by the petitioner, in which he alleges that Lyman, one of the grand jurors finding the indictment, was not a resident of the city of Charlottesville. To this plea the commonwealth, by its attorney, filed a replication. Thereupon the court impaneled a jury, and made up and propounded to it the issue whether or not said Lyman was at the time of finding the indictment a resident of the city of Charlottesville. This issue was found by the jury in the affirmative, and the action of the court in overruling prisoner's motion to set aside the verdict and entering judgment thereon constitutes the petitioner's first assignment of error.

It was decided in *Commonwealth v. Cherry*, 2 Va. Cas. 20, that by force of the common law, where a bill of indictment is found by a grand jury, one of whom is an alien, or otherwise disqualified by law, the bill or presentment may be avoided by plea. *Commonwealth v. Long*, 2 Va. Cas. 318.

In *Commonwealth v. St. Clair*, 1 Grat. 568, it was pleaded in abatement to the indictment that one of the grand jurors was not a freeholder. Upon that plea an issue was made up, tried at the bar of the court by a jury, the issue found for the defendant, and the indictment quashed.

In *Day v. Commonwealth*, 2 Grat. 563, the prisoner pleaded in abatement that one of the grand jurors was at the time of finding the indictment a surveyor of a highway. To this plea the attorney for the commonwealth replied generally, and thereupon the court decided the issue against the prisoner. The general court was of opinion that the issue so joined was one of fact, and that it should have been submitted to a jury; and for this error the judgment was reversed, and a new trial awarded.

Counsel for petitioner criticise the replication which the court permitted to be filed to the plea in this case upon the ground that it concludes with an offer "to verify," when it should have been "to the country."

We shall not stop to inquire into this nicety of pleading. The injury of which the petitioner complained was that he had been indicted by a grand jury upon which there was a juror incompetent by reason of the fact that he was not a resident of the city of Charlottesville. That issue was submitted to a jury, which heard the evidence, and decided it against him. We cannot permit the grave interests presented in this case to be determined upon a consideration so trivial. It is certain that no right of the prisoner was prejudiced by the ruling of which he complains. The verdict of the jury upon this issue must be considered in this court as upon a demurrer to evidence, and the evidence was, in our judgment, so considered, sufficient to sustain it.

The second assignment of error is as to the qualification of the petit juror J. Y. Stockdell, who was challenged by the petitioner.

He was asked if he had formed or expressed an opinion, to which he replied, "I formed an opinion on the newspaper evidence." He was reminded by counsel that in law the prisoner was presumed to be innocent, and he was asked, "In your present state of mind, could you go on that jury, starting out with that presumption of innocence in your mind? A. I could not say that I could, sir, for the reason that I have read this evidence. Naturally there is some impression on my mind, but I cannot say that it is biased or prejudiced. The only thing I have heard is one side as published in the newspapers. I must say that everything I read in the newspapers was one side." After further question and answer, counsel asked the juror this question: "In spite of what you have read and heard, you could go upon this jury and give the prisoner a fair and impartial trial according to the instructions of the court and the evidence as detailed by the witnesses? A. I feel that I am a fair-minded man. Q. But I also understand, Mr. Stockdell, that what you have read of this case has destroyed in your mind the presumption of the prisoner's innocence; that you would not go on the jury presuming him to be innocent. A. I don't know about that. It is a question as to drawing a line between

thinking him innocent and knowing him to be guilty, which I don't know."

In answer to other questions the juror stated "that as a fair-minded man I could render a verdict according to the law and the evidence, not biased; I have no prejudice one way or other"; and that as to innocence or guilt he would be governed by the evidence and the instructions of the court.

After numerous questions had been asked and reiterated, the object of which was to ascertain the precise character and strength of the opinion which the juror had formed and expressed, counsel asked him the following question:

"Do you feel at this moment that there is a presumption in your mind that this defendant is an innocent man?"

To which he replied: "I would like to say this: That I feel that I am an honest and unbiased man, and as such that I could enter this jury unprejudiced and unbiased, and give the prisoner a trial according to the law and the evidence. If I did not feel so, I would want to be turned out; but at the same time I feel that I could serve, and am called here to serve, and that it is therefore my duty to serve.

"By the Court: Do you feel that you can go into this trial leaving your mind open to the evidence, free from any previously read accounts in the newspapers, and go through the trial believing him innocent until he is proved guilty? A. Yes, sir."

And thereupon the juror was accepted.

The cases upon this subject are almost without number, and they are not to be reconciled. The trend of recent decisions is in the direction of limiting, rather than extending, the disqualification of jurors by reason of mere opinion. Whatever the mind receives has an effect upon it, passing with almost infinite gradation from a mere impression to a fixed belief. The state strains every nerve to disseminate knowledge. By the diffusion of education it hopes to create a higher citizenship, and to find the means of repressing vice and crime; but if the courts take an extreme position upon this subject, and hold that every opinion shall work a disqualification for service as a juror, the administration of justice will be confided, not to the most intelligent, but to the most ignorant, of our citizens. The courts therefore, while resolute in seeing that every man shall be tried by an impartial jury, inquire into the quality and degree of the opinion, and to that end search the conscience of the juror upon his *voir dire*, and look into the sources of the information upon which his opinion rests.

No man can read the rigid examination to which this juror was subjected without being impressed with his fairness, with his desire to deal justly by the prisoner, and with his conscientious purpose to discharge his duty as a citizen.

In *Moran's Case*, 9 Leigh, 651, two jurors were examined upon their *voir dire*. One stated that he had heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he had expressed no opinion, though he believes those rumors to be true, and, if they should turn out upon the trial to be true, he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied that he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumors he had heard. His opinion was that, if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. The other juror stated that he had made up no decided opinion; that he had heard a part of the evidence of one witness, and formed an impression, and, if the balance of the testimony should run that way, that impression would be confirmed; that, so far as the evidence went, he had a decided opinion, if the rest should not run against it; but that he had no prejudice, had not expressed any opinion, and was prepared to decide the case according to the evidence which might be given in, uninfluenced by the portion of evidence he had heard. Both jurors were held to be competent.

In *Smith v. Commonwealth*, 6 Grat. 696, a juror stated that he had read the evidence as published in the newspapers, and had formed and expressed the opinion, though it was not a decided one, that the prisoner was guilty; that he was satisfied that he could give the prisoner a fair and impartial trial, notwithstanding his impressions, and without being influenced by them, on hearing the evidence adduced at the trial. Another stated that he had formed and expressed a decided opinion, founded on a report of the evidence before the mayor, published in the papers, but not such an opinion as would influence his mind if accepted as a juryman; that the opinion so formed would naturally be recalled to his memory, but that he would be governed solely by the evidence which might be given in court. Held, that both were competent jurors.

In *Clore's Case*, 8 Grat. 606, a juror stated that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it, but from the rumor of the neighborhood he had formed an opinion, which at the time he spoke was existing on his mind, and which he should stick to unless the evidence turned out to be different from what rumor had reported it to be; that he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial according to the evidence that should be given in. Held, that he was a proper juror.

In *Jackson's Case*, 23 Grat. 919, Judge Moncure, delivering the opinion of the court, goes fully into this subject. He says: "There is no question, perhaps, about which

there has been more apparent conflict of decision in this state, or in regard to which it is more difficult to derive from our many cases on the subject any definite rules which will apply to all cases that may arise. The object of the law is to secure to every man who is charged with a criminal offense a trial by an impartial jury. And this rule has been established by the cases, if no other, that if a venireman has formed, and still more if he has formed and expressed, a decided or substantial opinion as to the guilt or innocence of the accused, no matter upon what ground it was formed, whether from having heard the evidence on some former trial or examination or from mere rumor or otherwise, he is an incompetent juror to try the case; and if, on the other hand, his opinion be merely hypothetical, he is not incompetent on that ground. The difficulty is in determining in any given case whether the opinion be decided or substantial or merely hypothetical, there being in almost every case some peculiarity of circumstance. And the desire to remove or lessen this difficulty by laying down certain other rules for our guidance has been the fruitful source of the apparent conflict in many of the cases. Thus, if a venireman has formed an opinion as to the guilt or innocence of the accused from having heard the evidence on a former trial or examination of the case, it would be difficult, if not impossible, to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. So, on the other hand, if a venireman has formed an opinion as to the guilt or innocence of the accused from mere rumor, the presumption, in the absence of evidence to the contrary, is that such opinion is merely hypothetical, and will be so considered even though he speak of it as a decided or substantial opinion, if he says he has no prejudice against the accused, and thinks he can give him a fair and impartial trial. But if the court be satisfied, either from the venireman's own statements or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror. There are intermediate cases which often give rise to difficulty on this subject. The venireman may have formed an opinion from having heard a part only of the evidence on a former trial, or from having heard the whole or part of the evidence given on a former trial, through persons who were present, in whose veracity and accuracy he may have more or less confidence; or from having read an account of such evidence in a newspaper. We cannot lay down any rule for the government of such cases except the general rule before stated; and the court must determine, as best it may, whether the opinion be decided or substan-

tial or merely hypothetical. It would be dangerous to lay down a rule; and no case has ever decided that a venireman who has formed an opinion from accounts received from witnesses out of court, and still less from accounts received from others, as to statements made by witnesses, either in or out of court, is therefore necessarily an incompetent juror, even though he may regard the persons from whom he received his information as persons of general veracity and accuracy, and may credit what he has heard from them. We know that witnesses who make statements out of court of transactions about which they may have testified in court, still more persons who profess to detail what they may have heard in or out of court, often speak carelessly, and generally omitting particulars which may be very material. And we know that those who listen to them often listen carelessly, and, though they almost always form some impression or opinion of the case from what they hear, yet that opinion is not always, and perhaps not often, decided or substantial, in the meaning of the rule aforesaid. The court must determine that question in all such cases in view of all the circumstances."

In the course of his opinion he cites numerous authorities, and quotes with approval the language of Judge Summers in *Moran's Case*, supra, in which he uses the following language: "Sustaining challenges to jurors for favor on slight grounds tends to place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard; and we are therefore not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided."

As we have said, the cases are not reconcilable, but we believe those we have cited establish a wise and salutary rule. When to these considerations it is added, as has been frequently reiterated by this court, that great weight is justly due to the opinion of the trial judge, who sees and hears the veniremen, we have no hesitation in rejecting this assignment of error.

These considerations lead to the same conclusion with reference to the juror Wood.

The next exception is as to the competency of the witness Kaufman, who was introduced by the commonwealth to prove that a piece of cloth found in the bathroom on the day following the alleged homicide was a part of the undershirt worn by the prisoner on that occasion.

Kaufman, it appears, is engaged in the clothing business, and is a salesman of and dealer in underwear, but has never manufactured it. Fontaine Eddins, a clerk in a clothing store, was introduced for the same purpose, and both were permitted to testify over the objection of the prisoner.

In this there was no error. It was for the court to say what evidence should be admitted. It was for the jury, before whom the witnesses were subjected to investigation as to their source of knowledge, to determine upon their credibility, and the weight to be given to their testimony.

The eleventh exception is to the admission of a conversation between the prisoner and his son, William McCue, as testified to for the commonwealth by the witness Martin. In this conversation petitioner, according to the witness, said that he (his son) knew that the statement made by Ernest Crawford about petitioner's having drawn a pistol upon his wife was not true; to which petitioner's son replied by affirming that petitioner did draw a pistol upon his wife. This is objected to upon the ground that there is no suggestion or approximation with respect to the time at which the occurrence took place which was the subject of this conversation; that it nowhere appears "whether it was a week, or a month, or a year, or five years, or ten years, before the homicide."

The testimony with respect to the incident in the jail was not introduced as proof of the circumstance narrated. It does not prove or tend to prove, and there was no purpose in its introduction to prove, that the accused at any time threatened his wife with a pistol, and that she sought the protection of her son. Ernest Crawford had testified before the jury that William McCue so stated to him, and Martin's testimony was introduced solely for the purpose of showing that McCue endeavored to induce his son to deny the statement attributed to him by Crawford. If the circumstance to which Crawford referred was inadmissible for remoteness in point of time, or for any other reason, objection to it should have been made when Crawford was upon the stand; but there could be no objection to it when introduced for the purpose indicated.

The precise language of the prisoner on that occasion was as follows: The prisoner said to his son: "You know it is not so about what Ernest Crawford said about my drawing a pistol on your mother." To which the son replied: "You did; and she run in the room and got in the bed with me, and asked me not to let you shoot her."

Nor is the testimony of Martin inadmissible because in effect "an accusation against the prisoner which he then and there controverted and denied." The conversation was brought about by the prisoner, who was apparently seeking to find the means of weakening the force of Crawford's statement, and he said to his son: "You know it is not true that I drew a pistol on your mother." And the denial comes from the son: "You did; and she run in the room and got in the bed with me, and asked me not to let you shoot her."

What was said, with all the attending cir-

cumstances, was before the jury, and we are of opinion that there was no error in this ruling of the court.

There are several exceptions to evidence, which seem to us to be immaterial, and to discuss which would unduly protract this opinion. That, for instance, of the witness Covington, who testified that he spoke to petitioner's wife at about 20 minutes before 8 o'clock; that he took off his hat, and bowed to her, but that she did not speak. Of the witness Hurley, who heard the prisoner say that his wife's jealousy diminished his pleasure and enjoyment in life.

The fifteenth exception is to the testimony of Dr. Nelson, who was permitted to testify as to the effects of a blow struck by a sandbag, or other similar instrument.

It hardly requires the learning or experience of a practitioner of medicine to know that if a man was struck by a sandbag a blow sufficient to render him unconscious, there would be at least some slight discoloration or external mark or after-effect consequent upon the blow. This assignment of error is also overruled.

The assignments of error from the sixteenth to thirty-third, inclusive, present a question of much importance in this prosecution.

William McCue, a son of the prisoner, was introduced as a witness by the commonwealth; and, it speedily appearing that he was adverse to the commonwealth and favorable to the prisoner, the commonwealth, alleging that it was surprised, asked and was permitted to introduce evidence to show that the witness had made statements inconsistent with his testimony.

So much of section 3351, Code Va. 1904, as is pertinent to this inquiry, is as follows:

"A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination.

"(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court prove adverse, contradict him by other evidence, or, by leave of the court prove that he has made at other times a statement inconsistent with his present testimony, but before said last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. In every case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness."

The law just quoted is so comprehensive in its terms that we shall content ourselves with observing that it warrants the action of

the court in this case, unless, as the petitioner insists, its operation is to be confined to civil cases. The law of evidence is in general the same in civil and in criminal cases. In each case the object is the same—to place evidence before the jury which will enable it to arrive at a just decision upon the issues. It has long been a subject of investigation before courts, text-writers, and legislatures how far it is permissible for a party to contradict his own witness.

In Wigmore on Evidence, vol. 2, §§ 897 to 908, inclusive, the whole subject is exhaustively discussed, and the views of eminent authorities given.

Lord Ellenborough is quoted as saying in *Alexander v. Gibson*, 2 Camp. 555: "If a witness is called on the part of the plaintiff who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed; but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted."

Chief Justice Tindal's remarks in *Bradley v. Ricardo*, 8 Bing. 58, are cited: "The object of all the laws of evidence is to bring the whole truth of a case before the jury; * * * but, if this contradicting evidence were excluded, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labor under a defect of memory, or be otherwise unable to make a statement on which complete reliance might be placed."

The reasoning and authorities range all the way from permission to refresh the memory of an adverse witness by cross-examination to the practice which finds expression in the statute under consideration of proving his inconsistent statements.

In England the subject was referred to a commission composed of eminent jurists, and they reported in favor of the admission of impeaching testimony by proof of contradictory statements. For the admissibility of the proposed evidence it is said that this course "is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to the party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that such a power is necessary for the purpose of placing the witness fairly and completely before the court, and for enabling the jury to ascertain how far he deserves to be believed; that the ends of justice are best attained by allowing the fullest power for scrutinizing and correcting evidence, and that the exclusion of the proof of contrary statements might be attended with the worst consequences. The chief objection to the proposed evidence appears to

be that a party, after calling a witness as a witness of credit, ought not to be allowed to discredit him. The objection proceeds upon the supposition that the party first acts on one principle, and afterwards, being disappointed by the witness, turns around and acts upon another, thus imputing to the party something of double-dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him, and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case and repress the truth would be to allow the witness to deceive both jury and party."

In *Babcock v. People*, 13 Colo. 519, 22 Pac. 818, Judge Elliott said: "The tendency of recent legislation, as well as of modern decisions, has been to relax somewhat the rules of evidence, so as to afford better opportunity for the development of truth. Modern experience has also shown that a party may sometimes be deceived in the character and animus of a witness whom he has called, as well as in the testimony he is expected to give; and he learns, after the witness begins to testify—a very inopportune time—that he has to encounter bitter and unscrupulous opposition where he had expected to receive only fair and honorable treatment. This may be evidenced by reluctance or evasion on the part of the witness in answering questions, or by too great readiness in making or volunteering damaging statements contrary to his previous version of the matter. Under such circumstances * * * in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectation of the party calling him, such party should be allowed to cross-examine such witness for the purpose of refreshing his recollection, with the view of modifying his testimony or of revealing his animus in the case, * * * and to ask him if he has not theretofore made other or different statements from those he has just given in evidence."

In this whole discussion, as given in Wigmore, the reasoning adduced and the authorities cited apply indifferently to civil and criminal cases; the civil cases being, of course, far the more numerous.

The English statute is given, passed in pursuance of the recommendation of the commission on procedure heretofore referred to: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony."

"It is easy to imagine," says the author, "the confusion caused by this bungling paragraph; for the showing of an error by ordinary contradiction, provided for in clause

8, was already freely permissible without interference by the judge, and whether or not the witness was adverse. * * * As the statute stands, the present class of evidence—self-contradictions—is admissible only by leave of the judge and in case of a witness deemed adverse by the judge. In the United States fortunately only a few jurisdictions have adopted the English statute. But the variety of attitude in the different jurisdictions and the indiscriminate citation of rulings from other courts, together with the indecision of the earlier English precedents, has tended to produce confusion in our law, even within the rulings of the same jurisdiction. The sound and simple remedy would be by statute to abolish all limitation on this kind of evidence; and this step has in some states already been taken."

The English statute quoted was passed in the seventeenth and eighteenth of Victoria. It applied only to civil cases, but by statute of the twenty-eighth and twenty-ninth of Victoria it was extended to criminal cases.

In *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 834, 84 L. Ed. 170, which was upon an indictment for murder, Chief Justice Fuller says: "When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. * * *

But proof of contradictory statements of one's own witness, voluntarily called, and not a party, inasmuch as it would not amount to substantive evidence, and could have no effect but to impair the credit of the witness, was generally not admissible at common law.

"By statute in England and in many of the states it has been provided that a party may, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actual hostile testimony with which the party has been surprised."

This citation is of value in two aspects. In the first place it shows what the common law was; it shows the tendency of modern thought upon the subject; and, although made in a case where a man was on trial for his life, rests the statements of law upon adjudications in civil cases.

Under these circumstances the Legislature of Virginia adopted the statute which we are now considering. Its language is broad and general. There is not a suggestion upon its face of the purpose to limit its operation to a particular class of cases. The evils are the same in criminal cases as in civil. It

is invoked to-day by the commonwealth. It may be to-morrow the last hope of an innocent man.

Against all this it is urged that the statute is found in the Code under the title of "Proceedings in Civil Cases." Embraced in that title are a number of chapters upon a great variety of subjects, many of which are obviously of a civil nature; others specifically declared to be of that character. In the chapter upon "Evidence," in which section 3351 is found, there are sections which, either from their subject-matter or by their express terms, apply to civil cases. There are other sections which, by their express terms, apply to criminal cases; for example, sections 3346, 3352, and 3352a, the first-mentioned referring to the competency of husband and wife to testify for or against each other in civil and criminal cases. We find, therefore, section 3351 placed in the midst of sections applicable alike by their terms to criminal and civil cases; and the operation of that section not extended upon the one hand, nor limited upon the other, to a particular class of cases, but its application to be determined by other considerations. We cannot think that the mere collocation of this section should override every other consideration, and require the courts to confine it to civil cases, when it is a remedy for an evil as great in criminal as in civil cases, and the consequences of which may be even more serious.

We are of opinion that these assignments of error are not well taken.

A careful perusal of the instructions satisfies us that they fairly submitted to the jury the principles of law by which they should be governed in the consideration of the evidence. It would be impossible to prepare instructions to which an ingenious critic might not present plausible objection. The definition of "reasonable doubt" is attempted by the court. It is a difficult, if not an impossible, task so to define it as to satisfy a subtle and metaphysical mind, bent upon the detection of some point, however attenuated, upon which to hang a criticism. But no unbiased person can read those instructions without having the conviction forced upon him that every safeguard which the benignity of the law throws around a prisoner upon trial was accorded to the petitioner in this case.

Two instructions asked for by the petitioner were refused by the court, one of which undertakes to define reasonable doubt, as follows: "The court instructs the jury that by reasonable doubt is meant such doubt as would cause a man of average prudence to hesitate about a matter of his own of like importance to himself as the case on trial is to the accused."

It would have been impossible for the jury to make any practical application of the proposition sought to be formulated in this

instruction. There could be no case of importance to a man such as "the case on trial was to the accused," unless he himself stood upon his deliverance before a jury, charged with a capital offense.

But the instruction was properly refused upon the further ground that the instructions of the court upon the subject of reasonable doubt were ample and correct guides to the jury upon that branch of the case.

The court was asked to instruct the jury "that under the humane policy of the law of this state it is considered infinitely better that ninety and nine (that is, an indefinite number of) guilty persons should escape punishment than that one innocent person should be punished; and therefore it is far better that the jury should err in acquittal than err in convicting."

We have heard it said, and it is sometimes stated in the opinions of courts, that it is better that ninety and nine guilty persons should escape than that one innocent person should be punished. We have no fault to find with the expression as a rhetorical phrase, but as a guide to a jury in reaching a conclusion it is of no value. That no guilty man should escape is equally indisputable, but it would hardly find a proper place in an instruction to a jury. The object of courts and juries is to shield the innocent and to punish the guilty; and in this case the jury were told that the accused was presumed to be innocent until his guilt was established by the commonwealth beyond a reasonable doubt, that this presumption of innocence goes with him through the entire case, and applies at every stage thereof, and that if, after having heard all of the evidence, the jury have a reasonable doubt of the guilt of the accused upon the whole case, or as to any fact essential to prove the charge made against him in the indictment, it is their duty to give him the benefit of the doubt, and find him not guilty. And, further, that if, upon the whole evidence, there is any reasonable hypothesis consistent with the innocence of the accused, they must find him not guilty; that the failure of the evidence to disclose any other criminal agent than the accused is not a circumstance which may be considered by the jury in determining whether or not he was guilty of the crime wherewith he is charged; that he is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point to any other criminal agent; nor is he called upon to vindicate his own innocence by naming the guilty person.

It is also to be observed that the court was careful in instructing the jury as to the weight to be given to the evidence of contradictory statements made by the witness William McCue and others. The jury was warned that this evidence was admissible only to contradict the witness, and not to be

taken as substantive proof of the facts related by the witness, or, in the terms of the statute, that they were not to consider the evidence of such inconsistent statements except for the purpose of contradicting the witness.

During the closing argument for the prosecution Capt. Micajah Woods, who had assisted the prosecution, arose, and in the presence of the jury said to the court: "With the gracious consent of the gentlemen on the other side and the commonwealth's attorney, I would like to make one statement, not pertaining to the merits of this case, but in view of the attack, which may not have been so intended, but which sounded to me ungenerous—as an ungenerous attack made upon me by the distinguished gentleman, and who has made so able a speech—I desire to say that I refused a large fee in this case to prosecute—"

Counsel for the prisoner objected to the statement, and asked that the jury be discharged in view of that statement.

It appears in the bill of exceptions that counsel for the prisoner had, in his argument, criticised the position of Capt. Woods in acting as prosecutor, under the compulsion of public opinion, of a man he admitted had been his friend for 20 years.

The right of the public prosecutor to have associated with him an attorney to assist in the prosecution is established law in this state, and it is not a proper subject of animadversion. He is as lawfully there to assist the prosecution as counsel for the defense to defend the prisoner; and so long as he keeps within proper bounds he is not open to criticism before the jury. It would be a strange thing if counsel for the accused were permitted to criticize opposing counsel, and that the latter should be obliged to submit in silence under the penalty we are asked to impose in this case. There is no merit in this exception.

The jury having rendered a verdict of guilty of murder in the first degree, the accused moved to set aside the verdict, among other reasons, because the jury were permitted during the progress of the trial to read, and did read, certain newspapers containing references to and comments upon the case pending the trial of the same.

It appears that "before the jury was sworn, and in response to a request from one of the jurors, the court stated to the members of the jury that they might be permitted to read such portions of the daily newspapers as in no way related to this trial, but that they must scrupulously avoid any parts of said papers as had any reference to this trial, which the said members of the jury then and there severally promised to do; and the sergeants were then instructed to carry out this instruction of the court. At the time this instruction was given neither the prisoner nor his counsel, they being

present, made objection, though they were not asked by the court if they had objection."

In *Hunter v. State*, 43 Ga. 483, after some of the jury were in the box, but the whole not impaneled, and in the presence of the court, those sworn were seen by counsel for accused reading a newspaper which contained an article reflecting upon the counsel for prisoner, and no motion or notice was then taken in regard thereto. It was held that this was not such irregularity upon the part of the jury as would be sufficient to set aside the verdict, and that such acts transpiring in the courtroom, and in the presence of the court and of counsel, when not objected to, will not be favorably regarded after the verdict.

In *Bulliner v. People*, 95 Ill. 394, counsel for a defendant handed a juror a newspaper to read, after he was sworn, but before the panel was filled, and afterwards on the trial his attention was called to the fact that another juror was reading a newspaper in which was an article purporting to contain a report of the trial, and commenting upon the case unfavorably to the defendant, and made no objection thereto, but stated privately to the court that it was best to say nothing about the matter, as it might give the article undue prominence, and do the defendant more harm than good, it not appearing that the prosecution was responsible for the act. It was held that the irregularity was waived, and could not be urged by the defendant as error to reverse a judgment of conviction; and that a prisoner on trial has no right to stand by and suffer irregular proceedings to take place and then seek a reversal for the same. Like any other defendant, if he neglects in proper time to insist upon his rights, he waives them.

In *McKinney v. People*, 7 Ill. 556, 43 Am. Dec. 65, it is said: "A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist upon his rights he waives them."

So it is uniformly held in civil as well as in criminal cases, for, as we have already remarked, the mode of procedure is substantially the same in both. A party who stands by without objection and sees proper evidence excluded or improper evidence admitted without objecting will not be heard to make the objection after verdict. And so with instructions. In other words, litigants are not permitted to play fast and loose with the court. If they are silent when it is their duty to speak, they are not permitted to speak when it is their duty to be silent.

The case under consideration is far stronger than those cited. The court, in the pres-

ence of the prisoner and of his counsel, at the instance of the jury, permitted them to have access to newspapers under rules which it prescribed. It does not appear that the limits imposed by the court were exceeded, or that the prisoner was prejudiced by what occurred. But, however that may be, he had no right to sit mute, prepared to abide by the results if they were favorable, or to make objection if they were adverse.

We think it is the safer and better practice to exclude newspapers from the jury. They are called upon to exercise the most sacred duty which can devolve upon a citizen, and in its discharge they must make such personal sacrifice as is necessary to its due performance; but under the circumstances of this case no reversible error is disclosed in this respect.

No one can read the petitions for a writ of error in this case without being satisfied that the accused had every advantage that could accrue to him from the efforts of able and astute counsel. But no one can read the facts presented in evidence without being convinced that no advocacy, however skilled to make the worse appear the better reason, could have brought about any other result than that which has been reached. The evidence precludes every reasonable hypothesis of innocence, and points with unerring certainty to the guilty man. The record discloses a homicide remarkable only for its atrocity, that it was committed by a member of the profession of the law who had been intrusted by his fellow citizens with a responsible office, and that the victim was his wife.

We have gone through the record and discussed what seemed to us to be its more important features. There are exceptions to which we have not adverted. Some of them we deemed unimportant; others as controlled by principles well established, or covered by what we have said with reference to kindred exceptions; and there is but one other view which we are called upon to present.

Running through the petitions, and more particularly the supplemental petition, there is a subtle suggestion that this court has introduced a practice which tends to undermine the rights and abridge the privileges of those who stand accused of crime.

The theory propounded seems to be that a writ of error to the judgment of a trial court is one of the rights of a person convicted of crime; while the truth is that a review by an appellate tribunal, whether upon an appeal or writ of error, is no part of "due process of law."

The inalienable rights of a person accused of crime are thus stated in the Bill of Rights: "That, in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to

a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers."

Our statute prescribes the rule which controls the action of this court. With reference to appeals and writs of error, section 3466 says: "In a case wherein the court shall deem the judgment, decree, or order, complained of, plainly right, and reject it on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained."

We have no such practice as an absolute right of appeal in civil or criminal cases. But the law requires a petition, accompanied by a transcript of the record, to be presented to the court, or one of its judges, whose duty it is to examine the errors assigned, and to grant or refuse a writ, as may seem proper. It is as much the duty of the court or judge to deny the petition when of opinion that the decision complained of is plainly right as it is to grant it when any doubt exists as to the propriety of the decision. The statute in its present form is found in the Code of 1849. Just when it took its place in the statute law we are not informed, but the uniform practice of this court and of the general court, its predecessor, as an appellate tribunal in criminal cases, has been in accordance with the letter and spirit of that statute.

In *Vance v. Commonwealth*, 2 Va. Cas. 162, a case of homicide, which ended in a conviction of murder in the first degree, the report of the case shows that it was highly litigated, and that many errors were assigned; but an application for a writ of error was unanimously refused by the judges of the general court.

Running through the Virginia Cases and other Reports in which the judgments of the general court appear numerous instances will be found of writs of error refused in every description of felony. In some cases opinions are delivered; some are heard upon the petition only, while in others the Attorney General is permitted to reply.

By the Constitution of 1851 the general court was abolished, and appellate criminal jurisdiction was given to the Court of Appeals. Beginning with 1854, our records disclose cases, involving every form of felony and every degree of punishment applicable to that crime, in which the order entered upon the petition is that "the court, deeming the judgment complained of plainly right, doth reject the petition" upon that ground.¹

We think that it has been made sufficiently to appear that our practice is not an innovation upon that of our predecessors;

that we are not perverting or diverting the administration of justice from its ancient and accustomed course; but that we walk in the beaten path prescribed to us from the earliest period in this commonwealth by judges whose names will always be remembered and revered.

While those accused of crime have rights which should be held inviolable, society has rights which are no less sacred. While the accused is entitled to a fair and impartial trial, the safety of the law-abiding citizen demands that the accused, having had a fair and impartial trial, and been adjudged guilty, according to the law of the land, should suffer with certainty and without delay the penalty imposed by the law upon his offense. Therefore, in obedience to the mandate of the statute, and in strict accordance with established precedent, having given careful consideration to the petitions and record, and being of opinion that no error is shown to the prejudice of the accused, we abide by the order entered at a former day of the term, and deny a writ of error.

Writ of error denied.

NOTE.

Writs of error were refused in the following cases:

Order Book No. 19.

Archer v. Commonwealth, p. 559; *Baxter v. Commonwealth*, p. 344; *Cronin v. Commonwealth* (murder) p. 679; *Gebhart v. Commonwealth*, p. 479; May 25, 1854, *Helms v. Commonwealth* (burglary) p. 514; May 15, 1854, *Keith v. Commonwealth* (felony) p. 633; February 28, 1855, *Murphy v. Commonwealth* (arson) p. 587; January 24, 1855, *Snyder v. Commonwealth*, p. 501; January 12, 1854, *Whalen v. Commonwealth* (murder) p. 429.

Order Book No. 20.

October 25, 1859, *Argentine v. Commonwealth* (forgery) p. 512; November 19, 1859, *Brown v. Commonwealth* (treason) p. 529; January 9, 1860, *Bayliss v. Commonwealth* (murder) p. 537; November 8, 1860, *Bragg v. Commonwealth*, p. 656; November 1, 1856, *Cornwell v. Commonwealth* (murder) p. 105; November 4, 1857, *Crowley v. Commonwealth* (murder) p. 220; November 9, 1860, *Craddock v. Commonwealth* (felony) p. 657; October 15, 1859, *Grubb v. Commonwealth* (rape) p. 509; November 23, 1859, *Gray v. Commonwealth* (felony) p. 499; April 21, 1858, *Hopkins v. Commonwealth*, p. 306; May 24, 1858, *Jones v. Commonwealth* (felony) p. 93; January 9, 1857, *Keene v. Commonwealth* (murder) p. 126; October 18, 1860, *Lacy v. Commonwealth* (felony) p. 644; May 13, 1856, *Moore v. Commonwealth*, p. 71; October 30, 1857, *Nichols v. Commonwealth* (felony) p. 218; January 17, 1858, *Parsons v. Commonwealth* (felony) p. 6; February 25, 1858, *Poff v. Commonwealth* (felony) p. 232; January 12, 1859, *Powell v. Commonwealth* (murder) p. 393; November 20, 1857, *Shiflett v. Commonwealth* (felony) p. 231; January 12, 1858, *Smither v. Commonwealth* (murder) p. 240; November 19, 1858, *Sunderland v. Commonwealth* (murder) 369; January 8, 1858, *Saunders v. Commonwealth* (murder) 390; April 23, 1858, *Tyler v. Commonwealth* (murder) p. 807; April 26, 1860, *Taylor v. Commonwealth* (felony) p. 615; October 31, 1860, *Totty v. Commonwealth* (murder) p. 652.

¹ See note at end of case.

Order Book No. 21.

January 24, 1862, Austin v. Commonwealth (felony) p. 110; February 2, 1861, Crump v. Commonwealth (murder) p. 15; January 12, 1867, Foster v. Commonwealth (felony) p. 410; February 22, 1861, Jefford v. Commonwealth (felony) p. 27; January 28, 1861, Mesco v. Commonwealth (felony) 12; October 12, 1866, Paul v. Commonwealth, p. 378.

Order Book No. 22.

March 25, 1872, Dougherty v. Commonwealth (felony) 513; November 16, 1871, Brock v. Commonwealth (to be hung) 871.

Order Book No. 23.

April 25, 1873, Hardwick v. Commonwealth (felony) p. 110.

Order Book No. 24.

April 21, 1877, Agree v. Commonwealth (felony) p. 501; March 14, 1878, Chambers v. Commonwealth (felony) p. 189.

Order Book No. 25.

May 2, 1879, Bell v. Commonwealth (felony) p. 377; March 12, 1878, Gregory v. Commonwealth (felony) 7; February 19, 1880, Kenney v. Commonwealth (felony) 816; January 23, 1879, Russell v. Commonwealth (felony) 227.

Order Book No. 26.

April 28, 1881, Cook v. Commonwealth (felony) 137; April 27, 1882, Jones v. Commonwealth (felony) 366; February 18, 1881, Mitchell v. Commonwealth (felony) 59.

Order Book No. 27.

November 9, 1885, Banks v. Commonwealth (felony) 458; March 30, 1886, Gresham v. Commonwealth (assault) 629; April 2, 1885, Hamilton v. Commonwealth (felony) 369.

Order Book No. 28.

December 7, 1888, Abrams v. Commonwealth (felony) 639; February 25, 1887, Newton v. Commonwealth (felony) 186; November 11, 1886, Smith v. Commonwealth (felony) 15.

Order Book No. 29.

November 13, 1890, Hughes v. Commonwealth (felony) 368; November 13, 1890, Walden v. Commonwealth (felony) 368; May 1, 1890, Davis v. Commonwealth (felony) 328.

Order Book No. 30.

December 12, 1893, Justus v. Commonwealth (felony) 377; January 15, 1894, Mason v. Commonwealth (felony) 392.

(103 Va. 477)

JOHNSON et al. v. BLACK et al.

(Supreme Court of Appeals of Virginia. Jan. 28, 1905.)

EQUITY — MULTIFARIOUSNESS — PUBLIC OFFICERS — PAYMENT OF ILLEGAL SALARIES — SUIT BY TAXPAYER — JURISDICTION — LACHES — LIMITATIONS.

1. The bill in a suit by a number of taxpayers of a county against the members of the board of supervisors and a number of their predecessors in office to compel defendants to restore to the county moneys paid them in excess of their salaries, in which the same defenses were made by each defendant, was not multifarious.

2. Va. Code 1904, p. 398, § 836, provides that all improper accounts presented to the board of supervisors shall be resisted by the commonwealth attorney, and that, when required by six freeholders of the county, he shall appeal

from any decision of the board to the circuit court within 30 days. *Held*, that equity is not without jurisdiction to entertain a suit by a number of the taxpayers of a county against the board of supervisors and a number of their predecessors to compel them to restore to the county moneys paid them in excess of their salaries, on the ground that there is an adequate remedy at law under the statute.

3. The fact that the suit embraced moneys paid for the period of 11 years did not render it barred by laches, though the books of the board had been open to the public.

4. The members of the board of supervisors of a county are not entitled to compensation in excess of that fixed by Va. Code 1904, p. 402, § 848, irrespective of what their services may have been reasonably worth, and irrespective of the custom of their predecessors.

5. In a suit by a number of taxpayers of a county to compel the members of the board of supervisors and a number of their predecessors to restore to the county moneys paid them in excess of their salaries, the county is practically the complainant, and, as against it, defendants could plead limitations.

Appeal from Circuit Court, Norfolk County.

Suit by Foster Black and others against the board of supervisors of Norfolk county, one Johnson, and others. From a decree in favor of complainants, certain defendants appeal. *Affirmed*.

John W. Happer, M. R. Peterson, and F. I. Crocker, for appellants. John B. Jenkins and N. T. Green, for appellees.

HARRISON, J. This suit in equity was brought by Foster Black and five others, resident citizens and taxpayers of the county of Norfolk, against the board of supervisors of that county and the appellants, for the purpose of compelling the appellants to restore to the county treasury certain public moneys which it is charged they had illegally and fraudulently withdrawn therefrom.

The bill alleges that the complainants had recently discovered that for 11 years said board had been continuously violating the law with respect to the compensation of its members, and had illegally and fraudulently during that time allowed and ordered to be paid out of the funds of the county, to the respective members of the board, compensation greatly in excess of that allowed by law. The names of the members of the boards during the time mentioned are set forth as defendants, and among them are the appellants.

There is filed with the bill, as a part thereof, a statement (Exhibit A) taken from the records of the board, which shows that between June 10, 1890, and June 11, 1901, compensation aggregating \$16,192.75 had been allowed by the board to its several members; that, of this sum, the appellant W. S. Johnson, who had been in office continuously during that time, had received the sum of \$3,042.75; that the appellant John A. Codd, who had been in office from 1892 to 1901, had received the sum of \$3,893; that the appellant George E. Wood, who had

been in office from 1896 to 1901, had received the sum of \$1,932; that the appellant J. C. Lynch, who had been in office from 1896 to 1901, had received the sum of \$849.50; and that the appellant D. M. Harding, who went into office in 1901, had received the sum of \$62.77. This statement also shows the several sums received by the other nine persons, defendants in the court below, during the respective periods of their occupancy of the office, to have been, according to length of service, in somewhat corresponding proportion to those mentioned. The bill further alleges that, under the law regulating the compensation of members of boards of supervisors, during the time mentioned, no member of such boards, for that time or for any part thereof, could have legally been paid as compensation for his services, as much, or anything like as much, for any one year or for the whole of such time, as the statement Exhibit A shows that the defendants received upon the order of the board of which they were respectively members. It is therefore further alleged that the payments so made to the defendants, and each and every one of them, as shown on said statement, were the result of an illegal, fraudulent, and corrupt combination upon the part of the members of said respective boards of supervisors to divert to the use of themselves, in their individual capacity, money belonging to the taxpayers of the county, which was controlled and held in trust by these several boards of supervisors, as the representatives of the county, for purposes authorized by law; that each of the defendants to whom such overpayments were made, as set forth, had notice of, and participated and acquiesced in, a fraudulent, illegal, and corrupt breach of trust, and are liable in equity therefor, and can be treated therein—each of them—as trustee for the county and its taxpayers for the amounts so overpaid, with interest on the same from the date of such payments, and can be required in this suit to repay the same into the treasury of the county.

It is further alleged that, if the amount of such overpayments can be recovered for the county, it will materially lessen the taxes to be paid by complainants and the other citizens of the county; that complainants had applied to the present board of supervisors of the county to take some steps to recover such illegal payments, but that it had refused to pay any attention to the application, and had treated the same with contempt, thus refusing complainants and the county any hope of relief from action on their part; that further application to said board in this behalf would be a useless waste of time, as five out of its six members are parties defendant hereto, whom complainants wish to compel to refund to the treasury of the county moneys illegally paid to them.

The prayer of the bill is that an account

may be taken of the amounts illegally paid to the defendants from the funds of Norfolk county; that a decree may be entered against each of the defendants for the amount so found to have been illegally paid, to be paid into the treasury of the county; and that each of the defendants be declared and held to be a trustee for the county to the extent of such illegal and fraudulent payments; and for general relief.

The defendants filed their several demurrers and separate answers to this bill, and the demurrers were overruled. In their answers they set out the amounts they have received for attendance on the meetings of the boards, and for mileage in going to and returning therefrom, as well as the amounts which they have received for service on committees of the boards, and for other alleged beneficial services rendered the county. They declare that they have faithfully performed their duties as members of the boards upon which they served, and deny that there was any illegal or fraudulent combination among them to divert the funds of the county to their own use, or that they have been guilty of any breach of trust in relation thereto, and claim that under a proper construction of the law, and in view of the arduous duties they have had to perform in such a large and prosperous county as Norfolk, and the manifest benefit of such services to the county, the amounts sought to be recovered were legally and properly allowed and paid to them. They also say that all of their meetings were open to the citizens of the county, and all of their allowances matters of public record, and that the complainants knew, or might, by due diligence have known, of the allowances to themselves at the time they were made. They also plead in their answers the bar of the statute of limitations. Numerous depositions were taken, and certified copies from the records of the boards of supervisors filed.

The circuit court held that the evidence did not justify the charge that the defendants had entered into a fraudulent conspiracy, but only showed that they had followed an illegal custom and precedent of their predecessors in office, in illegally withdrawing from the treasury of the county compensation in excess of that allowed by law; that the defendants had illegally withdrawn from the county treasury compensation in excess of their lawful right, the amount of which excess compensation the complainants were entitled to have returned to the treasury of Norfolk county, so far as the recovery of the same is not barred by the statute of limitations—being of opinion that the defenses of the statute of limitations were good against any defendant who had not drawn such illegal compensation within three years prior to the institution of this suit. The court, proceeding further, holds that a recovery is barred by the statute as to all of the defendants except W. S. Johnson, against

whom a decree is entered for \$945.20, with interest on the several parts thereof from the date that each payment was received; John A. Codd, against whom a decree is entered for the sum of \$1,283.75, with like interest; George E. Wood, against whom a decree is entered for the sum of \$1,070, with like interest; J. O. Lynch, against the administrator of whom decree is entered for the sum of \$412, with like interest; and D. M. Harding, against whom decree is entered for the sum of \$36.30, with like interest. From this decree, which appoints a receiver to collect these several sums, the five defendants held liable have taken this appeal.

The first assignment of error is to the action of the court in not sustaining the demurrers to the bill.

It is insisted that the bill is multifarious, and should for this reason have been dismissed.

It has been repeatedly said by this court that it was impossible for courts to lay down any general rule as to what constitutes multifariousness; that they are left to decide each case upon its own circumstances, governed only by a sound discretion. The criterion by which courts are guided in considering this question is "convenience in the administration of justice." Each case, if not brought directly within the principle of some preceding case, must be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situation of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; whether, within reasonable and fair grounds, the suit is calculated to be, in truth, one which will practically prevent a multiplicity of litigations, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any.

In the case of *School Board v. Farish*, 92 Va. 160, 23 S. E. 221, this court said: "Courts, in dealing with this question, look particularly to convenience in the administration of justice; and, if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that, when we look to see if a bill is multifarious, the first question to be determined is, does the bill propose to reach the end aimed at in a convenient way for all concerned? And if the mode adopted does accomplish the end of convenience, then the question arises, is any one hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?" These views are reiterated with approval in the subsequent cases of *Spooner v. Hilbish*, 92 Va. 338, 23 S. E. 751; *Stande v. Keck*, 92 Va. 544, 24 S. E. 227; *Jordan v. Liggan*, 95

Va. 616, 29 S. E. 330; and *Dillard v. Dillard*, 97 Va. 436, 34 S. E. 60.

Considering the bill in the case at bar in the light of these authorities, there is no difficulty in the conclusion that it is free from the vice of multifariousness. The plaintiffs were suing as the representatives of a class, the issues to be determined were common to all of the defendants, and they were in the same situation, so far as the points to be contested were concerned; the same defenses being made by them in their several answers. They have had the opportunity, without the slightest embarrassment or difficulty, to make their defense in a suit in which no possible harm has been or could have been done them; and, lastly, they have been saved a heavy burden of costs to each defendant, which would have been the result of a separate suit brought against each. In short, the ends of justice have been reached with the greatest possible convenience to all concerned, and without injury or even inconvenience to any party to the proceeding.

It is further contended that the demurrers should have been sustained and the bill dismissed because the appellees had an adequate remedy at law.

It has long been a well-established doctrine that courts of equity have jurisdiction to restrain the illegal diversion of public funds at the suit of a citizen and taxpayer, when brought on behalf of himself and others similarly situated, and to compel the restitution of public funds which have been illegally diverted and lodged in the hands of persons not entitled to the same, who have taken them with notice of the wrongful diversion, and the governing body of the subordinate or local government will not act or take the necessary steps to have such funds restored. *Bull v. Read*, 13 Grat. 78; *Redd v. Supervisors*, 31 Grat. 695; *Roper v. McWhorter, etc.*, 77 Va. 215; *Lynchburg, etc., Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Anderson v. Fisk*, 44 Cal. 309; *Bailey v. Stracham* (Minn.) 80 N. W. 694; *Land, Log & L. Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915; *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 108, 63 L. R. A. 133; *In re Police Dept.*, 85 Minn. 302, 88 N. W. 977; *Shepard v. Easterling* (Neb.) 86 N. W. 941.

But the appellants contend that, notwithstanding the well-settled doctrine recognized by the authorities just cited, the appellees have an adequate remedy at law under section 836 of the Code of 1887, which, as amended, is carried into Va. Code 1904, p. 898, § 836.

Courts of equity, having once acquired jurisdiction, never lose it because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words. *Filler v. Tyler*, 91 Va. 456, 22 S. E.

235; *Kelly v. Lehigh, etc., Co.*, 98 Va. 405, 36 S. E. 511, 81 Am. St. Rep. 736; *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227.

There is not a word or expression in the statute mentioned to indicate an intention to take away the jurisdiction that has been exercised for years by courts of equity in this class of cases. The section provides how accounts to be allowed by the board of supervisors shall be made out; that the county shall be represented by the commonwealth attorney, and all improper accounts resisted by him, and, when he thinks proper, or shall be required to do so by any six freeholders of the county, he shall appeal from any decision of the board to the circuit court of the county, causing a written notice of such appeal to be served on the clerk of the board, and on the party in whose favor the claim is allowed, within 30 days after the decision is made. It is thus seen that the right of appeal, under this section, from the allowance of a claim by the board of supervisors, is limited to freeholders, and to the concurrence of six of their number, and its exercise is limited to 30 days from the decision of the board. It cannot be presumed that the Legislature intended by this statute, without restrictive or prohibitory words, to take away the jurisdiction of courts of equity to entertain any taxpayer suing on behalf of himself and other similarly situated for the purpose of preventing the unlawful diversion of public funds, or for the purpose of compelling the restoration of such funds when already diverted.

But it is contended that this question has been settled to the contrary by this court in the cases of *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483, and *Manly Mfg. Co. v. Broadbuss*, 94 Va. 547, 27 S. E. 438. The sole object of the first-mentioned case was to test the constitutionality of the Virginia election law approved March 6, 1894. To accomplish this, certain citizens and taxpayers of Brunswick county filed a bill alleging that an election had been held under this law, and certain expenses had been incurred thereby; that bills covering these expenses had been presented to and allowed by the board of supervisors of the county, and warrants drawn on the county treasurer therefor. They further alleged that the law under which the election had been held was unconstitutional and void, and that the expenses accruing thereunder were therefore not legal charges against the county, and prayed that the treasurer be enjoined from paying the same. This court held that the law in question was valid. Judge Keith, after concluding his elaborate and able opinion on the constitutional question, which was a complete decision of the case, added these words: "If, however, we had come to a different conclusion as to the constitutional question involved in the record which accompanies the petition in this case, we

would still be obliged to refuse the appeal asked for, as the plaintiff had a plain and adequate remedy at law, under section 836 of the Code of Virginia, without resorting to a bill in chancery."

It may be that the remedy for the improper allowance of a claim for election expenses is by an appeal, under section 836, from the decision of the board of supervisors; but it is apparent that the learned judge was not dealing with the question now under consideration, nor was the language relied on necessary to the decision then made. It cannot, therefore, be regarded as militating against the view taken of the case before us.

The last-mentioned case of *Manly Mfg. Co. v. Broadbuss*, supra, holds that a taxpayer cannot come into a court of equity in a case where no fraud is charged, and where there is no pretense that the board of supervisors was transcending its power, merely to settle an account between a claimant and the board. The facts of the case are wholly different from those in the present case, and Judge Keith, in delivering the opinion of the court, says it is unnecessary to decide that the provision which requires the attorney to appeal at the instance of six taxpayers was intended to be in lieu of the right of taxpayers to resort to a court of equity, and we make no decision upon it. The opinion of the learned judge recognizes the right of taxpayers to come into a court of equity to protect their interests in a great variety of cases, and cites authorities in support of the proposition. These cases are not in conflict with the doctrine we have announced with reference to the jurisdiction of a court of equity in a case like the one before us, and we conclude what we have to say on this subject with the remark that, whatever remedy section 836 may afford as against a claim allowed by the board of supervisors before the same has been paid, it certainly furnishes no remedy for the recovery of moneys illegally diverted from, and already paid out of, the public treasury, which is the object of the present suit.

It is further assigned as ground in support of the demurrers that the appellees were guilty of laches.

The evidence shows that the appellees were not aware that the members of the board of supervisors had been drawing extra compensation until a few months before the institution of this suit, and it is well settled that laches cannot be imputed to those who are ignorant of their rights. It is no answer to say that the books of the board were open to the public, and could have been examined at any time. No duty rested upon appellees to examine the records kept by the board of supervisors. They, in common with other taxpayers, had the right to presume that their chosen representatives and agents would faithfully discharge their public duties within the law that regulated

and prescribed those duties, and that they would not illegally divert the public funds to their private use. The appellants represented the public, and they cannot escape liability upon the ground that their constituents did not discover sooner that they were unlawfully withdrawing the money of the taxpayers from the public treasury and appropriating the same to their individual use.

Further detail would extend this opinion, necessarily long, beyond reasonable limits. It must therefore suffice to say that, considering all of the objections made to the scope and purpose of the bill, we are of opinion that the demurrers were properly overruled.

The only compensation provided by law for a supervisor is fixed by section 848 of the Code of 1887, which, as amended, is now found in Va. Code 1904, p. 402, § 848. It is there provided that each supervisor shall receive "three dollars per diem for the time he shall actually attend, and five cents for each mile travelled in going to or returning from the place of meeting; but no per diem allowance shall be made for any time occupied in travelling where mileage is allowed therefor: provided that but one mileage shall be allowed for any one term of meeting of such board; and no supervisor shall be allowed to draw pay for more than ten days' attendance in any one year."

The record shows that during the period covered by this inquiry the members of the board of supervisors of Norfolk county appropriated and received for their private individual use thousands of dollars in excess of the per diem and mileage provided by the plain terms of the statute. The justification offered for this course is that the amount received was for attendance upon committees and for other alleged beneficial services rendered by them to the county in their official capacity, and was no more than these services were reasonably worth, and that their action in this behalf was in accordance with the custom of their predecessors in office. This may not have been regarded by appellants as malfeasance, and it was doubtless not done with an evil intent, but it was none the less fraud, in law, upon the rights of the taxpayers of the county. Services rendered by public officers do not partake of the nature of contracts, and have no affinity thereto. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. *Loving v. The Auditor*, 76 Va. 942; *Holladay v. The Auditor*, 77 Va. 425; *Frazier v. V. M. I.*, 81 Va. 59; *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187.

In *Dillon on Municipal Corporations*, vol. 1, § 283, it is said: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties

of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though the salary be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties, within the scope of the charter powers pertaining to the office, are increased, and not his salary. Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions to the duties properly belonging or which may properly be attached to an office to lay a foundation for extra compensation would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the Legislatures and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse."

To the same effect is *Mechem on Public Officers*. This author says that, unless compensation is attached by law to an office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth. In section 862 of this work it is said: "Neither can he recover extra compensation for incidental or collateral services which properly belong to, or form a part of, the main office. An express contract to pay such extra compensation or an express allowance of it is void."

These views are also found expressed in *Throop on Public Officers*, and by other text-writers.

In a very able opinion in the case of *Dela-plane v. Crenshaw*, 15 Grat. 457, Judge Lee, in discussing this subject, says: "It is certainly a marked feature in our system of offices that the compensation of public functionaries shall be fixed and certain. It is a great and pervading principle of our Code, and is essential to the purity and impartiality of the government. The idea of a perquisite of office, in the sense of a fee or allowance for services beyond the ordinary salary or settled wages, has no place in our legislation, but seems to be repudiated by the most necessary implication. Once to admit it is to open a wide door for imposition and corruption." Further the learned judge says: "He takes the office on the terms and conditions prescribed by the statute, and, when it allows a fixed and definite fee for the service which he is to perform, I think it is very far-fetched and illogical to say that

he acquires, also, by virtue of his appointment, a right, as by contract, to a portion of the property of the citizen in respect of which his office is to be exercised, because his predecessors in the office may have been in the habit of taking a like portion without objection or protest on the part of those with whose property they had been called upon to deal. The only contract which, as it seems to me, can possibly be inferred from an appointment to a public office created by statute, with special fees for the services rendered, and its acceptance, is an agreement on his part to perform the duties of the office, and on the part of the public that he shall be entitled to the fees prescribed by the act when the services shall have been rendered."

These principles are by universal consent thoroughly established throughout this country, and the public welfare demands that they should be enforced. Payment from the public funds for all official duties rests alone upon legislative sanction, which is the exclusive compensative power of the government. *U. S. v. Shields*, 153 U. S. 88, 14 Sup. Ct. 735, 38 L. Ed. 645; *Talbot v. East Machias*, 76 Me. 415; *White v. Inhabitants of Levant (Me.)* 7 Atl. 589; *Sikes v. Inhabitants of Hatfield (Mass.)* 13 Gray, 347; *Hillman v. Board of Commissioners (Minn.)* 86 N. W. 890; *Wight v. Board of Commissioners (Mont.)* 41 Pac. 271; *Jones v. Commissioners*, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710; *Albright v. County of Bedford*, 106 Pa. 582; *Hope v. Hamilton County (Tenn.)* 47 S. W. 487; *Stone v. Bevans*, 88 Minn. 127, 92 N. W. 520, 97 Am. St. Rep. 506; *Snipes v. Winston*, 126 N. C. 374, 35 S. E. 610, 78 Am. St. Rep. 666.

In obedience to the foregoing reasoning and the authorities cited, the conclusion is plain that the appellants have, without authority of law, appropriated to their own use the public funds of the county of Norfolk, and that they should be required to restore the same to the public treasury, to the extent that they severally appear to be liable therefor.

Under rule 9 of this court (45 S. E. vi), the appellees assign as cross-error the action of the circuit court in sustaining the pleas of the statute of limitations, set up in the answers of the appellants as a defense in part to the bill.

This is a civil proceeding for the recovery of certain sums of money claimed to be due by the appellants to the county of Norfolk, and the county is practically the complainant. The appellants are only constructive or implied trustees, and in such cases it seems to be well settled that the bar of the statute applies.

The right expressed in the maxim, "Nulum tempus occurrit regi," is an attribute of sovereignty, and cannot be invoked by counties or other subdivisions of the state. As to such subdivisions of the state the statute

runs in the same manner and to the same extent as against natural persons. *Wood on Lim. of Actions*, § 53; *Dillon on Mun. Corp.* vol. 2, § 668; *Armstrong v. Dalton*, 15 N. C. 568; *Clements v. Anderson*, 46 Miss. 581; *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *City of Palle v. Scholte*, 24 Iowa, 283; *May v. School District (Neb.)* 34 N. W. 377, 3 Am. St. Rep. 266; *Mount v. Lakeman*, 21 Ohio St. 643.

In a note to *Herrington v. Harkins*, 1 Rob. 591, in the Va. Rep. Ann. 273, it is said: "Statutes of limitations, run against public corporations, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily are clothed with the attributes and incidents of sovereignty; yet, when they have power to sue and be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons, unless exempt by positive law." Citing *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644, and *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

These authorities fully sustain the conclusion reached by the learned judge of the circuit court, that the appellants were entitled to the benefit of their plea of the statute of limitations.

Upon the whole case, we are of opinion that there is no error in the decrees appealed from, and they are affirmed.

(103 Va. 355)

CRALL et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 26, 1905.)

PEDDLERS—LICENSE—PEDDLING BY CORPORATION—LIABILITY OF OFFICERS—SALES.

1. A corporation may be punished criminally for peddling through the medium of an unlicensed agent.

2. While a peddler's license cannot issue to a corporation as such, a corporation desiring to peddle its goods may take out a license in the name of a designated agent, who may lawfully peddle the goods of the principal.

3. The vice president of a corporation, in general charge of its business in the state, may be convicted of peddling without a license because of the corporation's servants having peddled its goods without any license having been issued, as required by Acts 1902-03-04, p. 484, c. 271 [Va. Code 1904, p. 2223].

4. The manager of a store from which goods were peddled before he became manager, without any peddler's license having been issued as required by Acts 1902-03-04, p. 484, c. 271 [Va. Code 1904, p. 2223], cannot be held responsible for the unlawful peddling.

5. Where a peddler delivered goods on an understanding that title should vest in the one to whom they were delivered on payment of all the installments of "rent," the transaction amounted to a sale within Acts 1902-03-04, p. 484, c. 271 [Va. Code 1904, p. 2223], making sales by peddlers unlawful unless a license has been issued.

Error to Corporation Court of Manchester.

One Crall and one Ostrander were convicted of peddling without a license, and they bring error. Affirmed as to appellant Crall and reversed as to Ostrander.

R. Randolph Hicks, for plaintiffs in error.
The Attorney General, for the Commonwealth.

WHITTLE, J. Plaintiffs in error were tried and convicted upon information, in the corporation court of the city of Manchester, for peddling goods, wares, and merchandise in that city without having first obtained a license as required by statute.

It appears that the L. B. Price Mercantile Company, a Missouri corporation, domiciled at Kansas City, had established storerooms or depositories for its goods in some twenty-odd states of the Union. Among them, two were located in this state—one in the city of Norfolk, and the other in the city of Richmond. The plaintiff in error Crall was the vice president of the company, in general charge of its business in the Southern States, and with headquarters at Norfolk; while the plaintiff in error Ostrander, under the supervision of Crall, was in charge of the Richmond depository.

Two theories are presented as to the company's methods of conducting its business, to sustain each of which evidence has been adduced.

The contention of plaintiffs in error is that they were doing an installment business through agents, who were supplied with samples and order books, and whose duty it was to exhibit the samples and to canvass for purchasers, turning in all orders received by them to those in charge of the company's depositories; that thereupon the orders were filled by another agent, who delivered the goods, collected a certain part of the purchase price, and took from the purchaser a written agreement providing for future payments in monthly installments, and stipulating that the goods were not to be removed from the place of delivery or sold or disposed of until fully paid for.

The opposing theory of the commonwealth is that the course of business of the company was to deliver to its agents goods, wares, and merchandise, to be carried by them from place to place, and left with the purchaser on "general leases"—that is to say, to be paid for in installments—the L. B. Price Mercantile Company retaining title until the entire purchase price was paid.

The company dealt in rugs, curtains, bed spreads, blankets, covers, dress patterns, clocks, plated ware, wringers, albums, pictures, and other wares usually sold by peddlers.

The statute upon which the prosecution is founded is as follows:

"Any person who shall carry from place to place any goods, wares or merchandise, and

offer to sell or barter the same, or actually sells or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell or he may exchange the same for other articles; and whenever a license is granted to a peddler to sell such goods, wares or merchandise his license shall be valid for one year from date of its issue. Said license shall not be transferable, and any person so licensed shall endorse his name on the said license, and such license shall confer authority to sell at any house or place within the county or city in which the license was granted. Any peddler who shall peddle for sale or sell or barter without a license shall pay a fine of not less than one hundred dollars nor more than five hundred dollars for each offense, one-half of which shall go to the informer; and any persons selling or offering to sell as a peddler shall exhibit his license on a demand of any citizen of the county, city or town in which he sells or offers to sell or barter; and upon his failure or refusal to do so he shall be subject to the penalties of peddling without a license. This section shall be construed to include persons engaged in peddling lightning rods. All persons who do not keep a regular place of business (whether it be in a house, on a vacant lot or elsewhere) open at all times in regular business hours, and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this act. And all persons who keep a regular place of business open at all times in regular business hours, and at the same place, who shall personally, or through their agents, offer for sale or sell, and at the time of such offering or sale deliver goods, wares and merchandise, elsewhere than at such regular place of business, shall also be deemed peddlers as above; but this section shall not apply to those who sell or offer for sale, in person or by their employees, ice, fuel, meats, fowls, fish, game, vegetables, fruits or other family supplies of a perishable nature grown or produced by them; nor to merchants who keep a regular place of business open at all times in regular business hours and at the same place, without a city or town, who shall sell such articles to merchants only residing and doing business in a city or town." Acts 1902-03-04, p. 484, c. 271 [Va. Code 1904, p. 2223].

At the trial, the whole matter of law and fact having been submitted to the court, the judgment of conviction was rendered against Crall and Ostrander. The case is therefore before this court as upon a demurrer to evidence, and the evidence of the commonwealth seems quite sufficient to sustain the charge that the sales in question were made by the L. B. Price Mercantile Company through their agents, and elsewhere than at their regular place of business.

The law is well settled that a corporation

may be punished criminally for peddling through the medium of an unlicensed agent. While a peddler's license cannot issue to a corporation as such, it is competent for a corporation desiring to peddle its goods to take out license in the name of a designated agent, and such agent may lawfully peddle the goods of the principal. *Standard Oil Co. v. Commonwealth* (Ky.) 55 S. W. 8.

This seems to be conceded; but it is insisted that where a corporation is guilty of a violation of the peddlers' act the punishment must be visited only upon the corporation and the agent who actually makes the sales.

This statement of the law is too narrow, and, if followed, would in many instances afford immunity to the chief offenders, the officers of the corporation, without whose assistance it would be impossible for the corporation to engage in the prohibited business. A corporation can act alone through its officers and agents, and where the business itself involves a violation of the law the correct rule is that all who participate in it are liable. "The Law of Crimes," Clark & Marshall, pp. 395-397; 1 Bish. on Crim. Law (7th Ed.) § 892; *City of Wyandotte v. Corrigan* (Kan.) 10 Pac. 99, 102; *Standard Oil Co. v. Com.*, supra; *Hays v. Com.* (Ky.) 55 S. W. 425, 428.

"When the agent performs the illegal act under an absent principal's direction, either express or implied, this imposes responsibility on the principal.

"In misdemeanors the act may be charged to have been done by the principal himself without reference to an agent." 1 Whar. Crim. Law (9th Ed.) § 246.

"A principal is prima facie liable for the illegal acts of an agent done in a general course of illegal business authorized by the principal." *Id.* § 247.

In this case it is contended that the plain-

tiff in error W. F. Crall was vice president and general manager of the L. B. Price Mercantile Company, in charge of all its business in the Southern States. He was the vice principal, and the trial court was warranted in the conclusion that he was cognizant of the fact that the subordinate agents of the company were peddling its goods without license.

The case is unaffected by the circumstance that the transaction was denominated a lease, and that title to the goods was to remain in the seller until the rent was paid. The agreement was accompanied by a delivery of the goods, and, by its terms, title was to vest in the purchaser upon payment of the deferred installments of rent. Such a transaction is a sale in contemplation of the peddlers' act. *City of South Bend v. Martin* (Ind. Sup.) 41 N. E. 315, 29 L. R. A. 531; *Ry. Co. v. Erwin*, 84 Ind. 457; *Lanman v. McGregor*, 94 Ind. 301.

For these reasons the judgment of the corporation court of the city of Manchester must be affirmed as to the plaintiff in error W. F. Crall.

The record presents quite a different case as to the plaintiff in error C. C. Ostrander. He was only found guilty under the second charge in the information, namely, of the unlawful sale, on October 20, 1902, of a piece of dress goods to one Lucy J. Clarke.

It appears from the evidence that this sale was made before Ostrander became manager of the Richmond store, and he cannot be held responsible therefor.

The judgment as to him must therefore be reversed and annulled; and this court will enter such judgment as the corporation court ought to have entered, adjudging the said C. C. Ostrander not guilty of peddling goods without a license, as charged in the information, and ordering that he be acquitted and discharged, and go hence without day.

(37 W. Va. 84)

**STAFFORD v. BOARD OF CANVASSERS
OF MINGO COUNTY.*****(Supreme Court of Appeals of West Virginia,
Dec. 20, 1904. Dissenting Opinion, Feb.
1, 1905.)****ELECTIONS—CONTEST—EVIDENCE—BALLOTS
—SIGNATURES OF POLL CLERKS.**

1. Certificates of the results of an election made by the commissioners at the precincts are *prima facie* evidence of the result of the election. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots as controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed by the statute, and that while in such custody they have not been changed or tampered with.

2. If the ballots at an election precinct have the appearance of having been tampered with, the evidence of poll clerks and commissioners may be used before a canvassing board upon a recount to show that the ballots are all void because of the want of signatures of both poll clerks, each in his own handwriting, upon all the ballots at such precinct, but not to show that the ballots have not been altered, or to show the contents of the ballots; nor can that or other evidence be used to otherwise repel the *prima facie* case of tampering arising from such appearance of the ballots. If it appear from such evidence that all of such ballots are void for such defect, then the ballots of such precinct cannot be recounted, nor can the result be declared from the certificates made by the officers conducting the election. In such case the election at that precinct is void.

Poffenbarger and Sanders, JJ., dissenting in part.

(Syllabus by the Court.)

Petition of John L. Stafford for a writ of mandamus to the board of canvassers of Mingo county. Mandamus granted.

J. H. Holt, Geo. J. McComas, and S. D. Stokes, for petitioner. Sheppard & Goodykoontz, Mollohan, McClintic & Mathews, and S. U. G. Rhodes, for respondents.

BRANNON, J. John L. Stafford and John A. Sheppard were contesting candidates for the office of prosecuting attorney of Mingo county at the election in November, 1904. After the board of canvassers had canvassed the returns of the election, it happened that the candidates demanded a recount of the ballots, including all the precincts in the county. In the progress of the recount it was found that a ballot box in which ballots of Matewan Precinct had been inclosed, they being in two sacks in which they had been placed by the canvassers, who wrote their names over the sealing places, had been broken open, there being large openings in them, and the sacks of ballots which had been put in the box had the ends partly torn off, including the names written over the sealing places by the canvassers. As these sacks of ballots thus bore the unmistakable appearance of having been tampered with—a fact not denied in this case—Sheppard moved the board not to recount the ballots of Matewan Precinct, and to declare the result at that precinct by the certificates made out by the

officers who conducted the election at that precinct. Then Stafford offered to prove that the ballots in the sacks were the identical ballots cast by the voters at Matewan Precinct, and to show by evidence that, notwithstanding their appearance, they had not been tampered with, and that upon the canvass the said board had found the box broken in the same condition it presented when it was before the board on the recount, and that the board had, after the canvass, properly resealed the ballots before returning them to the box, and that the box was in the same condition in which it was when delivered by the clerk to the sheriff, the said box having been delivered to the sheriff, as stated in the opinion in another case between the same parties, this day decided. 49 S. E. 364. The board of canvassers refused to hear the proposed evidence, and refused to recount the ballots of Matewan Precinct, and declared the result of the election thereat upon the face of the certificates of the officers conducting the election. Stafford now comes to this court, asking a mandamus to compel the board of canvassers to reverse the action of said board of canvassers and compel them to hear the evidence proposed by Stafford.

It is undenied and undeniable that the sacks of ballots at Matewan Precinct bore unmistakable appearance of having been tampered with. The tops of the sacks were partly torn off, and the names of the members of the board of canvassers, which they had written across the sealing places of the sacks, were gone. Under principles stated in *Dent v. Board*, 45 W. Va. 750, 32 S. E. 250, the appearance and condition of the sacks of ballots raised the presumption of unlawful tampering, and excluded the ballots from recount, and called for the declaration of the result of the election at that precinct upon the certificate returned by the precinct officers. We are of the opinion that the oral evidence proposed by Stafford is not admissible. There stands the *prima facie* case of tampering presented by the very appearance of the broken sacks. The canvassers knew that they had been so tampered with, as they themselves had but recently sealed them in the sacks when they canvassed the returns of that precinct. When you propose to introduce oral evidence to repel the *prima facie* case of tampering, what is the character of such evidence; where will it lead? It opens a broad field, and presents a case judicial in character, proper for a court of contest. It opens the field of uncertainty; and that very uncertainty itself discredits the ballots for the purposes of a recount by such a body as a board of canvassers. It would make that board a court of contest, vested with full judicial power to hear and weigh all evidence that might be offered, so it bear any relevancy to the matter in controversy. We think this position is conformable to the functions assigned to the

*For corrected opinion, see 50 S. E. 1016.

board of canvassers and principles governing their proceedings in *Brazie v. Commissioners*, 25 W. Va. 213.

But the petition states that the ballots at Matewan Precinct are void, and not entitled to be counted either on the face of the certificate made by the officers of election or on the ballots, from the fact that the two poll clerks did not write their names on the ballot sheets, each with his own hand, as required by statute. If this be so, then, as held in *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 465, no valid ballots were cast at that precinct, the election there would be void, and its returns could not be counted for any candidate. The candidate asserting such to be the case ought to have the right to show this. He may do so by the evidence of the poll clerks or of the commissioners of the precinct. The ballots at that precinct ought to have been opened and inspected by the board of canvassers, in order that they and the candidate interested might know the facts, and adduce evidence to prove the nullity of the election at that precinct in the manner indicated. But he cannot adduce evidence—any evidence whatever—to identify the ballot sheets, or any of them, in order to repel the prima facie case of tampering arising from the appearance of the sack which contained those ballots. If it be found that none of the ballots at the precinct are valid, then the whole precinct is rejected. If, however, there be some void ballots because of the defect aforesaid, and some not subject to that defect, those not subject to that defect cannot be counted, but the result must be declared from the certificates returned by the officers of election. While the evidence of the poll clerks and commissioners may be heard to prove that the ballot sheets are the same used by the voters at the election, yet it cannot be used to prove the contents of the ballots, and thus verify the count made from them. Evidence cannot be introduced to prove the contents of the ballots to repel the prima facie evidence of tampering arising from the appearance of the sacks containing the ballots. I have said that, in case some of the ballots be found to be void for want of the names of the poll clerks properly signed, those not subject to that defect cannot be recounted; so neither can the result shown by the certificate made by the officers of election be altered or affected by those ballots not properly signed by the poll clerks, unless the canvassers can see by the test now to be stated that there has been no actual tampering. We think that there is one test only which will demonstrate whether the faces of the ballots have been tampered with. The case of *Dent v. Board of Com'rs*, 45 W. Va. 750, 32 S. E. 250, says that when there is appearance of tampering, in case of disagreement between the certificate and the result shown by the ballots, the certificate controls. This allows the canvassers to ascertain whether there is

such disagreement, and does not discard the ballots unless there is such disagreement. If there be some ballots void for want of proper signing by poll clerks, and others not so void, the canvassers must make comparison between the result shown by the certificate and that shown by the ballots. If there is no disagreement, thus indicating that there has been no actual tampering, then the votes shown by the void ballots as cast for each of the candidates between whom recount has been asked shall be subtracted from the total vote shown by the certificate as cast for them, respectively, and the result shown by the certificate, after such subtraction, shall be taken as the result. If, however, there be disagreement between the certificate result and the result shown by the ballots, the certificate must be taken as showing the result at the precinct.

The admission of the testimony of the poll clerks and precinct commissioners for the purpose of showing that the ballot sheets have not been properly signed by the poll clerks is no exception to the general rule against the admission of extrinsic testimony hereinbefore stated. It is founded upon the statute, Code 1899, c. 8, § 66. At any rate, it is justified by that statute. It tells the precinct commissioners to reject ballots having that defect. For the purpose of proving that defect, they may call upon the clerks who are present, as well as upon their own knowledge of the facts. Now, a recount is simply doing over again what the precinct commissioners have done. To do that over, they must have the same powers that are vested in the precinct commissioners. Therefore they may call as witnesses the clerks and commissioners.

The defendants filed two pleas in abatement to the effect that Stafford had obtained from the judge of the circuit court of Mingo county an alternative writ of mandamus commanding the board of canvassers to reject each and every ballot cast at Matewan Precinct upon which the names of the poll clerks had not been written each in his own hand. The theory under this plea in abatement is that the pendency of the mandamus before the circuit court of Mingo county would prevent this mandamus from issuing from this court. We do not think so. The mandamus in the circuit court is limited to the rejection of ballots having the defect aforesaid, whereas the mandamus sought for from this court has broader scope, in that it asks an inspection of the ballots at Matewan, and the admission of evidence to repel the charge of tampering with the ballots—a matter to which the proceeding of the circuit court does not in terms apply, and only inferentially—and asks relief under circumstances different from that existing in the circuit court, which proceeded upon the assumption that the element of viciousness in all the ballots, arising from their having been tampered with, does not exist.

The scope of the relief which may be granted upon the mandamus in the circuit court is not clearly as broad as that which may be afforded in this case. We should not refuse to entertain this writ unless we can see very clearly that relief as broad and effectual can be given upon the mandamus in the circuit court. "If the whole relief sought in the second suit is not attainable in the first, or if the relief which may be given or the remedies available in the second suit are more extensive than can be attained in the first, a plea to the second suit of the pendency of the first is not good." 1 Cyc. 29.

The objection that the canvassers have declared the result, issued the certificate, and adjourned, is no defense. *Daniel v. Simms*, 49 W. Va. 554, 89 S. E. 680.

A mandamus giving relief to the extent above indicated is awarded.

POFFENBARGER, J. (dissenting in part from decision). From so much of the decision as requires a comparison to be made between the result shown by the certificate of the precinct election officers and the result shown by the ballots, for the purpose of ascertaining whether or not the vote shown by the void ballots can be deducted from the certified returns, and directing, under certain conditions, that such deductions be made, I dissent. I believe this much of the conclusion reached by a majority of the court to be in conflict with certain principles stated in the opinion as sound and universally recognized law. The board of canvassers is not a judicial body. It is incompetent to deal with the question of fraud. Before it no evidence is admissible for the purpose of overcoming the presumption of viciousness arising from the fact that the ballots have been tampered with. If inferences arising from comparison of the ballots with the certificate or otherwise are allowed to be used as evidence for that purpose, I see no reason why any other relevant evidence might not as well be admitted for that purpose, and the board of canvassers held to be a judicial body, with all those powers which are denied to it by the case of *Brazie v. Commissioners*, 25 W. Va. 213. I place the power to hear testimony of the poll clerks, election commissioners, and others present at the election, for the purpose of identifying the papers used at the election and of obtaining complete returns, upon the statutory provisions which seem clearly to authorize it. I place the right to hear the evidence of such officers as to the manner in which the clerks' signatures were indorsed upon the backs of the ballots upon a statutory provision also, and I believe this to be the full extent of the powers of a board of canvassers to hear evidence respecting the election and its returns. The comparison would be obviously inconclusive of the question as to whether or not the ballots have been changed on their faces. Votes for can-

didates may have been stricken off of good ballots and put on void ones, and vice versa, without altering the whole number of good and bad votes. For instance, a candidate may have a total of 100 votes—50 on ballots properly signed by the poll clerks, and 50 on ballots not so signed. On their faces these ballots may be so manipulated and altered as to give that candidate 60 votes on void ballots and 40 on good ones, whereby he would sustain a loss of 10 votes, although the total of good and bad votes would remain unaltered. Complaint is made because the record indicates that there are only a few ballots in the precinct which have been properly signed by the poll clerks. But the court cannot lay down a rule for a special case. It must be the same whether there be few or many bad ballots. No principle is perceived under which the rule governing the admission of evidence in the case of a close contest, in which only a few votes would change the result, can be varied or departed from so as to meet a case in which it takes a large number to change the result.

SANDERS, J., concurs.

) (108 Va. 494)

SWIFT & CO. v. WOOD et al.

(Supreme Court of Appeals of Virginia. Jan. 26, 1905.)

STATUTES—INTERPRETATION—RE-ENACTMENT —
NOTICE FOR JUDGMENT—SERVICE—COMPUTATION OF TIME—SUNDAYS.

1. When a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given it is presumed to be sanctioned by the Legislature, and thenceforth becomes obligatory upon the courts.

2. Section 5, cl. 3, of the Code of 1887 [Va. Code 1904, p. 6], provides that, where a statute requires a notice to be given or an act done a certain time before any proceeding, there must be that time exclusive of the day for the proceeding, but the day on which the notice is given or act done may be counted. Section 3211 [page 1686] provides that a notice of a motion for judgment must be returned to the clerk's office within five days after service. *Held*, that a notice for judgment served on the 21st and returned on the 26th day of the month is not returned within five days after service, and a judgment by default upon such notice is not valid.

3. In computing time, Sunday is to be included, unless the last day falls on Sunday.

Error to Corporation Court of City of Newport News.

Action by Swift & Co. against Wood and others. From an order setting aside a judgment for plaintiffs, plaintiffs bring error. Affirmed.

Wm. C. Stuart, for plaintiffs in error. R. M. Hudson, for defendants in error.

HARRISON, J. On the 16th day of December, 1903, notice was served upon the plaintiffs in error that the defendants in error would on the 21st day of December, 1903, move the corporation court of the city of Newport News to set aside and declare

null and void a pretended or alleged judgment obtained by the plaintiffs in error on March 11, 1901, for \$263.64 and interest.

The judgment sought to be set aside under this notice had been obtained against the defendants in error, on motion, under the proceeding provided for by section 8211 of the Code of 1887 [Va. Code 1904, p. 1686]; and, among other grounds assigned for setting it aside, they asserted that the notice upon which the judgment was obtained had not been returned to the clerk's office, as provided by the statute, within five days after its alleged service. The notice was served February 21, 1901, and returned to the clerk's office on the 26th of that month. The plaintiffs in error insist that this return of the notice was within five days, as contemplated by the statute.

This question has been settled in this state for many years by the decision of this court in the case of *Turnbull v. Thompson*, 27 Grat. 806. In that case the objection was made that the original process commencing the suit was served on the defendant February 3, 1862, and that the judgment became final on the 8d of March, 1862, in violation of the statute which declares that no judgment by default on scire facias or summons shall be valid if it becomes final within one month after the service of such process. Judge Staples, delivering the opinion of the court, says: "The month indicated by the statute is, of course, a calendar month; and, if the 8d day of February—the day of the service of the process—is to be included in computing the time, then the judgment did not become final within a month after the service of process." The learned judge then proceeds as follows: "Without undertaking now to discuss the doctrines of the common law in respect to the days to be included or excluded in the computation of time under statutes, it is sufficient to say that every difficulty in regard to that question has been removed by the provisions of the eighth clause of section 17, c. 16, p. 115, Code 1860. That section declares that, where a statute requires a notice to be given or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done may be counted as part of the time." By virtue of this statute the judgment was held not to have become final within one month, and was sustained as valid.

The construction put upon this statute has received legislative approval and sanction; the same section, unchanged, having been re-enacted as section 5, cl. 8, with the Code of 1887, and is now found, without amendment, in Va. Code 1904, § 5, cl. 8. When a statute has been construed by the courts, and is then re-enacted by the Legislature, the construction given to it is presumed to be sanctioned by the Legislature, and thenceforth becomes obligatory upon the courts.

Mangus v. McClelland, 93 Va. 786, 22 S. E. 364.

Under the decision in *Turnbull v. Thompson*, supra, and the construction there put upon the statute, a notice served on the 21st day of February, 1901, and returned to the clerk's office on the 26th day of that month, is not a compliance with the statute which requires such notice to be returned to the clerk's office within five days after service of the same.

Plaintiffs in error further contend that the 24th day of February, 1901, was Sunday, which was not a juridical day, and therefore cannot be counted in computing the time. This position is not tenable.

Judge Lewis, speaking for this court in the case of *Rowles v. Brauer et al.*, 89 Va. 466, 16 S. E. 356, holds that when a statute prescribes a certain number of days within which an act is to be done, and says nothing about Sunday, it is to be included, unless the last day falls on Sunday, in which case the act may generally be done on the succeeding day, but if the act may be lawfully done on Sunday, and the last day falls on Sunday, then Sunday is not to be excluded.

The provision of section 3211 of the Code of 1887 [Va. Code 1904, p. 1686] with respect to returning the notice to the clerk's office within five days after its service is not, as contended, merely directory. This statute furnishes a summary remedy for obtaining a judgment for money, and where the judgment is by default, as in the case at bar, its terms must be strictly complied with; otherwise the judgment will not be valid.

For these reasons, the judgment complained of must be affirmed.

(108 Va. 504)

FARLEY v. THALHIMER.

(Supreme Court of Appeals of Virginia. Jan. 28, 1905.)

SLANDER — PRIVILEGED COMMUNICATIONS — ABUSE OF PRIVILEGE — MALICE — BURDEN OF PROOF — QUESTIONS FOR JURY.

1. While it is within the province of the trial court to determine whether or not the occasion when slanderous words were spoken was privileged, yet whether words spoken on a privileged occasion were spoken with or without malice is a question for the jury, which cannot be taken from them where there is evidence tending to show malice in the utterance of the words.

2. Where words complained of as slanderous were privileged communications, the burden is upon plaintiff to prove actual malice, either by construction of the words, or by the attending facts or circumstances, or situation of the parties.

3. Strong and violent language, disproportionate to an occasion otherwise privileged, may raise an inference of malice in the use of the language, and cause the loss of the privilege otherwise attaching to the communication.

4. The questions of good faith, belief in the truth of an alleged slanderous statement, and of the existence of actual malice, are for the jury.

5. Where the evidence on the material issues of the case is in conflict, it is for the jury to

§ 2. See *Libel and Slander*, vol. 22, Cent. Dig. § 150.

determine the credibility of witnesses and the weight of their testimony.

6. In an action for slander alleged to have been committed in the discharge of an employé for theft, evidence *held* to make a question for the jury on the issue of the existence of malice in the making of statements which were otherwise privileged.

Error to Circuit Court of City of Richmond.

Action by Ellen Farley against Moses Thalhimer. There was a judgment for defendant, and plaintiff brings error. Reversed.

Sands & Sands, for plaintiff in error. Meredith & Cocke, for defendant in error.

CARDWELL, J. Plaintiff in error, Ellen J. Farley, a young lady of 23 years of age, was on the 5th day of November, 1900, and for some months prior, in the employ, as a clerk or saleswoman, of Isaac and Moses Thalhimer, in their dry goods store, conducted on Broad street, in the city of Richmond, under the firm name of Thalhimer Bros.; and on the morning of the 6th of November, 1900, she was discharged from her employment by Moses Thalhimer on the alleged ground that she had on the day before been guilty of the theft of a handkerchief and two yards of ribbon from a different department of the store to that in which she was employed.

This action is brought by the plaintiff in error against the defendant in error, Moses Thalhimer, to recover damages for slanderous and insulting words alleged to have been used by defendant in error on the occasion of the discharge of the plaintiff in error, and on a subsequent date, January 17, 1901, when she visited the store of Thalhimer Bros. to collect a balance due her on her salary at the time of her discharge.

The declaration contains four counts. The first count alleges that on the morning of November 5th plaintiff in error purchased at the store of Thalhimer Bros. a handkerchief and two yards of ribbon, and openly deposited the same in an open cabinet drawer until the evening of that day, when she carried them with her when she left the store after that day's employment; that, on her return the next morning, defendant in error called her "around to one side" of the store, and falsely and maliciously said to a Miss Chisholm, another employé, in the presence of a Miss Allen and others, as follows: "Miss Chisholm, is this your friend? If so, I suppose you will be glad to cut the acquaintance of a common thief, won't you? That is what she is. Do you know what I would like to do with you, anyway? I would like to take you downstairs, and have you stripped, and take a cowhide and strike you from your head to your heels." "There goes a thief, a thief." The second count alleges the same words as insulting and tending to a breach of the peace. The third count sets forth that the plaintiff in error on January 17, 1901, went to the store of Thalhimer Bros. to secure the balance of

her wages, and that then and there, in the presence of Mrs. A. L. Pugh, Mrs. James Farley, and others, defendant in error used the following words: "You won't get it. It took you a long time to find out that I owed you anything, and it will take you a still longer one to collect it. You know how to make it. Go ahead and make it. I see you are looking for trouble, and you can get it good, and plenty of it. I am fixed for you. I will let you down easy. I called you a thief before, and I call you one now, and a good one at that. That girl is a thief. I caught her stealing in my store, and I can prove it. If I had gone over to her mother's house, I would have found out." The fourth count alleges the same words as insulting and tending to a breach of the peace.

Defendant in error, responding to the demand of plaintiff in error for a statement of his defenses, answered: "First, not guilty; 2nd, that, while he did not use the language set forth in the declaration, he did accuse her of having stolen a handkerchief and a piece of ribbon from the store of Thalhimer Bros.; third, that the charge was true; fourth, privileged communications; and it is agreed, as to the second defense, the defendant bears the same responsibility as if a plea of justification had been entered formerly."

At the trial, after the evidence on both sides was offered, certain instructions were asked for by both plaintiff in error and defendant in error, in both sets of which the question whether the words alleged as slanderous were spoken maliciously or not was left for the determination of the jury; but the court rejected all of the instructions asked for, and gave in lieu thereof its own instruction, as follows:

"The jury are instructed that it appearing from all the evidence that the words charged in the first and second counts of the declaration to have been spoken by the defendant were, if spoken at all, spoken in the defendant's place of business to the plaintiff or to one or more of his employés—they must be regarded as privileged communications.

"And it further appearing from all the evidence that the words charged in the third and fourth counts of the declaration to have been spoken by defendant, if spoken at all, were spoken to the plaintiff and her friends whom she had brought with her as participants with her in an interview sought by them with the defendant in his place of business, they must equally be regarded as privileged communications.

"And there being no evidence to justify an imputation to the defendant of actual malice, the jury must find for the defendant."

The jury returned their verdict in these words: "We, the jury, upon the issue joined, find for the defendant, upon the instructions of the court."

It seems too well settled in this state to

admit of extended discussion that, while it is within the province of the trial court to determine whether or not the occasion when alleged slanderous or insulting words were spoken or written was privileged, whether they were spoken or written with or without malice is a question for the jury, under proper instructions. *Dillard v. Collins*, 25 Grat. 353; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; s. c., 84 Va. 884, 6 S. E. 474; *Strode v. Clement*, 90 Va. 557, 19 S. E. 177; *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358; *Brown v. N. & W. R. Co.*, 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472; *Tyree v. Harrison*, 100 Va. 542, 42 S. E. 295.

It is true, as was held in *Reusch v. Roanoke, etc., Co.*, supra, the court may properly refuse an instruction submitting the question of malice to the jury where "there is no legal evidence in the record to suggest malice," but, where there is evidence tending to show malice in the utterance of the words spoken, or in the published communication, that question cannot be properly taken from the jury.

"Where the defendant acts in performance of a duty, legal or social, or in defense of his own interests, the occasion is privileged; * * * but strong or violent language, disproportionate to the occasion, may raise an inference of malice, and thus lose the privilege that would otherwise attach to it." *Tyree v. Harrison*, supra.

It is also true, as contended by the learned counsel for defendant in error, that, where the words complained of were privileged communications, the burden is upon the plaintiff to prove actual malice before he can be entitled to a recovery. The plaintiff in such a case must show malice, either by construction of the spoken or written matter, or by facts or circumstances connected with that matter, or in the situation of the parties, adequate to authorize the conclusion. *Dillard v. Collins*, supra. But though the occasion is privileged, and strong and violent language is used, disproportionate to the occasion, it may raise an inference of malice, and thus lose the privilege that would otherwise attach to it; and whether such an inference is to be drawn from the language used, or the circumstances in which it is used, etc., is a question for the jury. The question of good faith, belief in the truth of the statement, and the existence of actual malice, remains, also, for the jury. *Tyree v. Harrison*, supra, and authorities cited.

As was said in the opinion in *Dillard v. Collins*, supra: "The law holds the ægis of its protection not only over the person and property of the citizen, but vigilantly guards as equally sacred his personal reputation and character. And where one assails the character of his fellow man, and would secure himself from responsibility upon the ground that what he has spoken or written was only done confidentially, and with no intent to injure, and without malice, he must be careful that what he said or wrote comes within

the well-defined qualifications which the law attaches to confidential or privileged communications."

We do not mean to question at all the soundness of the ruling in *Reusch v. Roanoke, etc., Co.*, supra, and other authorities cited and relied on by defendant in error, that the trial court may properly refuse an instruction submitting the question of malice to the jury "when there is no legal evidence in the record to suggest malice," etc., or may not instruct the jury in such a case that there is not such evidence in the record, but to say that when there is any legal evidence tending to prove that the language spoken or written was disproportional in strength and violence to the occasion when spoken or written, though the occasion was privileged, may raise an inference of malice, thereby destroying the privilege that would otherwise attach to it, and that, where there is such evidence in the record, the question of malice in the use of the words spoken or written cannot be properly taken from the jury.

As the case at bar has to be remanded for a new trial because of the error in not leaving to the jury the question whether the words alleged as slanderous were spoken maliciously or not, and in giving the court's own instruction, above set out, taking that question from the jury, we refrain from reviewing the evidence further than is necessary, in our opinion, to justify that conclusion.

It is an admitted fact that the plaintiff in error on November 5, 1900, obtained a handkerchief and a piece of ribbon from the stock of Thalhimer Bros., and carried them away with her that evening when she quit work. Therefore an important question in the case was whether she paid for them, or took them without making payment. She claimed that she did pay for them, while defendant in error insisted that she did not. In her testimony she swears to the use of the words, and as to the circumstances in which they were used, on November 6, 1900, as alleged in the first and second counts of the declaration; adding that defendant in error also said: "That accounts for the handkerchief you lost in the store, that you said your mother had bought up the street, that had our private mark on it." That when she was dismissed, defendant in error snatched a handkerchief from the front of her dress, and followed her through the store, waving the handkerchief, saying, "There goes a thief, a thief," and that, when she was about to go out of the store, he jumped in front of her and said, "Don't you ever dare, as long as you live, to darken those doors again."

As to the charge in the third and fourth counts of the declaration, plaintiff in error testified as follows:

"Well, on the 17th of January father was sick, and I was out of employment, and could not get work, and I needed this money; and, being on the street with my aunt, I

asked her to go in with me as I asked Mr. Moses [Thalhimer] for the money, and she consented to go with me; and when we went in I asked for Moses Thalhimer—asked one of the girls—and when he came to me I told him that when he discharged me he owed me for a week and three days, and I had come for a settlement. He replied: 'You won't get it. It took you a long time for you to find out that I owed you anything, and it will take you still longer to collect it.' He says: 'You know how to collect it. Go ahead and collect it.' He says: 'I find you are looking for trouble, and you will get it.' 'I let you down easy.' He said, 'You came into this store once before—for what?' He said, 'You had a gall to come in here before all these ladies, who know what you are.' He asked my aunt if she was mother. She replied, 'No.' He said: 'I caught that girl stealing in my store, and I can prove it. She is a thief, and a good one at that.' There were present Mrs. Pugh and my aunt, and there were two or three customers right near us. I don't remember who they were. They were near enough to turn around and listen to the conversation that passed. Then there was some other conversation, after which I left without getting the money."

The plaintiff in error was corroborated in her statement as to the occurrences of January 17, 1901, very fully, by her aunts, Mrs. Pugh and Mrs. Farley, who accompanied her to 'Thalhimer Bros.' store, and to some extent, at least, by other witnesses as to the occurrences of November 6, 1900, while defendant in error, testifying in his own behalf, denied the use of the language charged in the declaration, and the statements made by plaintiff in error, but insisted that the charge he made that the handkerchief and ribbon had been stolen was true, and he is corroborated by other witnesses examined in his behalf. Therefore there was a conflict in the evidence throughout on every material question in the case, and it was for the jury to determine the credibility of the witnesses, and the weight to be given to their statements. In other words, there was evidence tending to sustain the theory of plaintiff in error, and hence the question of whether there was malice on the part of defendant in error should have been submitted to the jury.

We are therefore of opinion that the circuit court erred in taking from the jury the question whether the words alleged as slanderous were spoken maliciously or not, and the judgment complained of must be reversed, and the cause remanded for a new trial to be had in accordance with this opinion.

(103 Va. 512)

WHEELWRIGHT et al. v. COMMON-WEALTH.

(Supreme Court of Appeals of Virginia. Jan. 26, 1905.)

RAILROAD—PARALLEL LINES—CONSTITUTION—STATUTE—CONSTRUCTION.

1. Under Const. § 166 [Va. Code 1904, p. cclxi], providing that the Legislature shall have

power to prevent, by statute repealable at pleasure, any railroad from being built parallel to the present line of the Richmond, Fredericksburg & Potomac Railroad Company, and the act concerning corporations (Acts 1902-04, p. 453, subc. 2, § 12 [Va. Code 1904, p. 542]), enacted pursuant thereto, providing that no railroad company chartered under the act shall have power to build any railroad parallel to its line, the paralleling of a short portion of that line for local purposes is not forbidden; the intent of the law being to prevent competition between Richmond and Washington, the termini of the roads.

Application by Thomas S. Wheelwright and others to the State Corporation Commission for a charter for the Richmond & Chesapeake Bay Railway Company. From an order refusing the charter, the applicants appeal. Reversed.

Munford, Williams, Hunton & Anderson, for appellants. Wm. A. Anderson, Atty. Gen., for the Commonwealth.

CARDWELL, J. Thomas S. Wheelwright and others presented to the State Corporation Commission articles of association, in order that they might be incorporated under the corporate name of the Richmond & Chesapeake Bay Railway Company; the articles of association presented being in accordance with the requirements of section 2 of subchapter 2 of an act concerning corporations, which became a law on the 21st day of May, 1903. Acts 1902-04, pp. 437-484, c. 270 [Va. Code 1904, pp. 533-543, § 1105b].

The purposes of the incorporation are the construction and operation of two railroads—one from the city of Richmond to a point on the Rappahannock river near Tappahannock, and, crossing the Rappahannock river, to have its terminus on the Chesapeake Bay at some point within the county of Northumberland or the county of Lancaster; the other line, from the city of Richmond to a point on the Chesapeake Bay within the counties of Gloucester, Mathews, or Middlesex, as may be selected by the company. As to both lines, the articles of association, in describing the route, provide that it shall be from within the city of Richmond, "thence through the counties of Henrico and Hanover, via the town of Ashland, or such other route as may be selected by said company." Following the words just quoted, there is a further description of the routes along which the proposed lines are to be run, but it is not necessary to the determination of the question presented to this court that they be set out here.

The town of Ashland is in Hanover county, about 16 miles north of the city of Richmond, and the Richmond, Fredericksburg & Potomac Railroad Company has its line of railroad running from the city of Richmond to the town of Ashland, and beyond, through the county of Hanover, and further north. Under the proposed charter the applicants can construct and operate a railroad parallel to the Richmond, Fredericksburg & Potomac Railroad line as far as the town of Ashland, and up to the point where the latter road

crosses the county line of Hanover county, the distance of which parallel line would be 20 miles, or a little more.

The application for a charter to construct this so-called parallel line to Ashland, thence to Tappahannock and other points northeast of Richmond, was refused by the State Corporation Commission, not because the charter applied for would in fact conflict with section 12 of subchapter 2 (page 453 [Va. Code 1904, p. 542]) of the act concerning corporations, *supra*, but might possibly conflict therewith, the commission "perceiving no other objection to issuing the charter."

From the order of the Corporation Commission refusing to issue the charter, an appeal is taken to this court.

Section 166 of the present Constitution [Va. Code 1904, p. cclxi] gives the right to every railroad company in this state, subject to such reasonable regulations as may be prescribed by law, to parallel, intersect, connect with, or cross with its roadway any other railroad or railroads, but provides further as follows: "Nothing in this section shall deprive the General Assembly of the right to prevent by statute, repealable at pleasure, any railroad from being built parallel to the present line of the Richmond, Fredericksburg and Potomac Railroad Company." Pursuant to section 166 of the Constitution, the Legislature enacted section 12 of subchapter 2 of the act concerning corporations, *supra*, which provides: "No railroad company chartered under this act, or whose charter may be amended under this act, shall have power to build any railroad parallel to the line of the Richmond, Fredericksburg and Potomac Railroad."

The contention of appellants is that the intention of the statute was to forbid the issuing of a charter to build a railroad reasonably and substantially parallel with the entire line of the Richmond, Fredericksburg & Potomac Railroad Company, and that the statute cannot and should not be so construed as to prevent railroads running from Richmond City to other parts of Virginia from running a short distance in the same direction of the Richmond, Fredericksburg & Potomac Railroad, and that such lines could not and would not in any way interfere with the Richmond, Fredericksburg & Potomac Railroad.

It is manifest from the opinion of the Corporation Commission, made a part of the record before us, that the commission considered the contention of appellants just set out as having great force, but denied the charter only for the reason, as the opinion states, that they deemed it best that the statute in question should be construed by this court, and its purpose and meaning finally fixed and settled. The opinion says:

"The great bulk of the business of the Richmond, Fredericksburg & Potomac Railroad consists of through traffic, and it is doubtless true that the running either of an electric or steam railroad from Richmond to

Ashland would not interfere with the business of the Richmond, Fredericksburg & Potomac Railroad, but might, on the contrary, relieve it of local passenger business between Richmond and Ashland, which it would prefer to have handled by a local road. While it rather seems to us that the intention of the statute was not to forbid the chartering of a road such as that now asked for, yet we are of opinion that we should deny the charter asked for in these articles of incorporation. If the charter is granted and the corporation created, there seems to be no way in which the commission can recall the charter, and it is extremely doubtful whether the validity of the charter could be called in question by any one—even by the commonwealth itself—after the commission has issued it. In this particular case the commission takes this action because it has been intimidated by the applicants that if the charter is not granted an appeal may be taken to the Supreme Court of Appeals. The commission deems it its duty to have the Court of Appeals pass upon this question as early as practicable, in order that it may be finally fixed and settled. Other applications may come before the commission, and, although it would be inclined to grant them, it would greatly prefer, before finally putting its own construction upon this statute, to have its proper interpretation and meaning passed upon by our Court of Appeals."

In the original charter granted by the General Assembly February 25, 1834 (Acts 1833-34, p. 127, c. 111), to the Richmond, Fredericksburg & Potomac Railroad, to construct its road from Richmond City to the town of Fredericksburg, it was provided, among other things, that the General Assembly, in the event of the completion of the said railroad within the time limited by the act, would not, for the period of 30 years from the completion of said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of said distance, the probable effect of which would be to diminish the number of passengers between the one city and the other upon the railroad authorized by the act, or to compel the company, in order to retain such passengers, to reduce the passage money: "provided, however, that nothing herein contained shall be construed as to prevent the Legislature, at any time hereafter from authorizing the construction of a railroad between the city of Richmond and the town of Tappahannock, or Urbana, or to any intermediate points between said city of Richmond and the said towns," etc.

On the 27th of March, 1848 (Acts 1847-48, p. 188, c. 164), the Legislature passed an act authorizing the Louisa Railroad Company, formerly chartered, and which had constructed and was operating its road between Louisa Court House and the junction with the Richmond, Fredericksburg & Potomac Railroad, in Hanover county, about 25 miles north of

the city of Richmond, to extend its road westward, and also from the junction to the dock in the city of Richmond; and in the case of Richmond, etc., Railroad v. Louisa Railroad Co. the validity of the last-named act was called in question, as impairing the contractual rights of the first-named road, entered into between its original incorporators and the state; but the superior court of chancery for the Richmond circuit and this court took the opposite view, which view, on an appeal taken from the refusal of an appeal by this court from the decree of the superior court of chancery denying an injunction to restrain the defendant from extending its road across the complainants' road at the junction to the city of Richmond, was sustained by the Supreme Court of the United States. 13 How. 71, 14 L. Ed. 55.

The last-named court, in its opinion, after stating the well-settled rules of construction of all such acts, and referring to the provision contained in the original charter of the Richmond, Fredericksburg & Potomac Railroad Company, above set out, says: "Construing this act with these principles in view, where do we find that the Legislature has contracted to part with the power to construct the railroad, even between Richmond and Fredericksburg, for carrying coal or other freight? Much less can they be said to have contracted that no railroad connected with the western part of the state shall be suffered to cross the complainant's road or run parallel to it in any portion of its route. Such a contract cannot be elicited from the letter or spirit of this section of the act."

It will be observed that the act here under consideration makes no reference to building a railroad, the line of which might parallel a part of the Richmond, Fredericksburg & Potomac Railroad, but makes reference only to the building of railroads parallel to the line of the Richmond, Fredericksburg & Potomac Railroad. Since, by an inspection of a map of the state of Virginia, it appears that a railroad cannot be built from the city of Richmond to the town of Tappahannock or Urbana, or for the benefit and development of that portion of Virginia in which those towns are situated, without paralleling to some degree the railroad owned and operated by the Richmond, Fredericksburg & Potomac Railroad Company, to construe the statute as inhibiting this would be equivalent to saying that the constitutional convention and the Legislature intended that there should be no railroad constructed from the city of Richmond to the northeastern portion of the state—a section as much in need of railroad facilities as any portion of the state is now or has been, and as much deserving and as much entitled to such facilities as any other section of the state. Such a construction would result disastrously to the state's interests, in that it would prevent the construction of local railroad lines, even for a mile or two miles north of the city of Rich-

mond, in any direction, for they would, in a sense, parallel the Richmond, Fredericksburg & Potomac Railroad, or at least a portion thereof, if they ran in a northern direction from Richmond. If such was the purpose of the Legislature, it is inconceivable that it would not have been so declared in express terms.

It is obvious, also, that it is greatly to the interest of the city of Richmond and of the whole section through which appellants' contemplated road would pass that it be built, while, so far from interfering with the Richmond, Fredericksburg & Potomac Railroad, such a road, by bringing the citizens and products of that section of northeast Virginia which now has no railroad to Richmond or to Ashland, and delivering the same to the Richmond, Fredericksburg & Potomac Railroad for transportation to other points, would be of great benefit to that road, and would do it no possible injury. In fact, it should be stated in this opinion that the Richmond, Fredericksburg & Potomac Railroad Company entertains this view, and in no way is it opposing the granting of the charter desired by appellants.

For the want of modern transportation facilities, the counties in the northeastern section of the state are so cut off from Richmond as to be almost entirely tributary to the city of Baltimore—certainly to make the latter city more easily and conveniently reached than the former. The whole state has an interest in the industrial development of that section, and the facilities to be afforded by the railroad which appellants propose to construct should not be denied to a people having none such, if any other construction of the statute in question can be reasonably adopted.

Statutes which interfere with legitimate enterprise, or limit the right to construct or operate legitimate industries, must be construed strictly. And in like manner, statutes which constitute an exception from a well-defined statutory policy are given a strict construction. Sutherland on Stat. Constr. §§ 370, 407.

By constitutional provisions and numerous statutes since 1865, whatever may have been the policy of the state prior to the Civil War, by which the state lent its resources and credit to works of internal improvements, the policy declared is that the greatest opportunity shall be given to private corporations to build railroads and other works of internal improvements for the development of the interests of the state. And while the Legislature has been careful to provide for the protection of the state's interest, as a stockholder, in the Richmond, Fredericksburg & Potomac Railroad, neither in the policy in vogue since 1865, nor in the present Constitution, nor in the statute under consideration, are there any words or phrases used that would justify a denial of the charter applied for by appellants. The learned Attorney General frankly stat-

ed when this case was submitted for the consideration of this court that it was not, in his opinion, to the interest of the commonwealth to oppose the charter, and that it was the purpose of neither the constitutional provision nor the act in question to prevent the construction of such lines of railroad as proposed by appellants; that neither the letter nor the spirit of the act would be violated by the granting to them of the charter they ask. This was practically the view taken by the State Corporation Commission, in which we fully concur.

The purpose of section 168 of the Constitution and of the act was merely to protect the interest of the commonwealth in the Richmond, Fredericksburg & Potomac Railroad by guarding against competition in the transportation of passengers between the city of Richmond and the city of Washington, and not to prohibit the granting of a charter to build a railroad line such as is contemplated by appellants, although the railroad they purpose building, strictly speaking, will parallel the Richmond, Fredericksburg & Potomac Railroad for a short portion of its line, but not its entire line, whereby the road, when built, would become a competitor of the Richmond, Fredericksburg & Potomac Railroad for its through traffic between Richmond and Washington.

Whether or not the legislative act under consideration inhibits the granting of a charter to build a railroad paralleling the Richmond, Fredericksburg & Potomac Railroad for a greater distance than is proposed by appellants, and whereby such paralleling road, when built, would become a competitor of the Richmond, Fredericksburg & Potomac Railroad for its through traffic between Richmond and Washington, we are not called upon to express an opinion in this cause, nor has it been our purpose, in anything that has been said, to do so.

It follows that the order of the State Corporation Commission appealed from must be reversed, and the cause remanded to the commission, that it may issue the charter applied for by appellants.

(103 Va. 465)

RICHMOND ICE CO. v. CRYSTAL ICE CO.
(Supreme Court of Appeals of Virginia. Jan. 28, 1905.)

LANDLORD AND TENANT—DESTRUCTION OF BUILDINGS—LIABILITY FOR RENT—STATUTE—JURY QUESTION—INSTRUCTION—ARGUMENT OF COUNSEL—REMARK OF COURT—ERROR.

1. In an action for rent error cannot be based on the cross-examination of one of defendant's witnesses over the objection that the lease was in writing, and could not be contradicted or varied by parol, where the cross-examination was not as to the contents of the lease, but as to the purpose for which defendant had leased the premises.

2. Where, in an action for rent, there was evidence that the premises were rented merely to get an objectionable competitor of defendant out of business, counsel for plaintiff had a right to comment thereon in argument, though the testimony of a witness to show such fact had been excluded.

3. Where there was evidence as to what purpose the premises were rented for, but the testimony of a witness to show such fact had been excluded by the court, there was no error prejudicial to defendant in the court stating that the evidence was improperly excluded, when objection was made by defendant to a comment on such fact by counsel for plaintiff in argument to the jury.

4. Under the direct provisions of Code 1887, § 2455 [Va. Code 1904, p. 1207], the reduction in rent to which the tenant is entitled on the destruction of leased buildings without his fault is the diminished value of the leased premises to the tenant for his purposes.

5. Charges requested, which are covered by the instructions given, are properly refused.

6. In an action for rent, where the tenant relied on Code 1887, § 2455 [Va. Code 1904, p. 1207], providing that in case of the destruction of leased buildings without fault on the part of the tenant he shall be entitled to a reduction in rent equal to the diminished value of the leased premises for his purposes, and the evidence showed that the premises had been rented to keep a competitor from using them, it sustained a finding that the value of the leased premises for the tenant's purposes had not been diminished during the period in which the rent demanded accrued.

Error to Circuit Court of City of Richmond.

Action by the Crystal Ice Company against the Richmond Ice Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. S. P. Patterson for plaintiff in error.
Leake & Carter, for defendant in error.

BUCHANAN, J. This is the second time this case has been before this court. Upon the former writ of error (99 Va. 239, 37 S. E. 851), after disposing of certain questions of pleading and practice, it was held that the liability of the tenant, the plaintiff in error, to pay the rent stipulated for in the contract sued on, was limited by the terms of section 2455 of the Code of 1887 [Va. Code 1904, p. 1207], which allows a reduction of the rent where buildings are partially destroyed, without the fault or negligence of the tenant; and the action was remanded for a new trial.

When the case went back to the circuit court, the tenant, the Richmond Ice Company (plaintiff in error), filed a special plea of set-off, in which, after setting out the lease, it averred that, after leasing the premises in the declaration mentioned, a substantial portion of the buildings and structures used in connection therewith was demolished or destroyed, without fault or negligence on its part, by the action of ice, or an ice gorge, in James river, on which the premises were located, so that since the buildings were destroyed there have not been on the premises buildings of as much value to the tenant for its purposes as those which were so destroyed, by reason of which the leased premises are worth at least the sum of \$90 per month less than they were before such destruction; and this sum, which amounts to \$900, it offers to set off against the plaintiff company's demand.

Upon the trial of the cause there was a

verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

The first error assigned is that the court erred in permitting the questions set out in bill of exceptions No. 2 to be answered by one of the defendant's witnesses (its general manager) on cross-examination.

The questions and answers objected to are as follows:

"Q. Were not you and the Crystal Ice Company engaged in business together at the time you made this lease?

"A. Interested in the same company; yes, sir.

"Q. And was not the purchase of this property from Warner Moore made by the Crystal Ice Company in consequence of a suggestion coming from you, or from your company, that it would be well to get Warner Moore out of business?

"A. I cannot answer positively about that. I knew there were negotiations going on in the formation of the Mutual Ice Delivery Company by Mr. Wingfield and myself. The first suggestion of the formation of the Mutual Ice Delivery Company came from Mr. Wingfield. Of course, I was willing to go into it, and I did. The object of the purchase of the property was to get Warner Moore out of the way."

The only objection made to this evidence was "that the lease is in writing, and its terms contain all of the agreements made by the parties," and that it cannot be contradicted, added to, or varied by parol evidence.

The questions to which objection was made do not refer to the contents of the lease, and the answers do not contradict, add to, or vary its terms in any manner. This being the only objection made to the evidence, it was properly overruled, even if the evidence had been objectionable on other grounds, as it clearly was not under the issue in this case.

The next error assigned is based upon bill of exceptions No. 3, which is as follows, leaving off the formal parts:

"Q. How did your company come to buy this property?

"A. The property in dispute?

"Q. Yes, sir.

"A. On June 4, 1895, I was approached by Mr. Landerkin, who represented the Richmond Ice Company, and he said that Warner Moore & Co. had been a disturbing element in the ice business previous to that, and in the coal business also, by reason of his being a cutter of rates, which demoralized trade; and if we, who were interested in the ice business, would buy out the real estate of Warner Moore & Co., on which he had an option, they would guaranty to pay us interest at six per cent. on the investment in rental of the property"—which question and the answer thereto were at the time objected to by counsel for the defendant, and the

objection sustained. But during the progress of the argument of the case, when plaintiff's counsel was making his closing argument and while he was stating to the jury that the purpose for which the premises were rented was to get Warner Moore & Co. out of the ice business as a competitor, objection was made by counsel for defendant to this line of argument on the ground that this question, when asked by plaintiff of witness Wingfield, on his examination, had been ruled out as improper, and the counsel for plaintiff said he was arguing on the evidence of Mr. Landerkin, the court overruled this objection, and said in the presence of the jury that, if its attention had been called to the statute, the objection of defendant to this question asked by plaintiff of Wingfield would not have been sustained, and permitted the counsel to continue his argument on that line. To this action of the court the defendant, by counsel, then and there objected and excepted."

There was evidence in the case tending to show for what purpose the premises were rented, and as that question was a material one in ascertaining what reduction in the rent, if any, the tenant was entitled to, as will be hereafter shown in considering the motion to set aside the verdict, counsel had the right to argue it. The statement of the court, in the presence of the jury, that it had improperly rejected evidence offered by the landlord, which it did not then admit, could not, so far as we can see, have prejudiced the tenant. The court did not err, therefore, in overruling the objection.

The landlord asked for three and the tenant for two instructions. The court rejected all of them, and gave two instructions of its own. The refusal of the court to give the tenant's instructions and the giving of its own in lieu thereof is assigned as error.

Upon the former writ of error it was contended by the landlord that the covenant in the lease by the tenant "to keep the plant and buildings in repair during the term of this lease" was not covered by section 2455 of the Code of 1887 [Va. Code 1904, p. 1207], but was controlled by the common-law rule, and bound the defendant to rebuild and pay the rent without any abatement. But this court said, in disposing of that contention, that, taking the lease as a whole, "it seems clear that the intention of the parties was that the repairs to be made by the lessee during the lease were only the ordinary repairs indicated by the particular description used, such as broken glass, bursting water pipes, etc. It follows from what has been said that the liability of the lessee to pay rent provided for by the contract is prescribed and limited by the terms of section 2455 of the Code, which must be given full force and effect in determining the rights of the parties."

Section 2455 of the Code is as follows:

"No covenant or promise by a lessee to pay

the rent, or that he will leave the premises in good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise without fault or negligence on his part, or if he be deprived of the possession of the premises by the public enemy, of binding him to make such payment or erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound. But in case of such destruction, there shall be a reasonable reduction of the rent, for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed; and in case of such deprivation of possession, a like reduction until possession of the premises be restored to him."

There was evidence tending to show that, if the tenant had made ordinary repairs on the wharf—that is, such repairs as would have to be made to correct wear and tear—it would not have been destroyed by the ice gorge.

It was clearly the duty of the tenant to make that kind of repairs under the terms of the lease as construed by the court on the former writ of error.

Whether or not the wharf was destroyed without fault or negligence on the part of the tenant was one of the questions to be passed upon by the jury, yet the tenant, in its instruction No. 2, erroneously assumed that it owed no such duty. By its instruction No. 1 the tenant asked the court to tell the jury that if, upon the facts hypothetically stated, it was entitled to a reduction of the rent, the plaintiff could only recover what the leased premises are reasonably worth generally, without the use of such buildings and structures, whereas the amount which a tenant is entitled to have the rent reduced under the statute is the diminished value of the leased premises "to the tenant for his purposes," caused by such destruction. For that reason the tenant's instruction No. 1 was erroneous.

The instructions given by the court are as follows:

(1) "The jury are instructed that they should find for the plaintiff any unpaid amount of the sum of one hundred dollars, stipulated in the lease as a monthly rent, and may allow interest on any such monthly installment from the time said monthly rent was due, unless they shall believe from all the evidence that the value to the defendant of the premises for its purpose was diminished without any fault or negligence of the defendant by reason of destruction of any building or structure on the premises by the ice or ice gorge set out in the defendant's special plea, in which event the jury should allow the defendant such abatement of the stipulated rent as they may believe from all the evidence to be a reasonable reduction of the rent on account of such destruction; but if the jury shall believe from the evidence

that the injuries to the leased premises caused by said ice gorge spoken of herein were caused by the fault or negligence of the defendant, or that the premises were not rendered less valuable to the defendant thereby, they should make no reduction in the said rent on that account."

(2) "If the jury believe from all the evidence that any of the buildings or structures upon the leased premises were destroyed without fault or negligence of the defendant by the ice or ice gorge in defendant's plea set out, and were not, before the bringing of this suit, replaced in whole or in part, and that in consequence thereof the value of the premises to the defendant for its purposes was diminished, they are instructed that the defendant should be allowed a reasonable abatement therefor, and the plaintiff is only entitled to recover the agreed rent of \$100 per month, less a reasonable estimate for defendant's damages occasioned by such destruction of buildings or structures."

These instructions cured the defects pointed out in the rejected instructions offered by the tenant, and fairly and fully instructed the jury upon the law as applicable to the evidence in the case.

The next and remaining assignment of error is to the refusal of the court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The jury allowed no reduction of rent, although it was clearly proved that there had been a destruction of the wharf and some structures on or connected therewith. At common law, where there was an express agreement to pay rent, as in this case, there could be no reduction of the rent on account of the destruction of the buildings on the leased premises. One of the reasons for that rule was that such liability was requisite to stimulate the tenant to the proper care of the premises, and to guard against frauds which the landlord is often not in a condition to establish. 2 Minor's Inst. 60, and cases cited.

Section 2455 of the Code modifies the common-law rule so as to allow a reduction of the rent on account of the destruction of buildings where they were destroyed without fault or negligence on the part of the tenant. It is not sufficient, to entitle him to a reduction in the rent, that the buildings on the leased premises have been destroyed, but it is made a condition to that right that they were destroyed without fault or negligence on his part.

It was therefore necessary for the tenant in its pleadings to aver (as it does) and prove that fact. That it was required to prove a negative does not affect the question, since the existence of that fact was necessary to the relief sought. 1 Greenleaf on Ev. §§ 73, 81; 1 Taylor on Ev. §§ 304 to 306. See, also, Reusens v. Lawson. 91 Va. 226, 253, 21 S. E. 347, and authorities cited.

Upon the question of whether or not the

wharf was destroyed without fault or negligence on the part of the tenant the evidence is conflicting, and of such a character that a verdict in favor of the landlord on that point could not be disturbed by the court.

In order to maintain the issue on the part of the tenant, it was not only necessary for it to prove that the wharf had been destroyed without fault or negligence on its part, but that the value of the leased premises for its purposes was thereby diminished. The object for which the premises in question were leased, the use (or, rather, the nonuse) made of them by the tenant before, at the time of, and subsequent to the destruction of the wharf, clearly appear from the evidence of the manager of the tenant company, one of its own witnesses. Upon his cross-examination, among other things, that witness testified as follows:

"Q. So that, for going on two years you had not used this property at all?

"A. No, sir.

"Q. At the time the accident happened it had not been of any use to you at all?

"A. I was not using it, but it was a help to us.

"Q. In what respect?

"A. Because no one else could use it being in the business. That is the reason the place was bought in the first instance by the Crystal Ice Company—to get some one else out. * * *

"Q. Was not the inducement offered by your company to the Crystal Ice Company that if they would buy this property you would pay them a rent equal to six per cent. per annum on what it cost them?

"A. Yes, sir. There was three thousand tons of ice there. * * * The arrangement was that the Crystal Company would buy the property from Mr. Moore at a cost of \$18,500, I think, and that the Richmond Ice Company would buy the ice on hand, the coal he had on hand, his horses and wagons, in fact all of his personal property, and in addition lease the property from the Crystal Ice Company for ten years for \$1,200 a year.

"Q. And that was done to get Warner Moore out of business?

"A. There was three thousand tons of ice there. There is no question about the lease. We rented the property for ten years, and paid the rent for forty-three months.

"Q. And you say that before the flood—before the property was injured—you had not used the property for nearly two years?

"A. Do you know why?

"Q. Will you tell me?

"A. Because when we bought the property we were handling Kennebec river ice to furnish our quota to the Mutual. After

handling northern ice for, I think, two years, Mr. Wingfield having a surplus at his factory, I made a contract with him. I figured I could better afford to pay rent and take ice from him, and do away with northern ice.

"Q. You had no further use for the property?

"A. No, I paid rent until the gorge.

"Q. So for two years before the gorge you had no use for this property, and did not use it?

"A. Exactly.

"Q. How did the gorge hurt you?

"A. It hurt me by preventing me from disposing of it to anybody else.

"Q. Did you try to dispose of it?

"A. No.

"Q. It seems you had two opportunities to dispose of it?

"A. Yes.

"Q. You had two opportunities to dispose of it after the gorge and did not think it prudent to do so?

"A. No, because I thought I had better pay the rent and have the management of it. * * *

"Q. And although you had an offer twice after this thing happened, once at \$600 and once at \$700, you decided not to take it?

"A. No, sir.

"Q. And you had not been using the property for two years—about two years—before the ice gorge?

"A. For good business reasons I did not. I thought I could make more money by not using it."

From this evidence and other evidence it appears that the object of the tenant in making the lease was to get rid of a rival in business, and to stop the use of the premises for the purposes for which they were constructed; that they were not in use when the wharf was destroyed; that they had not been in use for more than one year—perhaps as much as two years—prior to that time; and that they were not used afterwards during the period in which the rent accrued which is sought to be recovered in this action; and the reason given is that the tenant could make more money by not using them.

Under the facts and circumstances disclosed by the record the jury were warranted in reaching the conclusion that the value of the leased premises for the tenant's purposes had not been diminished during the period in which the rent demanded accrued, and that it was therefore not entitled to any reduction in the rent.

Upon the whole case we are of opinion that there is no error in the judgment of the circuit court, and that it must be affirmed.

(108 Va. 536)

STULTZ v. PRATT.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

QUO WARRANTO—RETURN OF WRIT—RETURN TO SPECIAL TERM—STATUTES.

1. Va. Code 1904, p. 1633, § 3060, provides, in section 3062, that there may be tried at special term any civil case not tried at the last preceding term, any motion cognizable by the court, any criminal case which could be tried at a regular term, and any controversy ready for hearing at law or in chancery, though it could not have been heard at the preceding term; and section 3024, p. 1612, provides that, where the reasons stated in a petition for quo warranto are legally sufficient, the writ shall be returnable to the next term of the court. *Held*, that a writ of quo warranto may not be returned to a special term, the phrase "next term" in section 3024 referring to a regular term, and the matter not being within section 3062.

Appeal from Circuit Court, Henry County.

Quo warranto proceedings on the relation of Thomas G. Pratt to determine the right of Brice Stultz to the office of superintendent of the poor for the county of Henry. From a judgment overruling a motion to quash the writ, respondent appeals. *Reversed*.

H. G. Mullins and John W. Carter, for appellant. Gravely & Gravely, for appellee.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court for Henry county, rendered at a special term thereof, in a proceeding of quo warranto instituted by the attorney for the commonwealth for that county, at the relation of Thomas G. Pratt, against Brice Stultz, to determine which of the two was the legal and rightful superintendent of the poor for that county.

The petition for the writ was presented to the judge of that court in vacation, as was authorized by section 3023, p. 1612, Va. Code 1904, and was made returnable to the first day of the next term of the court, namely, the 15th day of February, 1904, which was a special term.

On that day the defendant, Stultz, appeared, and moved the court to quash the writ on the ground that the same was not legally returnable to or cognizable by the court at that term. But the court overruled his motion, to which action of the court he excepted. Thereupon, by consent of parties, the cause was submitted to the court for decision in vacation, and on the 29th of March following a vacation judgment was entered in favor of the relator. To that judgment this writ of error was awarded.

The action of the court overruling the motion to quash the writ is assigned as error. As the question raised by that assignment of error goes to the jurisdiction of the court to render the judgment complained of, it will be first considered.

By section 3060, p. 1633, of the Code of 1904, it is provided how and when special terms of circuit courts may be appointed.

Section 3062 declares what class of cases and controversies may be tried at such special terms: (1) Any civil case which could lawfully have been, but was not, tried at the last preceding term that was or should have been held; (2) any motion for a judgment, or other motion cognizable by such court, whether it was pending at the preceding term or not; (3) any criminal case which could be tried if it were a regular term; (4) and any cause or matter of controversy at law or in chancery then ready for hearing, or which may be made ready by consent of parties, may with the consent of parties to such cause or controversy, although it could not have been lawfully heard at the preceding term that was or should have been held.

It is clear, we think, that the proceeding in this case is not within either of the classes of cases or controversies which it is provided may be heard at a special term, and that the writ could not be made returnable to that term, unless, as is contended, section 3024, p. 1612, authorizes it. That section provides that, where the reasons stated in the petition for a writ of quo warranto are sufficient in law in the opinion of the court or judge to whom it is presented, the writ shall be awarded by the court or judge, as the case may be, returnable to the next term of the court. As the "next term" of the court was the special term, it is insisted that was the term to which the writ was properly returnable.

The word "term" in some instances may include both regular and special terms. But, as a general rule, when a statute speaks of terms of court, the regular terms fixed by law are meant, and not the special terms appointed by the courts or judges. See *Com. v. Sessions of Norfolk*, 5 Mass. 435; *Smith v. Cutler*, 10 Wend. 590, 25 Am. Dec. 580; *Tompkins v. Clackamas*, 11 Or. 364, 366, 4 Pac. 1210; 21 Am. & Eng. Enc. Pl. & Pr. 600.

There is no more reason for holding that the words "next term," in section 3024, include "special term," than there would be in holding that they should receive the same meaning when used in other sections of the Code, where they are never construed to include special terms.

By section 3287, p. 1731, it is provided that every office judgment in a case where there is no order for an inquiry of damages, and every nonsuit or dismissal entered in the clerk's office, shall, if not previously set aside, become final, if the case be in a circuit court, on the last day of the next term, or the fifteenth day thereof, whichever shall happen first.

In section 3446, p. 1820, it is provided that, where an injunction is dissolved, the bill shall stand dismissed of course, with costs, unless sufficient cause be shown against such dismissal at the next term of the court after the dissolution.

To hold that the word "term" in sections

3287 and 3446 includes special terms would result in great injustice and wrong. Litigants know when regular terms of court come. They are fixed by law. They prepare their cases and put in their defenses accordingly. They may not, and generally do not, actually know anything of the time when special terms may be appointed; yet, if the construction insisted upon were correct, office judgments and dismissals in the office would become final, and bills would stand dismissed if a special term intervened before the next regular term.

The true rule of construction is, we think, that, where the word "term" is used in a statute with reference to courts, it should be construed to mean a regular term fixed by law, and not a special term fixed by the court, unless it is otherwise expressly provided or clearly implied from the act.

We are of opinion, therefore, that the writ in this case was made returnable to the special term without authority of law, and that the motion to quash should have been sustained, and the proceeding dismissed. For this error the judgment complained of must be reversed, and this court will enter such order as the circuit court ought to have entered.

(103 Va. 864)

KLOSS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 28, 1905.)

PEDDLERS—TAKING ORDERS BY SAMPLES—CONSTRUCTION OF STATUTE.

1. A traveling salesman, who carries samples and takes orders for brooms from merchants in lots of a dozen or more, and afterwards delivers the brooms, which are shipped to him from the factory, is not a peddler requiring a license, within Act April 16, 1903, § 50, as amended May 13, 1903 [Va. Code, 1904, pp. 2223-2224], defining as such all persons who carry goods from place to place for sale, and all persons who offer goods for sale without having a regular place of business.

2. A revenue law requiring peddlers to obtain a license, being penal in so far as it imposes a penalty for a violation of its provisions, must be strictly construed.

Error to Corporation Court of City of Fredericksburg.

John Kloss was convicted of carrying on the business of peddler without a license, and brings error. Reversed.

Chas. L. Page, for plaintiff in error. The Attorney General, for the Commonwealth.

BUCHANAN, J. This is a writ of error to a judgment of the corporation court of the city of Fredericksburg affirming a judgment of the mayor of that city finding John Kloss, the plaintiff in error, guilty of carrying on the business of a peddler without first having obtained a license therefor as required by section or paragraph 50 of the tax

bill approved April 16, 1903, as amended by an act approved May 13, 1903 (Appendix to Va. Code 1904, pp. 2223, 2224).

That section, so far as it is material to a consideration of this case, is as follows: "Any person who shall carry from place to place any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler. * * * All persons who do not keep a regular place of business (whether it be in a house, on a vacant lot, or elsewhere), open at all times in regular business hours, and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this act. And all persons who do keep a regular place of business open at all times in regular business hours, and at the same place, and who shall personally or through their agents, offer for sale or sell, and at the time of such offering or sale deliver goods, wares and merchandise, shall also be deemed peddlers as above. * * *"

The evidence shows that the plaintiff in error was the traveling salesman of one Chalkley, who carried on the business of a broom manufacturer in the city of Manchester. The salesman's method of doing business was to go from place to place; his employer shipping him from the factory, by rail, to the freight depot at each place on the salesman's route, brooms in such quantities as would, in their opinion, be sufficient to supply the trade at such point. The shipments were so timed as to reach the salesman on his arrival at each place. From the shipments so made, the salesman would select one or two brooms as samples, and with these go around and drum the town for orders; taking orders only from merchants, and never for less than dozen lots. After taking all such orders as he could get in the place, the salesman would go to the freight depot, and there "shape up" his brooms, and fill the orders taken by delivering the goods. It further appears that this method of selling brooms was an established feature of the business of broom manufacture, rendered necessary to avoid injury to the brooms by bending and breaking the straw when shipped in small lots from the factory.

The only question presented here is whether the plaintiff in error, in doing the acts he did without a license, came within the provisions of the statute quoted.

It was conceded by the Attorney General in oral argument, and properly so, that the business in which the plaintiff in error was engaged was not within the spirit of the act in question. Nor do we think that it is clearly within the letter of that law. If the plaintiff in error had gone from place to place in the state and taken orders for the brooms manufactured by his principal, and sent such orders to the latter at his place of business in Manchester, to be filled by him,

¶ 1. See *Hawkers and Peddlers*, vol. 26, Cent. Dig. §§ 3-5.

the plaintiff in error could not be regarded as a peddler. Neither would he be a peddler if, instead of sending such orders to his principal to be filled, he had notified him of the amount of brooms necessary to fill the orders taken, and the brooms had been shipped to him from the factory, or he had gone to the factory and gotten the goods, and filled the orders theretofore taken by him.

In the case of *Rex v. McKnight*, 10 Barn. & Cres. 734, the accused was in the employ of a tea dealer, and was sent by his master about the neighboring country once every fortnight soliciting orders, and on subsequent occasions was sent to deliver small parcels of tea in pursuance of those orders. This was held not to be an exposing for sale, or a carrying to sell, within the meaning of the hawkers' and peddlers' act, so as to subject the defendant to a penalty for trading without a license.

In *Village of Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500, the defendant had a wagon, with which he made trips to the village, filling his previous orders and taking new ones at the various houses. It was held that this failed to establish a violation of the town ordinance prohibiting all persons "from hawking or peddling in the public streets" of the village.

In *Com. v. Ober*, 12 Cush. 493, it was held that it was not a violation of the Massachusetts statute concerning hawking and peddling for an agent to go about delivering to traders in the country goods made by his principals, in Boston, which had been previously ordered by such traders. See, also, *Com. v. Farnum*, 114 Mass. 267.

In *Com. v. Elchenberg*, 140 Pa. 158, 21 Atl. 258, it was held that one who travels through the county as the employé of a store kept therein, and without a license solicits orders, and afterwards delivers goods to the person ordering, is not a peddler, within the meaning of the peddlers' act involved in that case.

In *State v. Frank*, 130 N. C. 724, 41 S. E. 785, 89 Am. St. Rep. 885, it was held that one who travels from house to house on foot, exhibiting samples of goods and taking orders, which he sends to his principals, in another state, who ship them to him, and he afterwards delivers such goods, is not a peddler.

The plaintiff did not carry brooms from place to place for sale. He was merely the salesman of a manufacturer who had a regular place of business, and who shipped from the factory to each point the salesman visited goods to fill such orders as he secured at such place. The goods with which orders were filled at each place where the salesman took orders were shipped directly from the factory to such place, and not from one place along the salesman's route to another.

The mere fact that brooms were shipped from the factory, the principal's place of

business, so as to enable the salesman to fill the orders after they were taken by him, instead of having the goods shipped to him after the orders were taken, does not, it seems to us, work such a change in the character of the business as to make the plaintiff in error a peddler, within the meaning of our statute, where such a method of business was adopted, not for the purpose of evading the revenue laws, but because that mode of delivery was an established feature in the business of manufacturing brooms.

The rule is universal, except where otherwise provided by statute, that penal statutes are to be construed strictly, and are never to be extended by implication. This rule applies with full force to a case like the present, for, while the statute on which the prosecution is based is a revenue law, yet, in so far as it imposes penalties for a violation of its provisions, it is a penal statute, and must be construed accordingly.

"No man," said the court in *Harris v. Com.*, 81 Va. 240, 243, 59 Am. Rep. 666, "incurs a penalty unless the act which subjects him to it is clearly within the spirit and the letter of the statute imposing the penalty." *Sutherland on Statutory Constr.* § 348.

It follows from what has been said that we are of opinion that the judgment complained of is erroneous, and must be reversed, and the prosecution dismissed.

(103 Va. 332)

RICHMOND PASSENGER & POWER CO. v. ALLEN.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

STREET RAILWAYS—VEHICLES—CARE—INSTRUCTIONS—HARMLESS ERROR.

1. A street railway company operating its railway upon a public street cannot run down a vehicle from behind, under any ordinary circumstances, without negligence or willful wrong.

2. It is not negligence to drive a vehicle, with curtains down on the sides and rear, upon the tracks of a street railway in a public street.

3. Where, upon the whole record, a different verdict could not have been found, the judgment will not be reversed because of error in giving or refusing instructions.

Error to Law and Equity Court of City of Richmond.

Action by Sally W. Allen against the Richmond Passenger & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry Taylor, Jr., for plaintiff in error. Smith, Moncure & Gordon, for defendant in error.

BUCHANAN, J. This action was brought by Mrs. Sally W. Allen against the Richmond Passenger & Power Company to recover damages for injuries resulting to her from the alleged negligence of the defendant company in running one of its cars upon the vehicle in which she was riding.

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. §§ 190-194.

It appears that Mrs. Allen, a few minutes after 6 o'clock on the morning of the 5th of December, 1902, was driving a Dayton wagon, with side and rear curtains down, along Lester street, in the city of Richmond, in a westerly direction; that upon this street the defendant company was operating a double-track street car line, and that she was driving upon the track upon which it ran its west-bound cars; that she had been driving upon that track for several squares when one of the defendant company's cars ran into the rear of her wagon, tilting the wheels, and shoving the wagon upon the horse, causing him to run away, and resulting in the injuries complained of.

The plaintiff and her companion in the wagon both testify that they heard no bell, and had no warning of the approach of the car until their vehicle was struck. The motorman testifies that the gong was sounded, but when or where does not appear. He further states that he was running at a moderate rate of speed; that the morning was dark and cloudy, and his headlight was burning. He gives as a reason why he did not stop his car before running upon the wagon that there was a curve in the track, which threw the light away from the track, and not upon the wagon in front of him, so that he could not see the wagon; and that he did all he could to stop after he saw it. It clearly appears, however, from this motorman's own evidence, that it was sufficiently light for him to have seen the wagon without the aid of the headlight, for he testifies that he stopped as soon as he struck the wagon, and saw the horse, while it was running away, until the wagon struck an east-bound car a square or more distant and was turned over; all of which he thinks occurred in two minutes. From a map filed by the defendant, it seems the track was straight for several squares east of where the wagon was struck, and very slightly, if at all, curved at that point.

If the motorman did not see the plaintiff's wagon moving along in front of him, it was, under the facts and circumstances disclosed by his own evidence, because he was not keeping a proper lookout. Under the facts shown by the record the defendant company was clearly guilty of negligence in the management of its car.

A street car company operating its railway upon a public street cannot run down a vehicle from behind, under any ordinary circumstances, without negligence or willful wrong. *Vincent v. Norton & Taunton St. Ry. Co.*, 180 Mass. 104, 61 N. E. 822; *Richmond Traction Co. v. Clark*, 101 Va. 382, 386-388, 43 S. E. 618.

The plaintiff was not guilty of contributory negligence under the facts of this case. It is not negligence to drive a vehicle, with curtains down on sides and rear, upon the tracks of a street railway in a public street. The duty she owed the car coming up be-

hind her was to get off the track when she knew of its approach. She did not know of it. If the gong was sounded, or any other warning given, neither she nor her companion heard it. They were not bound to keep an impossible watch to the rear to avoid an injury which, under any ordinary circumstances, could only result from culpable negligence or willful wrong on the part of the defendant company. *Vincent v. Norton & Taunton St. Ry. Co.*, supra; *R. & P. Ry. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Richmond Traction Co. v. Clark*, supra.

Upon the whole record a different verdict could not have been rightly found. It is therefore unnecessary to examine the propriety of the rulings of the court in giving and refusing instructions, since a decision of that question could not affect the result. *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Moore v. B. & O. Ry. Co.*, 103 Va. —, 48 S. E. 887, and cases cited.

The judgment complained of is plainly right, and must be affirmed.

CARDWELL, J., absent.

(103 Va. 559)

GLOBE FURNITURE CO. v. TRUSTEES OF JERUSALEM BAPTIST CHURCH.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

RELIGIOUS SOCIETIES—CONTRACTS BY TRUSTEES —JUDGMENT—LIEN.

1. Va. Code 1904, p. 773, § 1398, validates conveyances for the use of any religious congregation as a place of worship, and provides that the land shall be held for no other purpose. Section 1399, p. 774, provides for the appointment of trustees, on application of the congregation, to effect the purpose of a conveyance, and that the legal title shall vest in the trustees. Section 1405, p. 776, provides that a congregation may sell or incumber church property, the proceeds to be disposed of as the congregation may wish; and section 1406 provides that trustees may effect an incumbrance on or a sale of such real estate, on the wish of the congregation, the court to make an order for proper reinvestment of the proceeds; and by section 1402, p. 775, the trustees may sue in their own name to recover any land, and be sued in relation to the same. *Held*, that the trustees have no power of their own volition to alien or incumber the real estate, and a judgment against the trustees of a church for the price of pews purchased by them for the church was binding on the trustees individually, but not on the real estate, or the proceeds of a sale thereof.

Appeal from Law and Chancery Court of City of Norfolk.

Suit by the Globe Furniture Company against the trustees of Jerusalem Baptist Church. From a decree in favor of defendants, complainant appeals. Affirmed.

P. A. Agelasto and W. W. Old, for appellant. A. B. Seldner, for appellees.

HARRISON, J. The question involved in this case is whether or not the judgment asserted constitutes a lien upon the lot, and

nouse of worship thereon, of the appellees, or upon the proceeds of sale thereof.

It appears that two of the trustees of the church bought of the appellant certain pews and church furniture, which were delivered and placed in the church. The debt thus created not having been paid, suit was brought by the appellant, and judgment by default obtained against the several trustees of the church. The object of the present chancery suit is to enforce this judgment as a lien upon the real estate of the church, or upon the proceeds of the sale of a part of its church lot to the city of Norfolk.

Churches in Virginia are not incorporated, and, under the policy of our law, cannot be. The property they are permitted to hold, and its use, are fixed by statute. Church trustees are creatures of statute, and their powers are limited by the law that authorizes their appointment.

Section 1398 of the Code of 1887, as amended and found in Va. Code 1904, p. 773, validates every conveyance, devise, or dedication for the use and benefit of any religious congregation as a place for public worship which has been made since January 1, 1877, or shall thereafter be made, and provides that the land shall be held for such use or benefit and for such purpose, and not otherwise.

Section 1399 of the Code, as amended and carried into Va. Code 1904, p. 774, provides the method of appointment of trustees, upon the application of the proper authorities of the congregation, in order to effect or promote the purpose of such conveyance, devise, or dedication, and that the legal title to such land shall, for that purpose and object, be vested in the trustees.

Section 1405 of the Code of 1887 [Va. Code 1904, p. 776] provides how a congregation may proceed to sell or incumber church property; and section 1406, as amended and found in Va. Code 1904, p. 776, provides how trustees may, by suit in the proper court, effect an incumbrance upon, or a sale or exchange of, such real estate, provided it shall appear to be the wish of the congregation.

Section 1402, as amended and found in Va. Code 1904, p. 775, provides that church trustees may sue in their own names to recover any land or other property held by them in trust, or damages for any injury thereto, and be sued in relation to the same.

It is very plain that this section has no reference to suits of the character we are considering, but relates only to suits by or against the trustees touching the property, the legal title to which is vested in them.

It is clear from the statute law to which we have adverted that the trustees of a church merely hold the legal title to the real estate conveyed, devised, or dedicated for the use and benefit of the religious congregation at whose instance they have been appointed, and have no power of their own volition, and in their capacity as trustees, to either alien or incumber such real estate.

The judgment asserted is valid as to the individuals against whom it was obtained, but it has no validity as a lien upon the real estate of the appellees. If the church property could be incumbered by this method, the statutes mentioned would be useless, and it would be in the power of church trustees appointed merely to hold the legal title to sweep away their house of worship without the authority or even knowledge of the religious congregation that had acquired it.

If the judgment constitutes no lien upon the real estate of the congregation, it for the same reason is no lien upon the proceeds of that part thereof taken for street purposes by the city of Norfolk. When the sale is made at the instance of the congregation, under section 1405, the proceeds are to be disposed of by the court in such manner as the congregation may desire. And when the sale is made at the instance of the trustees, under section 1406, the court is to make the necessary order for the proper reinvestment of such proceeds.

We have dealt with the legal rights of the parties to this litigation. It is hardly necessary to add that nothing we have said has been intended as approving the course of this congregation in failing to pay for pews and other church furniture used and enjoyed by them. Such conduct is in the highest degree reprehensible.

The lower court committed no error in sustaining the demurrer to the original and supplemental bills filed by the appellant, and the decree complained of must therefore be affirmed.

(108 Va. 498)

NORFOLK & W. RY. CO. v. TOWN OF SUFFOLK.

(Supreme Court of Appeals of Virginia. Jan. 28, 1905.)

BUSINESS LICENSE—RAILROAD COMPANIES—MUNICIPAL AUTHORITY—CONSTITUTIONAL PROVISIONS.

1. Suffolk Town Charter, § 18, providing that "whenever any business, trade, occupation, calling, or any other thing, is to be done within the town for which a state license is or may be required, the council may require a town license to be had for doing the same," authorizes an ordinance imposing a license tax on a railroad company doing business in the town, though it is for a failure to transact its business as provided by Code 1887, § 1200, in addition to its common-law liability, amenable, under section 1201, to a fine.

2. Suffolk Town Charter, § 18, providing for an occupation tax, as applied to the business of a railroad company, is not in conflict with Const. art. 10, § 4 [Va. Code 1904, p. cclxii, § 170], permitting the Legislature to impose license tax on any business which cannot be reached by the ad valorem system.

Error to Circuit Court, Nansemond County.

Action by the town of Suffolk against the Norfolk & Western Railway Company to recover a license fee. From a judgment for plaintiff, defendant brings error. Affirmed.

Geo. S. Bernard, Legh. R. Watts, and Jos. I. Doran, for plaintiff in error. J. U. Burges, for defendant in error.

WHITTLE, J. This controversy involves the construction of section 18 of the charter of the town of Suffolk, and the validity of an ordinance passed in pursuance thereof, imposing a license tax of \$50 on the plaintiff in error for the privilege of conducting its business in that town.

The language of the charter pertinent to this inquiry is as follows: "Whenever any business, trade, occupation, calling, or any other thing, is to be done within the town of Suffolk for which a state license is or may under the Constitution of this state or the Constitution and laws of the United States be required, the council may require a town license to be had for doing the same."

Conceding the soundness of the proposition that the intention of the state to clothe a municipal corporation with a portion of its own sovereignty in the matter of levying taxes must be manifested in plain and unambiguous terms, the court is nevertheless of opinion that the phraseology of the charter in question measures up to that requirement. Language substantially the same as that employed in this instance has been so repeatedly and so recently construed by this court to confer upon a municipality a general power of taxation, subject only to such limitations as may be imposed by the Constitution of the state or of the United States, that a discussion of the subject would be unprofitable. *Ould & Carrington v. City of Richmond*, 23 Grat. 464, 14 Am. Rep. 139; *Humphreys v. City of Norfolk*, 25 Grat. 97; *City of Norfolk v. Norfolk Landmark Co.*, 95 Va. 564, 28 S. E. 959; *Newport News, etc., R. Co. v. City of Newport News*, 100 Va. 157, 40 S. E. 645; *Woodall v. City of Lynchburg*, 100 Va. 318, 40 S. E. 915; *Blanchard v. City of Bristol*, 100 Va. 460, 41 S. E. 948; *City of Norfolk v. Griffith-Powell Co.*, 102 Va. 115, 45 S. E. 889; *Gordon v. City of Newport News*, 102 Va. 649, 47 S. E. 828.

It is sought, however, to distinguish this case from the foregoing authorities on the theory that the Legislature cannot be presumed to have intended to authorize the town of Suffolk to impose upon the plaintiff in error a license tax, enforceable by fine, for doing a business which it was required by statute to transact under pain of forfeiture. (The sections of the Virginia Code of 1887, relied on—sections 1200 and 1201—have since been repealed. Acts 1904, p. 55.)

The argument is more specious than sound, and, carried to its logical conclusion, would have afforded a ready means of escape from taxation to a large class of businesses of a quasi public nature, for the exercise of which a license tax might have been imposed under the Constitution of 1869; for example, ordinary keepers, express, telegraph, and tel-

ephone companies, street railroad companies, and the like.

The statute is declaratory merely of the common-law duty of transportation companies; and for a failure to discharge that duty, independently of statute, they would be liable in damages to any person injuriously affected by the omission. The differentiating features, therefore, between a railroad company and other common carriers, is that for a failure to discharge the duties enumerated in section 1200 the former was, in addition to its common-law liability, amenable, under section 1201, to a forfeiture of not less than \$25 nor more than \$100, recoverable by the injured party by motion or action. So far, consequently, as the argument that the Legislature cannot be presumed to have intended to delegate to the town of Suffolk authority to demand a license tax of a railroad company for doing that which the law required it to do is concerned on principle the argument is equally applicable to all other public service corporations.

That the business of railroad companies may be subjected to a license tax is distinctly declared in the cases of *Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 South. 915, and *Florida Cent. R. R. Co. v. City of Columbia* (S. C.) 32 S. E. 408.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 376, 2 Sup. Ct. 265, 27 L. Ed. 419, it was said: "That the power of the state to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are quasi public, cannot be disputed; and that, whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists." See, also, *Postal Tel. C. Co. v. City Council of Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871.

It must be observed that the ordinance under consideration does not make the payment of the license tax a condition precedent upon which the right of the plaintiff in error to carry on its business depends. It merely imposes the tax, and the ability to fine for a violation of the ordinance is a remedial incident of the original power. *Blanchard v. City of Bristol*, supra.

This is made plain by the case of *Home Ins. Co. v. City of Augusta*, 93 U. S. 123, 23 L. Ed. 825, where, in discussing the character of a license tax, the court said: "This court (in the License Tax Cases, 5 Wall. 462, 18 L. Ed. 497) held that the payment required was a special tax, levied in the manner described; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. * * * In the ordinance in question the tax is designated 'a license tax,' but its payment is not made a condition precedent to the right to do business.

No special penalty is prescribed for its non-payment, and no second license is required to be taken out. Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the License Tax Cases, that the result would have been the same."

Finally, it is insisted that, if the Legislature, by section 18 of the charter, intended to give the town council power to require a railroad company to take out a license and pay a tax for the privilege of doing business therein, the section is unconstitutional, because contrary to the provisions of section 4 of article 10 of the state Constitution [Va. Code 1904, p. cclxii, § 170].

That section, it will be recalled, after authorizing the levy of a license tax upon certain specified businesses, concludes: "and all other businesses that cannot be reached by the ad valorem system."

With respect to the foregoing provision this court said, in *Gordon v. City of Newport News*, supra: "The Legislature, or a municipality possessing full powers of taxation under its charter, must decide primarily whether a particular business can or cannot be reached by the ad valorem system; and with the exercise of their discretion the courts may not interfere, except in case of a plain departure from the constitutional requirement. The question is one of power, and not of policy, so far as the courts are concerned; and they are without authority to control legislative discretion, even if, in their opinion, it is violative of sound principles of political economy, unless in its exercise it contravenes some provision of the Constitution of the state or of the United States. Subject only to that limitation, the discretion of the legislative department of the government in the administration of the fiscal affairs of the commonwealth is exclusive and supreme."

It not only cannot be affirmed that the imposition of a license tax on the business of the plaintiff in error is "a plain departure from the constitutional requirement," but, under similar charters, such action on the part of city councils has been sanctioned by this court in the analogous cases of *Newport News*, etc., *R. Co. v. City of Newport News*, supra, and *Postal Tel.-Cable Co. v. City of Norfolk*, 101 Va. 125, 43 S. E. 207.

In the latter case the court said: "A city ordinance imposing a privilege tax on a telegraph company is not in conflict with section 4, art. 10, of the Constitution of this state [Va. Code 1904, p. cclxii, § 170], permitting the Legislature to impose a license tax on any business which cannot be reached by the ad valorem system. The tax imposed by the ordinance is a tax imposed upon the privilege of doing business in the city, and is wholly different from a property tax. It is immaterial that the state taxes the property of the company on the ad valorem system. The two subjects of taxation are whol-

ly different, and both may be taxed without being obnoxious to the objection that it is double taxation."

The above authorities show conclusively that the last contention is without merit, and cannot be maintained.

It must be remembered that this case arose under the Constitution of 1869, and what has been said with respect to the power of the defendant in error to impose the license tax in question has no reference to a case arising under the present Constitution.

For these reasons the judgment of the circuit court of Nansemond county is without error, and must be affirmed.

(103 Va. 551)

WILLIAMSON et al. v. PAYNE et al.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

APPEAL AND ERROR—AMOUNT—BURDEN—TRUST DEED—PERSONAL PROPERTY—DESCRIPTION—COSTS.

1. Generally speaking, the value or amount in controversy must be made to appear affirmatively on appeal, but where the original demand is pecuniary and in excess of the jurisdictional amount, and is alleged by the appellee to have been reduced below that amount by payment, the onus rests upon him to make that fact appear.

2. Costs of executing the trust and of drawing and recording the deed are, when secured by the deed, to be considered part of the amount in controversy, when the deed is attacked.

3. Where there is a description of the property mortgaged, and the description is true, and by the aid of such description and the surrounding circumstances a third person would, in the ordinary course of things, know the property was mortgaged, the description is sufficient.

4. The recording of a trust deed of personal property, which furnishes a stranger with a means of identifying the property, gives constructive notice.

Appeal from Circuit Court, Henry County.

Bill by one Williamson and others against one Payne and others. Decree for defendants, and plaintiffs appeal. Reversed.

Halrston & Gravely, S. A. Anderson, and Geo. H. Marshall, for appellants. L. W. Anderson, for appellees.

WHITTLE, J. The facts of this case necessary to be stated are as follows: Appellants, who are creditors by deeds of trust of the Franklin Log & Lumber Company, together with their respective trustees, filed a bill in equity in the circuit court of Henry county for an injunction to restrain the grantors in said deeds and other persons from removing or in any manner interfering with the trust property. The bill further prays for the appointment of a receiver, and for the sale of the trust subject, and the application of the proceeds to the payment of the debts secured.

At the December term, 1903, the court awarded an injunction and appointed a re-

† 3. See *Chattel Mortgages*, vol. 2, Cent. Dig. §§ 87-106.

ceiver in accordance with the prayer of the bill, and also directed the receiver to take possession of the trust property, sell the live stock at public auction, and to deposit the proceeds of sale in bank, subject to the order of the court.

At the same term the appellee Cassell recovered a judgment against the Franklin Log & Lumber Company for more than \$300, and, having subsequently caused an execution to issue on the judgment, intervened in the suit in equity, and asserted priority of lien for the execution to the demands of appellants upon the property in controversy.

From a decree in the cause sanctioning that contention, this appeal was allowed. The ground of decision of the circuit court was that, while the deeds in question were valid and binding between the parties, the property conveyed was not sufficiently described for the recordation of said deeds to affect third parties with constructive notice of the identity of the property conveyed.

Before considering the case in that aspect, it will be necessary to notice the contention of appellee that each of the amounts in controversy, exclusive of costs and interest accrued since the decree appealed from, is less in value or amount than \$300, and that this court is consequently without jurisdiction to entertain the appeal.

The demand asserted by Williamson, with interest to the date of the decree, is \$475; but it is said that the amount in controversy as to him is the original demand, less the sum directed to be paid him by the decree under review, which payment, it is alleged, reduces his debt to less than \$300.

The property in dispute had been sold by the receiver under a former order of the court, and the decree appealed from directs him, out of the proceeds, to pay to the appellee Cassell the amount of his execution, including interest and costs, and his costs in this suit expended, and, after paying all other unpaid costs, to pay the residue to the appellant Williamson. What that residue amounts to, the record does not disclose.

"Generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained, the appeal will be dismissed, and the burden is on appellant to establish the jurisdiction." 2 Cyc. 555.

On the other hand, where the original demand is pecuniary and in excess of the jurisdictional amount, but is alleged by the appellee to have been reduced below that amount by payment, the onus rests upon him to make that fact appear. *Fink Bros. & Co. v. Denny*, 75 Va. 663; *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

The debt of the appellant Clement amounts, with interest to the date of the decree, to \$293; and his deed of trust also secures the expenses of executing the trust and drawing and recording the deed, which, it is

conceded, raise his demand beyond the jurisdictional amount. That these latter items are proper to be considered in arriving at the amount in controversy, see 2 Bar. Chy. Pr. (2d Ed.) p. 1208.

So that, if appellee's apprehension of what constitutes the amount in controversy in this case is correct, the allegation that appellants' respective demands are less than \$300 is not sustained.

On the merits of the case, the decision of this court in *Hardaway v. Jones*, 100 Va. 481, 41 S. E. 957, is relied on to show the insufficiency of the description of the property to affect Cassell with constructive notice under the registry act.

In that case the deed of trust conveyed four mules, without further description. It did not state where or in whose possession they were, nor did it mention the residence of either the grantor, the trustee, or the beneficiary. The deed was acknowledged before a notary public in Scott county, and was put to record in that county. Within less than one month after the deed had been recorded, the grantor removed the mules to Wise county, and sold them, for a valuable consideration, to a purchaser residing in that county, who had no actual notice of the deed of trust. A few days thereafter the trustee demanded possession of the mules, and, upon the refusal of the purchaser to surrender them, brought an action of detinue for their recovery, which resulted in a judgment in his favor. That judgment was reversed on appeal; this court, as remarked, holding that the description of the property was inadequate to affect innocent third parties with constructive notice under section 2468 of the Code of 1887 [Va. Code 1904, p. 1228].

It must, however, be observed that there are many distinguishing features between that deed and the deeds drawn in question in this case.

The two deeds convey the same property, and, with the exception of dates, amounts, trustees, and beneficiaries, are practically identical in form. Both deeds show that the grantors resided in the county of Henry, and the trustees and beneficiaries in the town of Martinsville. The horses, mules, oxen, and wagons were conveyed in the same clause, with a definitely described lumber plant, consisting of an engine, boiler, and sawmill, and would naturally have been regarded as parts of that outfit. The deeds further show that the property was to remain in the possession of the grantor until default was made in the payment of the debts secured. And finally it appears that the deeds were executed and duly recorded in the clerk's office of the county court of Henry county before the recovery of Cassell's judgment.

The doctrine of *Hardaway v. Jones* is that a deed of trust or mortgage conveying chattels constitutes constructive notice to third

persons, when the description in the deed or mortgage is such as would enable them to identify the property, aided by the inquiries which the deed or mortgage itself indicates and directs. And the court in that case, at page 485, 100 Va., page 958, 41 S. E., observes: "In no case that we have seen has the recordation of a deed of trust been held to be constructive notice, which contained no description of the animals conveyed, except their number, which did not state in whose possession the property was, or where it was located or might be found, or where any party to the deed resided."

The converse of that proposition is also true—that the recordation of a deed which furnishes a stranger with the obvious means of identifying the property, which these deeds afford, does give constructive notice.

The registry of the deeds in question affected Cassell with constructive notice of the following facts: That his debtors resided in the county of Henry; that they had conveyed their property to trustees, in trust, to secure the debts described in the deeds; that the trustees and creditors were all residents of the town of Martinsville; that the property constituted part of a sawmill outfit which belonged to his debtors; and that the whole of it was in that county and in the possession of the grantors.

The written description of personal property in mortgages, taken alone, rarely furnishes strangers adequate means of identifying the property, and information thus imparted must usually be supplemented or aided by extraneous inquiry.

That would have been equally true in this instance, even though the sex, color, and names of the live stock conveyed had been specified in the deeds. Hence the reasonableness of the rule that a deed is sufficiently definite when it enables a stranger to identify the property, aided by proper inquiry, such as the instrument itself indicates and directs.

The same is true with respect to the description of land in an action of ejectment. It is not required that the designation should be so certain that the officer will know from an inspection of the record of what he is to give possession, but, in executing the writ of possession, he may supplement the information obtained from the record with knowledge acquired from the plaintiff. *Howdashedell v. Krenning*, 103 Va. —, 48 S. E. 491.

In a leading case on the subject under consideration—*Willey v. Snyder*, 34 Mich. 60—Chief Justice Cooley says: "Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect—the parties and their privies. A subsequent purchaser or mortgagor

is supposed to acquire a knowledge of all the facts, so far as they may be needful to his protection, and he purchases in view of that knowledge. * * * Descriptions do not identify by themselves. They only furnish the means of identification. They give certain marks or characteristics—perhaps historical data or incidents—by the aid of which we may single out the thing intended from all others, not by the description alone, but by that explained and applied." See notes to *Barrett v. Fisch* (Iowa) 41 N. W. 310, 14 Am. St. Rep. 238, where many illustrations of the doctrine will be found.

In *Estes v. Springer*, 47 Mo. App. 99, it was held: "Notwithstanding the description in a chattel mortgage is faulty, in that it does not locate the property and does not state who is the owner, yet such fault is cured where other portions of the instrument show the residence of the mortgagor, and that the property is in his possession, and that it shall not be moved from the county in which the mortgagor's residence is fixed, and that upon default it shall be sold in such county."

Also in *Shaffer v. Pickrell*, 22 Kan. 619: "A chattel mortgage in which the description of the property is as follows, 'Two hundred and fifty stock hogs owned by the said B. D. Mott, in Franklin county, Kansas,' and which contains the provision that until default be made, or until such time as the mortgagees shall deem themselves insecure, the mortgagor, said Mott, is to continue in the peaceable possession of all the property, all of which, in consideration whereof, he engages shall be left in as good condition as the same now is, and taken care of at his own cost and expense, is not void for uncertainty."

See, to the same effect, *Brown v. Holmes*, 13 Kan. 482; *Wells v. Wilcox*, 68 Iowa, 708, 28 N. W. 29; *Everett v. Brown*, 64 Iowa, 420, 20 N. W. 743; *Bank v. Johnson*, 79 Iowa, 290, 44 N. W. 551; *Eddy v. Caldwell*, 7 Minn. 225 (Gil. 166).

The rule fairly deducible from the authorities seems to be that: "Where there is a description of the property mortgaged, and the description is true, and by the aid of such description and the surrounding circumstances the third person would, in the ordinary course of things, know the property was mortgaged, the description should be held sufficient." *Mills v. Kansas Lumber Co.*, 28 Kan. 578.

For these reasons, the decree appealed from, to the extent to which it establishes appellee's execution as a superior lien to appellants' deeds of trust on the property involved in this litigation, is erroneous, and must be reversed and annulled, and the cause remanded to the circuit court of Henry county for further proceedings to be had therein not in conflict with this opinion.

(108 Va. 1012)

JONES v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

ARSON—EVIDENCE.

1. Evidence that a fire was incendiary, and that the accused had an opportunity to commit the crime, and ill feeling toward the owner of the property, without more, cannot sustain a conviction.

Error to Circuit Court, Clark County.

John Jones was convicted of arson, and brings error. Reversed.

Chas. M. Broun and F. B. Whiting, for plaintiff in error. Wm. A. Anderson, Atty. Gen., and W. T. Lewis, for the Commonwealth.

CARDWELL, J. John Jones was indicted in the circuit court of Clark county for burning in the nighttime the dwelling house and two frame outhouses, the property of Clay Carr. Upon this indictment he was tried, found not guilty of burning the dwelling house, but guilty of burning the two frame outhouses, and sentenced to a term of nine years in the penitentiary.

A number of exceptions were taken by the prisoner at the trial to the rulings of the court, but upon the view of the case taken by this court we deem it only necessary to consider whether the evidence warrants the conviction of the prisoner.

It appears that Clay Carr's residence is situated a little over half a mile northwest of Boyce; that just a little northwest of the dwelling there was stable barn, just 50 steps (supposed to be 50 yards) from the wing of the dwelling; that the barn was 78 feet long and 36 feet wide, with 12-foot stables on each side and a 12-foot driveway the full length of the barn, the door to which was only fastened with a hook, and not locked; that just 16 steps north of that barn is another barn, three stories, 27 feet square. The latter was used to store machinery, corn, and some hay at the time of its destruction by fire. On the west side of the barnyard fence, running its full length, there was a rick of fodder, which ran south and north, and butted upon the northwest side of the stable barn, which rick was supposed to contain 20,000 bundles of fodder; and just over the fence east of that was a large straw rick, butting up against the south side of the barn, and supposed at that time to have had 15 tons of straw in it.

On the night of March 18, 1904, these barns and the straw and fodder ricks were discovered to be on fire by Carr's neighbors, between 10 and 11 o'clock, and, it being in a very dry season, the barns, with their contents, live stock, etc., and ricks were speedily consumed—certainly by 20 minutes after 11 o'clock. During the progress of the fire the shedroom of the dwelling house, it being covered with shingles, caught on fire several times, but these fires were extinguished. Just at what time this fire originated, and

whether it originated in one of the barns, or the straw, or fodder rick, is not disclosed by the evidence.

After stating that he was waked up by the ringing of the farm bell by one of his neighbors, and then discovered that something was on fire, Mr. Carr testifies that he went out, and found his stable barn had fallen in, and there was only a little frame of it standing; that the fodder rick had burned down, and the straw rick about half as high as it was before; and that after he had been out, as he supposes, about a half hour, or more, he remembered that he had his watch, and upon looking at it found that it was 20 minutes past 11 o'clock; so that the fire necessarily had been in progress some time prior to 10:30 o'clock, as the stable barn had been almost entirely consumed, as well as the straw and fodder ricks, when he first went out of the house, and the fence around the lot almost entirely consumed. He further says that he was at his barn at 9 o'clock, which was his usual custom, and everything was then all right.

It further appears that prior to July 19, 1903, and for about two years, the prisoner had been in the employ of Carr on his farm; that on that day they had some disagreement, and the prisoner left, going to his home—that is, to his father's, where he lived—which is about 900 yards from Carr's residence; that about one week afterwards the prisoner returned to Carr's house for the purpose of having a settlement with him of the wages he claimed to be due him; that upon this settlement Carr was of opinion that he owed the prisoner \$4, while the prisoner claimed that the balance due him was \$6, whereupon Carr paid the prisoner \$4, and they parted, the prisoner saying as he walked away, "I will get even with you."

Between Carr's residence and Jones' house there is a field belonging to one Bowles, which Carr had rented for the year 1903, and there is a fence which divides this field from the lot of land owned by the prisoner's father, in which there was a gap, which had been established by him.

On December 17, 1903, while in the Bowles field attending to some other matters, Carr discovered that this gap was down, whereupon he went to the gap, dismounted from his horse, and put it up. About the time he finished putting up the gap and was tying the wire to hold it in place, he heard a rustling in the weeds behind him, and as he turned around the prisoner grabbed him in the throat with one hand and shook his fist in Carr's face, and said with an oath, "If you put that gap up again, I will knock you into jelly." Upon being asked what he meant by this attack upon Carr, the prisoner replied that he had no right to be in the field at all: that Bowles had said he had no right to put it up, as it was the prisoner's father's gap. After some further colloquy between the par-

ties, and Carr had gotten upon his horse and started away, the prisoner dared him to get off, and, upon being told by Carr that he was going to Justice Struder and get a warrant, the prisoner replied, "Damn old Struder; I can whip him and you both." Carr did get out a warrant for the prisoner, and he was that evening tried by Justice Struder, found guilty of an assault, and required to pay as a fine and costs \$11.85; and it is testified to on behalf of the commonwealth that after the trial of the warrant, and Carr had left for his home, the prisoner was heard to say to some one, "Never mind, I will get even with him." Whether he had reference to Carr or to the justice who had imposed a fine upon him is left entirely to conjecture.

The next morning after the fire, Carr, in looking about his premises, discovered a horse's track coming to his place from the direction of the Bowles field, and, supposing that it might have been made by the horse owned by the prisoner, attempted to follow it, but upon investigation he found that the track was made by the horse of a neighbor who came to the fire that way. That track was made by a shod horse.

On Tuesday following the fire Carr discovered other tracks across his lawn in front of his house, which were prints of a bare-footed horse. These tracks were first discovered about 100 yards from the barn, and within the lawn, which was covered by sod. This track was followed to within 11 steps of a gate that goes into the lawn, and there the track had been destroyed by cattle passing over it. The distance he could follow the track was about 150 yards altogether, and was going from, rather than towards, the prisoner's house, and could not be tracked nearer than 900 yards from his house. At the time of the fire the prisoner's father owned a horse which was unshod, and about the size of a horse that would have made a track similar in size to the track found on the lawn.

On Saturday, the 26th of March, eight days after the fire, two persons, witnesses in this cause, took the horse just referred to, and which it was shown that the prisoner was riding at Boyce on the evening of the fire, to Carr's lawn, and a comparison made of the size of its feet with the tracks found by Carr on Tuesday morning. They say that they put three of the feet into these tracks and that they appeared to make "a perfect fit"; and that the length of the step of the horse was the same, apparently, as the step of the horse that made the tracks in question. There was nothing, however, peculiar about the horse's feet to distinguish the tracks made by it from tracks that may have been made by some other horse.

It further appears that Mrs. Pyle, who lived on Carr's premises, a short distance from the buildings that were burned, on the night of the fire had occasion to go out on

the porch and get water for her sick child, and while there heard Carr's dogs barking furiously in front of Carr's residence, and heard a voice, but could not say whether it was the voice of a man or a woman. Upon hearing this voice the dogs ceased barking, and she states that about that time she heard a horse going towards Carr's gate, which seemed to be running very rapidly. This witness went back into her house, and after being asleep, she does not know how long, she was aroused by the ringing of the farm bell, which she says was about 11 o'clock, and that was the first she knew of the fire.

With reference to his dogs, Carr states that they were good guards—one a shepherd's dog and the other a bulldog; and he was asked to state if they knew the prisoner well, to which he answered, "Yes, sir; he had worked for me over two years, and they knew him. Q. Were they in the habit of following him? A. They were with the wagon. I have known them to follow him with the wagon time and again." It further appears that no one noticed the presence of these dogs about the fire, or on Carr's premises, until the fire was pretty well over, when one of them appeared, and seemed very much subdued. The prisoner is not shown to have been on Carr's premises since his visit there in July prior to the fire above mentioned, nor is it shown that these dogs were seen following him thereafter, nor any circumstance tending to show that he retained at the time of the fire the control over them that he had when living with Carr.

We have stated above all the facts testified to on behalf of the commonwealth, with the exception as to the time the prisoner left Boyce on the night of the fire, as to which there is great conflict. George Harrison testifies that he saw and talked with the prisoner at Boyce, and by an estimate made by him of the time at which he left the prisoner sitting in a store at Boyce he judged that it was about a quarter past 9; while the prisoner claimed, and was corroborated by a number of witnesses who lived in the house with him, that he reached home at 9 o'clock, and was in bed by a quarter past 9, and that he never left the house thereafter that night. Harrison says, with reference to his clock, that he kept it regulated by the trains, and usually set it once or twice a day in order to keep it running with the time of the railroad.

So that the conflict in the evidence as to the time when the prisoner left Boyce only involves a difference in the estimates made of some 15 or 20 minutes, which was sufficient for the prisoner to have reached his home by 9 o'clock, and it appears by the evidence of the commonwealth that he was seen riding towards his home by the public road, and the usual route for him to have taken, though also the route to Carr's place, a little before or a little after 9 o'clock.

Effort was made to prove that the prisoner was not at home at 10 o'clock, and that circumstance is relied on here; but the record shows that the statement of the witness Henry Taylor upon that point was ruled out by the trial court; and Willie Harris, who was at the time with Henry Taylor, who had stated that Harris called at prisoner's home for him about 10 o'clock, and got no answer, testifies that he and Taylor passed prisoner's home about 8 o'clock, and upon his (Harris') calling for him learned that he had gone to Boyce.

Much stress is laid upon the fact, admitted by the prisoner, that he knew nothing of the fire until next morning, when he had started out to his work; but this circumstance loses its criminating force when it is testified to by a witness for the commonwealth, Henry Taylor, who was at the time working for Carr, and had left his house the night of the fire after supper, that he and another slept in a room with a window next to Carr's, and in a house on an adjoining lot to the prisoner's, but nearer to the scene of the fire, and knew nothing of it till they went out of the house about 5 o'clock the next morning.

"The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty man. He rests secure in that presumption of innocence until proof is adduced which establishes his guilt beyond a reasonable doubt, and, whether the proof be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the prisoner." *McBride's Case*, 95 Va. 828, 30 S. E. 454.

"The rule in criminal cases is that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti—the fact that the crime has been actually perpetrated—be first established. So long as the least doubt exists as to the act, there can be no certainty as to the criminal agent." 1 *Starkie on Ev.* 510.

"Evidence only that a fire was incendiary, that the defendant had an opportunity to commit the crime, and that he cherished ill feelings towards the owner of the property destroyed, does not warrant a conviction." *Garner v. Commonwealth*, 26 S. E. 507, 2 Va. Dec. 458.

In that case a millhouse was burned. Tracks were discovered the next morning about the mill, and led from it in the direction of the prisoner's house, which corresponded in measurements and other characteristics with the prisoner's footprints (were in fact his tracks), and there was ill feeling between the owner of the mill and the prisoner. The opinion in that case, by Keith, P., says: "The utmost that can be

said of the proof is that it shows the burning of the mill as the act of an incendiary, that the prisoner had the opportunity to commit the crime, and that he cherished ill feelings towards the owner of the property destroyed. These circumstances were sufficient to cause the prisoner to be suspected of the crime, and rendered an investigation of it proper, to ascertain whether or not he had any connection with it, but * * * falls short of that degree of proof which warrants a conviction, or which will sustain a verdict under our statute, which requires us to consider the motion for a new trial as upon a demurrer to the evidence by the prisoner. There is no evidence whatever which connects the prisoner with the crime charged, and all that is shown in the record may be true (doubtless is true), and, at the same time, be entirely consistent with the innocence of the accused."

In *Pryor's Case*, 27 Grat. 1009, the proof was that the fire in question was the work of an incendiary; that the accused had made threats, which might have been reasonably construed as an intended purpose on his part to do the owner of the property burned an injury; tracks were found near the burned building which corresponded in size and other respects with the tracks made by the accused, and the evidence was that the tracks were made by one wearing a shoe similar to that of the accused. These tracks were traced in the direction of the accused's house for more than half a mile. In the opinion in that case it is said that the only circumstances in the case which tend to raise a suspicion against the accused are that a track was found on the morning after the barn was burned, which witnesses said they recognized as the track of the accused. This was considered by the court as only the opinion of the witnesses, and not proof; and upon the whole case it was considered that the facts proved were plainly insufficient to warrant the verdict of the jury, and a new trial was granted.

In the case at bar it is frankly and properly conceded that the facts as to the horse's tracks alone would not have been sufficient to justify a conviction, the tracks disclosing no peculiar formation of the hoof of the horse making them. We say that this was properly conceded, because it is admitted that between the time that the tracks were made and the following Saturday there was not only weather producing freezing at night and thawing in the day, but there had been a very heavy rain; and the uncontradicted proof adduced by the prisoner from experienced men (blacksmiths included) was that, unless there was some peculiar formation about the horse's hoof, which would make an impression in a track, it would be impossible to identify a track as having been made by any particular horse. As we have seen, there was no peculiar formation about

the hoof of the horse ridden by the prisoner on the evening of the fire, and it was simply a track that might have been made by any number of horses requiring a No. 2 shoe, as it is shown this horse required.

There is no direct evidence tending to prove that this fire was the work of an incendiary, and not the result of an accident, and there is no attempt whatever to prove that it could not have originated in any other mode than that of an incendiary fire.

"Where a building is burned, the presumption is that the fire was caused by an accident, rather than by the act of the accused, accompanied by a deliberate intent." 3 Cyc. 1003.

It is true, as counsel contend, and unfortunately so, "that, in the nature of things, it is generally extremely difficult to prove by direct testimony that an incendiary who sets fire to his neighbor's property actually started the conflagration," and this kind of proof is not required to convict of the crime of arson; but the coincidence of circumstances relied on to convict, however strong and numerous, must conclusively prove (1) the fact that the crime has been perpetrated, and (2) that the accused is the guilty party.

If we were to concede that the evidence in this case was sufficient to show that the fire was incendiary, that the defendant had an opportunity to commit the crime, and that he cherished ill feelings towards Carr, the owner of the property destroyed, this, according to the authorities which we have already cited, is not sufficient to warrant a conviction; and this, in our opinion, is all that the evidence for the commonwealth, considered under the rule governing its consideration, establishes. The most that can be said of the evidence is that it is sufficient to raise a suspicion of the guilt of the accused, but, in our opinion, it is plainly insufficient to warrant the verdict of the jury.

Therefore the judgment of the circuit court of Clark county, refusing to grant the prisoner a new trial, must be reversed, and the cause remanded for a new trial.

(108 Va. 528)

POWELL v. PIERCE.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

LANDLORD AND TENANT—COVENANTS TO RENEW OR PAY FOR BUILDINGS—SATISFACTION—ESTOPPEL.

1. Where a lease gave the lessor the option of renewal for a second term upon six months' notice, and the lessor covenanted that, if he did not renew, he would pay the lessee the value of buildings which the latter had agreed to build on the land demised or else the lessee should hold over as tenant from year to year, subject to the ordinary notice to quit at the end of the year, at which time the lessee should pay for the buildings, and the lessee remained in possession after the end of the first term without having received any notice of renewal, and so held until after the expiration of the period

of time which would have constituted the second term, the lessor was then entitled to possession on giving due notice to quit, without paying for the buildings, as the covenant to continue the lease or pay for the buildings was then satisfied.

2. The lessee, having failed, at the end of the first term, to exercise his right to refuse the second term on default of notice of renewal, waived such notice, and could not, after having accepted all the benefits of a formal renewal for the full period of the second term, assert that he was a tenant from year to year, and thus obtain pay for the buildings.

Error to Hustings Court of Portsmouth.

Forcible entry and detainer by one Powell against one Pierce. There was judgment for defendant, and plaintiff brings error. Affirmed.

R. C. Marshall and John W. Happer, for plaintiff in error. Burroughs & Bro., for defendant in error.

WHITTLE, J. The writ of error in this case is to a judgment of the court of hustings for the city of Portsmouth, rendered in behalf of the defendant in error, plaintiff in the trial court, in an action of unlawful detainer to recover possession of a lot, with the buildings and improvements thereon, situated in the city of Portsmouth.

It appears that by a lease bearing date October 4, 1867, the lot in question was demised to the defendant for the term of ten years from January 1, 1868, at a yearly rent of \$185, the lessee also covenanting to pay all taxes accruing upon the property during the continuance of the lease, and to erect upon the lot a two-story brick building, not to be worth less than \$1,500, and to be completed within six months from the date of the lease. It was further stipulated that at the expiration of the first term it should be optional with the lessor to continue the lease for a second term of ten years, on the same terms, upon giving six months' notice of his purpose to renew prior to the expiration of the first term. The lessor also covenanted, if the lease was not so continued, to pay the lessee the full value of the buildings erected by him upon the property in cash, the same to be valued by three disinterested persons, each party to choose one, and the two so chosen to select the third. It was further agreed that if, from any cause, the lessor should fail to pay for the buildings according to the terms of his covenant, the lessee should have the right to hold over as tenant from year to year, subject to the ordinary notice to terminate the tenancy at the end of any year, at which time the lessor should pay for the buildings; and until such payment no increase of rent was to be demanded, and the tenancy was in all respects to be according to the terms of the lease. It also appeared that the lessee took immediate possession under the lease, and erected the buildings in accordance with its terms.

The six-months notice of lessor's election to continue the lease was not given, but the

lessee remained in the quiet and undisturbed possession of the premises, and continued to pay taxes and the rent reserved, and the lessor continued to receive the rent, until January 1, 1903. At that date the lessee was in arrears for rent to the amount of \$252.50; and on July 1, 1902, the lessor served notice upon him that he was at that time a tenant from year to year, and that the tenancy would expire January 1, 1903, at which time he would be expected to surrender possession of the premises. Until the date of that notice nothing had been said by either party as to the termination of the tenancy, or that the premises were held on terms other than those prescribed in the lease; nor had any demand been made by the lessee with respect to paying for the buildings.

The error assigned is that by the terms of the lease the lessor was not entitled to recover possession of the premises until the buildings were paid for.

On the other hand, it is insisted by the defendant in error that this case is ruled by the decision of this court in *Pierce v. Grice*, 92 Va. 763, 24 S. E. 392.

Both cases involve the construction of building leases; the lessor was the same in each; the first terms of ten years' commenced at the same time; and the option to renew for a second term of ten years on the terms of the first lease was in both instances vested in the lessor, with a stipulation that upon the failure of the lessor to renew for the second term he should pay the lessee the value of the buildings. In both cases, at the end of the first term of ten years, nothing was said by either party with regard to renewing the leases; but the lessees continued to hold possession of the premises to the end of the second term, paying rent and taxes, and the lessor receiving the rent in the same manner as during the first term.

In *Pierce v. Grice*, after the expiration of the second term of ten years, the lessor brought an action of assumpsit against the lessee to recover the sum of \$300 annually, for the period of five years next preceding the institution of the suit, for the use and occupation of the buildings erected upon the leased premises. The ground upon which the defendant denied liability was that the buildings in question were his property, and that the plaintiff had, therefore, no right to recover any amount for their use and occupation. But the court held "that a contract

of lease for a period of ten years, with the option to the lessor at the end of that period to renew for another period of ten years upon like conditions, or else pay for the buildings erected by the lessee, is satisfied by one renewal for the period of ten years."

The plaintiff in error maintains that the lease in the case in judgment is to be distinguished from that in *Pierce v. Grice* in this: that in the latter case it was merely left optional with the lessor to continue the lease, while in this case the lessor was required to give six months' notice, previous to the termination of the first term, of his election to continue the lease. Attention is also called to the fact that upon a failure to give the required notice and pay for the buildings the lessee was to become a tenant from year to year, subject to the ordinary notice to terminate the tenancy at the end of any year, at which time the lessor was to pay for the buildings.

With respect to these contentions it is not perceived that the difference between the leases materially affects the question at issue. The failure of the lessor to give the six-months notice of his intention to renew the lease entitled the lessee, at the expiration of the first term, January 1, 1878, to decline to accept the second term, and to at once demand pay for the buildings. But he impliedly waived that notice, and, having accepted all the benefits that could have accrued from a formal renewal of the lease for the full period of the second term, he cannot now be permitted, by shifting his position, to reap the additional advantage of receiving pay for the buildings, on the theory that he was holding all these years as tenant from year to year. If it was his purpose to stand on the letter of his contract, fair dealing required that he should have repudiated responsibility under the second lease for want of notice, and insisted on his right to pay for the buildings when that right first accrued, and not after he had received the full benefits of the lease.

It may be said here, as was remarked in *Pierce v. Grice*, under substantially the same state of facts: "As the lease was continued for twenty years, the full period which the lessee was entitled to, the lessor had, at the expiration of that time, the right to the possession of the leased premises, including the storehouse."

For these reasons, the judgment complained of is without error, and is affirmed.

(103 Va. 540)

SAVAGE et al. v. BOWEN et al.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

CONTESTING OF WILL—PERSONS ENTITLED—ADMISSION OF EVIDENCE—DISCRETION OF COURT—ATTESTATION OF WILL.

1. The grantee of an heir of testator has such an interest in the controversy as entitles him to contest a will found and filed for probate after the grant, by which testator devised the land to the grantor's children.

2. The will by which testator devised land to the children of her son, S., not having been probated, S. took the land as heir, and afterward conveyed it to plaintiff. After the death of S. his wife filed the will for probate, and it was admitted on her evidence as attesting witness. Plaintiff then brought suit to set aside the will. *Held*, that for the purpose of affecting her credibility it could be shown by the wife of S. that she joined S. in the deed to plaintiff.

3. Allowing a witness to be recalled for the purpose of laying the foundation for impeachment by contradiction is within the discretion of the court.

4. It is within the discretion of the trial court to allow bank officers to testify as experts as to handwriting and the difference in inks used in writing and signing a paper.

5. In a suit to set aside a will the admission of evidence as to the enhanced value of the land affected is error.

6. Code 1887, § 2544 [Va. Code 1904, p. 1297], provides: no will shall be valid unless in writing signed by the testator, or by some other person in his presence, and by his direction, so as to make it manifest that the name is intended as a signature; and, unless it be wholly written by the testator, his signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time, who shall subscribe to the will in the presence of testator. *Held* that, if the attesting witnesses each signed the will in the presence of testator and of the other, it was not necessary that testator expressly requested each witness to sign the same.

Appeal from Circuit Court, Mecklenburg County.

Action by E. T. Bowen and another, administrators of George L. Savage, deceased, against the children of George L. Savage. From a decree for plaintiffs, defendants appeal. Reversed.

R. T. Thorp, C. T. Baskerville, and Reekes & Goode, for appellants. W. E. Holmes, A. L. Holladay, and E. P. Buford, for appellees.

HARRISON, J. Ann C. Savage, of Mecklenburg county, departed this life in July, 1883, leaving a will, whereby she devised her tract of land in that county to her grandchildren, who are the appellants here. This will was dated the 7th day of June, 1883, and was in the following words:

"In the name of God, Amen. After the Bowen debt becomes due and is settled, then I give to G. L. Savage's children my tract of land on which he, Bowen, has a deed; it contains sixty acres more or less. I want Geog's children to have my land and its benefits: this is my wish and will."

Then follows the signature of the testatrix and those of two attesting witnesses, namely, N. C. Bugg and T. A. Savage.

On the 20th day of January, 1902, the will, upon the testimony of the subscribing witnesses thereto, was admitted to probate in the county court of Mecklenburg county.

In March, 1902, E. T. Bowen and B. E. Cogbill, administrators of George L. Savage, deceased, who are the appellees here, filed their bill in the circuit court of Mecklenburg county, in which they allege that Ann C. Savage died intestate, leaving surviving her George L. Savage as her only child and heir at law, and that upon her death the tract of land mentioned in the alleged will descended to him as her sole heir at law and next of kin; that after the death of his mother George L. Savage and his wife had sold and conveyed the land to the complainant Bowen by deed with general warranty dated December 4, 1890, and that he is now the owner of the same, as will appear from such deed, duly executed, recorded, and filed with the bill as a part thereof; that the estate of George L. Savage is interested in the matter of this alleged will by reason of his general warranty in the said deed to the complainant Bowen. They further allege that the paper in question, admitted to probate in the county of Mecklenburg, is not the true last will and testament of Ann C. Savage, and that, in view of their interest in the land passing by such pretended will, they desire to impeach the same and have it set aside. The grandchildren of Ann C. Savage, who are the children of George L. Savage, deceased, are made parties defendant; and the prayer of the bill is that the alleged will may be declared null and void, and the complainants granted all the relief provided for under section 2544 of the Code of 1887 [Va. Code 1904, p. 1297], and such other further and general relief as the nature of their case may require.

The defendants demurred to and answered the bill, denying its material allegations, and insisting that the complainants had no interest in the estate of Ann C. Savage or the probate of her will, and further insisting that the controverted paper was the true last will and testament of Ann C. Savage.

The demurrer having been overruled, a jury was impaneled to try the following issue: "Whether any, and, if any, how much, of what was offered for probate at the January term, 1902, of the county court of Mecklenburg county, a copy of which, marked '1,' is filed with the plaintiffs' bill, is the last true will and testament of said Ann C. Savage." Upon this issue *devisavit vel non* the jury found for the contestants that the paper in question was not the true last will and testament of Ann C. Savage.

A motion to set aside the verdict was overruled, and the decree appealed from entered, adopting and approving the finding of the jury.

The demurrer was properly overruled. The allegations of the bill show such an in-

terest in the subject-matter as entitles the appellees to impeach the will. Controversies of this character usually arise between persons claiming as heirs at law on the one hand and as devisees under the contested will on the other. George L. Savage, as heir of Ann C. Savage, would have had the right to impeach the will, and no reason is perceived why those claiming under and through him are not entitled to his rights in that respect.

The second assignment of error is that the court erred in admitting improper testimony.

Without referring in detail to the several bills of exceptions embracing these objections, we are of opinion that there was no error in proving by the witness T. A. Savage the deed from George L. Savage and wife to the complainant, E. T. Bowen, filed with the bill, and that the witness T. A. Savage had united with her husband, George L. Savage, in this deed conveying the land in question to Bowen. This evidence was admitted solely for the purpose of affecting the credibility of the witness T. A. Savage, who was one of the attesting witnesses in the will; and the contestants had the right to ask any question which tended to test the accuracy, veracity, or credibility of the witness. *Va., etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 978.

We are further of opinion that there was no error in allowing the witness A. W. Bracey to be recalled for the purpose of laying the foundation to contradict him, and afterwards permitting the introduction of witnesses to contradict him. The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed except for palpable error. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

We are further of opinion that there was no error in admitting the testimony of the two bank officers and the clerk of the circuit court as expert witnesses. These witnesses were introduced to state whether or not, in their opinion, the body of the will, the signature thereto, and the name of the attesting witness N. C. Bugg, were written in the same ink as the name of the attesting witness T. A. Savage, and which, in their opinion, was the older writing.

They testify to their long experience in handling and examining written papers and in comparing signatures and writings. It is the practice in this state to admit such evidence for the purpose mentioned. Indeed, with our courts, located as they are for the most part in the country, no better evidence on the subject is attainable. It would be impossible in most cases to secure a chemist or manufacturer of ink to say which of two writings was the older, or written with the older ink. Whether a witness is quali-

fied to testify as an expert is largely a matter in the discretion of the trial court, and its ruling allowing a witness to testify will not be disturbed unless it clearly appears that he was not qualified. *Richmond Locomotive Wks. v. Ford*, 94 Va. 627, 27 S. E. 509.

We are further of opinion that it was error to admit the evidence objected to tending to show the enhancement in the value of the land in controversy since its purchase by the complainant Bowen. The sole issue before the jury was whether or not the controverted writing was the true last will and testament of Ann C. Savage. The value of the land could have no bearing upon that question, and the evidence tending to show its enhancement was irrelevant, and calculated to divert the minds of the jury from the real issue.

The third assignment of error relates to the court's action with respect to the instructions.

The instructions given by the court, taken together, are predicated upon the view that it is essential to the due execution of a will that the attesting witnesses should have been requested by the testator to act in that capacity. They convey the impression—which appears to have been the view of the court—that the request must have been express; and that, although every other statutory requisite may appear to have been complied with, the instrument will not be valid unless there shall also appear to have been an express request made by the testatrix to the witnesses to attest the same as and for her last will and testament, and that each should know that the other had been so requested.

The requirements for the due execution of a will are found in section 2514 of the Code, and are as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses; present at the same time; and such witnesses shall subscribe to the will in the presence of the testator—but no form of attestation shall be necessary."

The purpose of the statutory requirements with respect to the execution of wills was to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. To effectually accomplish this, the statute must be strictly followed. It is, however, quite as important that these statutory requirements should not be supplemented by the courts with others that might tend to increase the difficulty

of the transaction to such an extent as to practically destroy the right of the uninformed layman to dispose of his property by will.

As said by Judge Moncure in the case of *Parramore v. Taylor*, 11 Grat. 220: "The law of wills should be plainly written, and no room should be left for doubt or implication. It is a law of almost universal application, and must often be acted on by unlearned persons in a situation which precludes the possibility of obtaining professional aid. The most important family settlements, which are often postponed to the last day or hour of life, may depend upon an observance of its requisitions. How important, then, that it should impose no needless requisition; none that is not productive of some substantial good; and that it should plainly express what it means."

Prof. Minor, in his *Institutes*, says: "The statute is peremptory in requiring that the witnesses shall subscribe their names in the presence of the testator, and at his request." 2 Minor (4th Ed.) p. 1017.

A casual glance at the statute shows that there is no peremptory requirement that the will shall be attested at the request of the testator; indeed, the word "request" does not appear in the statute. If the learned author means that the plain implication from the language used is that the witnesses must be requested by the testator to attest the will, and it be true, as contended, that such request is necessary to the validity of a will, then the question arises, how is the fact that the request was made to be evidenced? We are of opinion that it may appear from the facts and circumstances surrounding the transaction, as well as by an express and formal announcement of the invitation.

In the case at bar it appears that T. A. Savage was the daughter-in-law of the testatrix, and that they lived together in the same house; that the will was executed in a small room, 10 by 12 or 14 feet. It further appears that the will was written by T. A. Savage at the earnest request of the testatrix. This witness, who was not asked if she had been requested by the testatrix to witness the will, testifies that when N. C. Bugg, who had been sent for to witness the will, arrived, she handed the will to the testatrix, who raised up in her bed without assistance, and signed the will in the presence of N. C. Bugg and herself; that, after the testatrix had signed the will, Mr. Bugg signed his name as witness, at the bed; and that she then took the will, and went over to the bureau, and signed her name under Mr. Bugg's at the bureau; that the testatrix signed and acknowledged the will in the presence of N. C. Bugg and herself; that N. C. Bugg signed his name thereto in the presence of the testatrix and herself, and that she signed her name thereto in the presence of the testatrix and N. C.

Bugg; that the testatrix, from the position occupied by her on the bed, could have seen the witness sign her name to the will at the bureau without changing her position, and simply by looking; that Mr. Bugg, from his position at the bed, could have seen her sign her name by simply turning his head; that the testatrix was in clear and strong mind at the time, mentally as sound as a dollar. The witness N. C. Bugg says that he was sent for to witness the will; that when he arrived the testatrix said to him: "Napoleon, I want you to witness my will. I want to give what I have to George's children, because I do not think he will take care of it;" that he did not see the testatrix sign the will, but that she acknowledged it as her will to him, in the presence of Mrs. T. A. Savage; that the testatrix raised up in bed, and her mind was clear and all right; that he went around to the foot of the bed and signed the will; that he signed it in the presence of Mrs. T. A. Savage and of the testatrix; that after he had signed it Mrs. T. A. Savage took the paper, and went with it to the bureau; that he could have seen her if he had turned his head and looked, but that he did not see her sign the paper; that the testatrix, from her position on the bed, could have seen Mrs. T. A. Savage sign the paper without change of her position, as the bureau sat in front of the bed. This witness further states that he does not remember anything being said about Mrs. T. A. Savage witnessing the will; that, if anything was said about it, he did not recollect it; that he did not know T. A. Savage was to be a witness; thought that Mr. Gregory was to be the other witness.

It is clear from the evidence that the testatrix knew that two witnesses to the will were necessary, and she and the two whose names are signed to the will were the only persons present at the time of the transaction. From this testimony, if true, the implication is plain that the witness T. A. Savage signed the will at the request of the testatrix, and the jury should have been instructed that, if they believed the same, it constituted all the proof necessary to show that T. A. Savage had been requested by the testatrix to attest the will.

The fourth instruction goes a step further, and tells the jury that it is necessary for them to believe from the evidence that the testatrix had authorized or requested T. A. Savage to subscribe her name to the paper as an attesting witness before she attested the same.

The vice in this instruction, in addition to the inference that an express request was necessary, is the proposition that such request must have been made at some time prior to the act of attesting the will. This position is not tenable. The request might have been made at the time the will was being subscribed as well as before; or the

testatrix might have acquiesced in and ratified the act of attestation at the time it was done. In this case the witness T. A. Savage wrote the will at the urgent request of the testatrix, and signed it as a witness in the plain view and conscious presence of the testatrix, without objection on her part; and yet the jury are told that, though they believe these facts, they must find against the validity of the will.

In addition to the general objection pointed out, the sixth instruction is erroneous, because it, in effect, tells the jury that at some time prior to the signing each of the witnesses must have known that the other was to be an attesting witness, and each must also have known that the other had been requested to act in that capacity. This instruction imposes unnecessary requirements, not called for or suggested by the statute, which would be likely to defeat the probate of many otherwise valid wills. The witness T. A. Savage, who wrote the will, may have been asked to attest it before N. C. Bugg came to the house, and, unless the request was repeated in his presence after his arrival, and at some time prior to the act of signing, the jury could not, under this instruction, find in favor of the validity of the will.

As said by Judge Moncure in *Parramore v. Taylor*, supra: "Nothing is more common or natural than for a scrivener to subscribe a will as a witness before his fellow witness is called in to join him in the attestation; or for a witness called on to attest a will, after doing so, to turn his back, and walk off, without noticing what is done by others afterwards."

In the matter of executing a will the statutory requirements must be complied with, but substance must not be sacrificed to form, and the end of the law to the means used for attaining it.

For these reasons the decree appealed from must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial of the issue *devisavit vel non* in accordance with the views herein expressed.

CARDWELL, J., absent.

(103 Va. 521)

GLENN v. WEST.

(Supreme Court of Appeals of Virginia. Feb. 2, 1905.)

QUIETING TITLE—RIGHT TO SUE—HOLDER OF EQUITABLE TITLE—TRUSTS—SUITS AGAINST TRUSTEES—PARTIES DEFENDANT.

1. One who has merely an equitable title to land, and who is out of possession, cannot maintain a bill to quiet title against a party in possession claiming under a tax title, between whom and himself no privity in title or right exists. He must first acquire the legal title from the trustee, and then bring ejectment against the adverse claimant.

2. The holder of an equitable title, who sues to procure the outstanding legal title of his trustee, cannot, in such suit, implead an adverse

claimant in possession, in order to quiet title against such adverse claimant.

Appeal from Chancery Court of Richmond.

Bill by William B. West against Joseph E. Glenn. From a decree in favor of plaintiff, defendant appeals. Reversed.

S. A. Anderson and W. H. Werth, for appellant. Long & West, for appellee.

HARRISON, J. The first assignment of error in this case calls in question the action of the chancery court of the city of Richmond in overruling the demurrer to the bill.

The bill sets forth that the house and lot in controversy was held by Barnett Wicker, as substituted trustee under a deed dated in 1851 for the benefit of Elizabeth Ann Probst for life, and at her death to be conveyed by the trustee to the child or children living at that time of the life tenant and Geo. W. Probst; that Elizabeth Ann Probst died in September, 1883, leaving Charles S. Probst as the only surviving child of herself and Geo. W. Probst; that the trustee, Wicker, died at some time prior to the year 1861, and that James F. Phillips had been appointed as his administrator c. t. a.; that no conveyance had ever been made of the house and lot to Chas. S. Probst, but that he had taken possession thereof as the equitable owner upon the death of his mother, and had, in July, 1886, sold and conveyed his title and interest therein to Willard E. Brown, who remained in possession until November, 1899, when he was ousted by the appellant, Joseph E. Glenn; that, after being so ousted, he (Brown) had conveyed, by deed dated March 28, 1902, his interest in the property to the appellee, Wm. B. West. The bill then alleges that the house and lot were listed for taxation in the name of B. Wicker, trustee for E. A. Probst, etc.; and that it had been sold for the delinquent taxes for the years 1876, 1877, and 1878, and bought in by the commonwealth; that, not having been redeemed as provided by law, the appellant had, in pursuance of the statute, made application for the purchase thereof, and that on the 28th day of November, 1899, the clerk of the hustings court for the city of Richmond had executed a tax deed conveying the property to the appellant, and that this tax deed had been duly recorded. It is further alleged that, inasmuch as the taxes for which the property was sold had accrued during the period of the life tenancy, the tax deed to the appellant did not "effect or divest" the title of the appellee, who was successor under the several conveyances mentioned to the right and title of the remainderman, Chas. S. Probst.

The bill further charges that the administrator c. t. a. of the trustee, Wicker, should be required to convey the house and lot in question to the appellee, but that after diligent inquiry his whereabouts could not be ascertained.

The prayer of the bill is that the appel-

lant, Jos. E. Glenn, and the administrator of Barnett Wicker, deceased, be made parties defendant; that the deed establishing the trust under which the property was held by Elizabeth and Chas. Probst be construed and enforced according to its purpose and effect; that the tax deed from the clerk to the appellant be set aside and annulled, and that the administrator of Barnett Wicker be required to convey the property to the appellee; that the appellant be required to account for rents and profits during the period of his occupancy of the premises; and for general relief.

Stripped of verbiage, the purpose of the bill is to procure the outstanding legal title in James F. Phillips, administrator of Barnett Wicker, trustee, and at the same time, by way of removing a cloud from that title, to have canceled and annulled the deed of a third party who is in possession, holding as purchaser from the commonwealth.

The complainant admits that he has only an equitable title to the property in question, and admits that the defendant is in possession under a tax title deed. The parties are strangers, and no privity in title or right exists between them, nor is any fact stated in the bill that connects the defendant in any way with the equity alleged by the complainant.

The doctrine is well settled that only those who have a clear legal and equitable title to land, with possession, have a right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. *Kane v. Va. Coal & Iron Co.*, 97 Va. 329, 33 S. E. 627; *Otey v. Stuart*, 91 Va. 714, 22 S. E. 518; *Smith v. Thomas*, 99 Va. 86, 37 S. E. 784; *Orton v. Smith*, 18 How. 263, 15 L. Ed. 333; *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010.

The bill being without equity against the defendant, his possession is good against all the world except the true owner. As the bill asserts no equity against him, he has the right to stand on his possession until compelled to yield to the true title. The plaintiff cannot deprive him of that right by neglecting to acquire the legal title, and upon the ground of his equitable title ask the aid of a court of equity. The plaintiff can turn the defendant out of possession only upon the strength of the legal title, which he must first acquire. Having done this, a court of law is the proper forum in which to bring his suit. *Fussell v. Gregg*, 113 U. S. 550-555, 5 Sup. Ct. 631, 28 L. Ed. 993, citing *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Parker v. W. Mfg. Co.*, 2 Black, 545, 17 L. Ed. 333; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246.

This is not, as contended, a case in which a court of equity, having acquired jurisdiction for one purpose, will, in order to avoid a multiplicity of suits, proceed to administer complete relief. The appellee is asserting in a court of equity a purely equitable claim against the personal representative of B. Wicker, trustee, and he cannot in such a suit implead the appellant, against whom he has no equity, for the purpose of enforcing a purely legal claim. The appellee has the right to prosecute his suit for the purpose of recovering the outstanding legal title to the property in question, but when that is secured his remedy is at law.

For these reasons the decree complained of must be reversed, and such decree entered here as the lower court ought to have entered, sustaining the demurrer and dismissing the bill as to the appellant, Joseph E. Glenn, but without prejudice to the rights of either party in such further proceedings as the appellee may be advised to take.

KEITH, P., absent.

(121 Ga. 714)

SWINDELL & CO. v. FIRST NAT. BANK.

(Supreme Court of Georgia. Jan. 27, 1905.)

CONTRACT—VALIDITY—ACTION ON NOTES—PLEA OF RECOUNPMENT—NEW TRIAL.

1. A contract between a bank and a lumber manufacturer, whereby the bank agreed to advance to him a certain sum of money, but the manufacturer was not bound to take the whole or any part of said sum unless he found it necessary in conducting his business, is unilateral, in that there was no binding obligation on the part of the manufacturer to borrow any definite sum of money.

2. Where, in a suit to recover on certain promissory notes, the sole defense is a plea of recoupment claiming damages for a breach of a contract which appears from the evidence to have been unilateral, a verdict for the plaintiff is demanded by the evidence, and any possible errors in admitting or excluding testimony relating to the breach of such contract, or any error in the charge of the court respecting the same, cannot afford cause for ordering a new trial.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by the First National Bank against Swindell & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

T. S. Hawes, Townsend & Dickenson, and Albert H. Russell, for plaintiff in error. Donaldson & Donaldson, Byron Bower, and A. G. Powell, for defendant in error.

EVANS, J. The First National Bank brought a suit against E. Swindell & Co., a partnership, to recover the amount due on certain promissory notes executed by that firm. The defendant filed a plea of recoupment, alleging, in brief, that the partnership was engaged in the manufacture of lumber, and required a large amount of money with which to conduct its business; that the partnership entered into a contract with the bank, whereby it was to advance to the firm \$20,000, as called for from time to time, in order that it might carry on its business successfully, the firm being induced by the bank to sever its financial relations with another banking institution and to get its advances from the plaintiff bank; that the bank did advance the money for which the notes sued on were given, but later, without cause or excuse, committed a breach of the contract by refusing to advance any further sums of money to the partnership, and that by reason of such breach the firm had been unable to profitably conduct its business, and had been damaged in the sum of \$10,000. On the trial of the case the defendant admitted the execution of the notes, and assumed the burden of proof. Evidence was introduced to the effect that an arrangement had been made with the bank whereby it was to advance money to the partnership to enable it to carry on its milling operations; but it affirmatively appeared from the testimony of the member of the firm who made this arrangement with

the bank, and upon whose testimony the defendant wholly relied as establishing the making of the alleged contract, that the partnership was "to take \$20,000, if necessary, to run [its] business," but not otherwise, and "more, if necessary, to the amount of \$30,000," it being optional with the firm whether it would "take the \$20,000 or not." The plaintiff denied entering into any such contract, and introduced evidence tending to show that it had merely advanced money to the defendant partnership on particular occasions, in the same way as it had done to other customers, relying on Swindell & Co. to reimburse it when remittances for shipments of lumber were received by that firm. The jury returned a verdict in favor of the plaintiff, and the defendant filed a motion for a new trial, therein complaining of various rulings and charges of the court. To the overruling of this motion the defendant excepts.

1. An essential requisite of a contract dependent on mutual promises for a consideration is that the obligations imposed should be reciprocal. One promise must need be the complement of the other. The performance of the promise or agreement to perform by one party enjoins a duty on the opposite party to execute his reciprocal obligation. If the contract be such that performance by one of the parties of his promise does not confer the right to demand the correlative obligation from the other, it is lacking in mutuality. The contract between the bank and the plaintiff in error, as averred in the plea of recoupment, was mutual and binding. By its terms the bank agreed to loan, within the lumber season, \$20,000, and the plaintiff in error agreed to borrow that sum. However, when the plaintiff in error undertook at the trial to establish the contract set out in this plea, the testimony offered failed in a vital particular. The member of the firm who claimed to have made the contract with the bank was the only witness offered to prove it. This witness testified that the bank agreed to loan \$20,000 to his firm, but his firm was not to borrow the money unless its business necessities required it. In the course of his testimony he said: "We were to take \$20,000, if necessary, to run our business; we were not to take it if not necessary; more, if necessary, to the amount of \$30,000. It was with us whether we were to take the \$20,000 or not." The contention of the plaintiff in error, as proven by this witness, might be elaborated after this manner: "We are not bound to borrow any money unless we need it, but the bank must keep in reserve the necessary funds to meet the demands of our business, up to the amount of \$20,000. If we do not happen to need it, we are under no obligation to borrow, and the bank cannot expect any remuneration for maintaining a state of readiness to meet possible sudden demands for money; yet, if the de-

mand is made, and the money is not loaned, the bank is liable to us in damages for a failure to make the exacted loan." A contract of this kind is manifestly unilateral, without consideration, and incapable of enforcement. *McCaw Manufacturing Co. v. Felder*, 115 Ga. 408, 41 S. E. 664, and authorities cited.

2. The execution of the notes sued on having been admitted, the plaintiff was entitled to recover, unless the plea of recoupment was sustained by evidence. As pointed out in the preceding division of this opinion, the evidence discloses that this plea was in fact based upon the violation of a unilateral contract. This amounted to no defense at all. Therefore the verdict was demanded by the evidence, and the court, with propriety, might well have directed a verdict for the plaintiff for the full amount sued for. Instead of so doing, the trial judge submitted certain issues of fact to the jury, and error is assigned upon certain portions of his charge. Exception is also taken to various rulings in admitting or excluding evidence relating to a breach of this unilateral contract. Inasmuch, however, as the verdict was demanded, any possible errors committed by the court in charging the jury or in ruling upon the admissibility of evidence touching the alleged breach of such contract afford no cause for ordering a new trial. *People's Bank v. Smith*, 114 Ga. 185, 39 S. E. 920.

Judgment affirmed. All the Justices concur.

(121 Ga. 590)

EDWARDS v. STATE.

(Supreme Court of Georgia. Jan. 23, 1905.)
INDICTMENT—NOL PROS—PLEA IN ABATEMENT
—DISTURBING DIVINE SERVICE.

1. Where the grand jury has found a true bill, and subsequently in their general presentments recommend that the indictment be not prosessed, it is within the discretion of the court whether this recommendation will be followed.

2. There is no error in overruling a plea in abatement to a bill of indictment based on the ground that one of the grand jury that found the bill had not resided within the county for the period of six months, when it is not made to appear that the accused did not have full notice and opportunity to make the question by challenge before the finding of the indictment. *Lascelles v. State*, 16 S. E. 945, 90 Ga. 347, 35 Am. St. Rep. 216; *Fisher v. State*, 20 S. E. 329, 93 Ga. 309.

3. An indictment charging the accused with having disturbed divine service at "New Hope Methodist Church (Colored)" is substantially supported by proof that the offense was committed at "New Hope African Methodist Episcopal Church," the same being a "colored" church known generally as the "New Hope Church," and not appearing to be incorporated. (Syllabus by the Court.)

Error from Superior Court, Putnam County; H. G. Lewis, Judge.

Elliott Edwards was convicted of disturbing divine service, and brings error. Affirmed.

W. T. Davidson, for plaintiff in error.
Jos. E. Pottle, Sol. Gen., and S. T. Wingfield, for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 590)

HARVEY v. STATE.

(Supreme Court of Georgia. Jan. 23, 1905.)

LARCENY—INDICTMENT—INSTRUCTIONS—EVIDENCE.

1. An indictment for simple larceny which charges the accused with stealing "one black and white male hog, of the personal goods" of a named person, sets forth a legally sufficient description of the stolen property. *Brown v. State*, 44 Ga. 300; *Rivers v. State*, 57 Ga. 28.

2. "The failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error upon a charge which is abstractly correct." *Roberts v. State*, 40 S. E. 297, 114 Ga. 450.

3. The evidence authorized the conviction of the accused, and the trial judge did not abuse his discretion in declining to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Coot Harvey was convicted of larceny, and brings error. Affirmed.

Claude Payton, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 561)

REEVES v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Jan. 27, 1905.)

FOREIGN CORPORATIONS—ACTIONS AGAINST.

1. A foreign corporation doing business in this state and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in this state or otherwise; and it is immaterial whether the plaintiff be a nonresident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state.

2. The case of *Bawknight v. Insurance Company*, 55 Ga. 194, upon a review thereof, is overruled.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by H. N. Reeves against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Andrews & Skeen, for plaintiff in error.
Dorsey, Brewster & Howell and Sanders McDaniel, for defendant in error.

COBB, J. This was an action in the city court of Atlanta, by a plaintiff whose place of residence does not appear, against a foreign railroad corporation which is doing business in the city of Atlanta. The defendant

was duly served with process according to the law of this state. The cause of action alleged is a tort to property committed in the state of Alabama, the tort consisting of an injury to a horse which was being transported from Harrisonville, Mo., to Atlanta, Ga., in a car of the defendant company. The petition did not allege that the contract of transportation was made by any officer or agent of the corporation in Georgia, or that the tort was connected in any way with orders issued by a Georgia officer, or from a Georgia office of the corporation. The court dismissed the petition on demurrer for want of jurisdiction, and the plaintiff excepted.

The fact that a corporation has no existence except in legal contemplation gave rise to the conception that its existence could not be legally recognized outside of the territorial jurisdiction of the lawmaking power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the courts holding that the corporation could not be sued in a jurisdiction foreign to that which gave it existence. While, under this view, as a matter of theory the corporation did not migrate, yet as a matter of fact its officers and agents did; and contracts were made in its name, and wrongs committed by its officers and agents, in territory far remote from that in which it was supposed to have its only legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery. The recognition of the hardship resulting from this rule brought about a modification of the rule to the extent that, where a foreign corporation located an agent and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that jurisdiction as to make it amenable to the processes of the courts thereof on all causes of action originating within that jurisdiction. The rule was then further modified to the extent that, where the corporation had an agent and was doing business in a foreign jurisdiction, it might be sued upon any transitory cause of action by a citizen of the state in which the corporation was thus doing business. And in this country it followed from this rule that, if a resident was allowed to bring this suit, any citizen of the United States would, under the Constitution of the United States, have a similar right to bring suit. *South Carolina Railroad Co. v. Nix*, 68 Ga. 572 (2), 580; *Barrell v. Benjamin*, 15 Mass. 354; *Cole v. Cunningham*, 133 U. S. 107, 113, 114, 10 Sup. Ct. 269, 33 L. Ed. 538. There are many years and manifold

changes in economic conditions between the old rule, which denied the right to sue a foreign corporation in personam outside of the jurisdiction of its creation, and the modern doctrine that the question of jurisdiction and suability is not so much one of citizenship as one of finding. See *Williams v. Ry. Co.*, 90 Ga. 522, 16 S. E. 303; *Dearing v. Bank*, 5 Ga. 497, 48 Am. Dec. 300. The development of the principle was by gradual steps, and necessarily involved the overturning of many old cases. The case of *Bawknight v. Insurance Company*, 55 Ga. 194, was decided during the transition period, and before the modern doctrine had been firmly established. It denied the right to sue a foreign corporation on a foreign cause of action. This decision seems to have been followed in *Central Railroad Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339. In the *Bawknight* Case it is to be noted that the original record shows that the plaintiff was a resident of the state of Florida, and at that time the fact of the nonresidence of the plaintiff was by several courts considered important; some holding that on a cause of action arising in another state a nonresident plaintiff could not sue a nonresident corporation, while others held that it was within the discretion of the court to allow or refuse such right to a nonresident. The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted. A corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction, and suits may be maintained against it in that jurisdiction if the laws of the same provide a method for perfecting service on it by serving its agents. From 1845 to the present time the law of Georgia has provided that service of process necessary to the commencement of "any suit against any corporation in any court," with certain exceptions, which are not material to this discussion, may be perfected by serving any officer or agent of such corporation, or by leaving a copy of the process at the place of transacting the usual and ordinary business of such corporation, if such place shall then be within the jurisdiction of the state in which the suit is commenced. Civ. Code 1895, § 1899. The language of this section is sufficiently broad to authorize the service of process in a suit against a foreign corporation that has a place of doing business in this state. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660 (1), 671. There are many cases decided by this court where it either expressly or tacitly recognized that a foreign corporation may be sued in this state in personam if lawful service can be perfected upon it. See *Selma R. Co. v. Lacy*, 43 Ga. 461; *Mayor of Macon v. Cummins*, 47 Ga. 326; *Nat. Bank v. Mfg. Co.*, 55 Ga. 36; *Dahlonega Min. Co. v. Purdy*, 65

Ga. 496; *Central R. R. v. Swint*, 73 Ga. 631; *Ala. R. Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649; *Watson v. R. Co.*, 91 Ga. 222, 18 S. E. 306; *Saffold v. Mtg. Co.*, 98 Ga. 785, 787, 27 S. E. 208; *South Carolina R. Co. v. Dietzen*, 101 Ga. 730, 29 S. E. 292; *Equity Life Ass'n v. Gammon*, 119 Ga. 276, 46 S. E. 100. It is true that in most, if not all, of these cases the cause of action arose in Georgia, and the plaintiff was a resident of this state; but neither of these facts was stressed as being material in any of the decisions, the jurisdiction, where the question of jurisdiction was directly raised, being maintained on the ground that service of process could be had upon the corporation for the reason that it was present in the state when it transacted business there through an agent duly authorized to represent it in reference to the business transacted, and that the statute of 1845 was broad enough to authorize service of process upon foreign corporations by serving the agent who within this state transacted the business of the corporation. A natural person not a resident of this state may be sued in this state if found within its limits, and served with process, although he may be simply passing through the state, and not transacting business of any character within the same. Civ. Code 1895, § 4954. And there is nothing in the law authorizing such a nonresident person to be sued here which makes the jurisdiction of the courts dependent upon whether the cause of action against him originated in this state. Presence within the territorial limits of the state gives jurisdiction to its courts, and a nonresident may be brought into court by service of process in the same manner that a resident would be brought in. In cases of foreign corporations a mere passing through the state of an officer, even though the head officer, would not give the courts of this state jurisdiction of the corporation. *Schmidlapp v. Ins. Co.*, 71 Ga. 246; *Associated Press v. United Press*, 104 Ga. 51, 29 S. E. 869; *Reynolds Co. v. Martin*, 116 Ga. 495, 42 S. E. 796. A corporation is not always present where its officers are, but it is present in any place where its officers or agents transact business in behalf of the corporation under authority conferred by it. The weight of modern authority seems to support the proposition that a foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. From among the numerous cases relating to this subject we cite the following: *Eingartner v. Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503,

59 Am. St. Rep. 859; *Nelson v. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; *Haggin v. De Paris*, L. R. 23 Q. B. D. 519; *Lhoneux v. Banking Corporation*, L. R. 33 Ch. Div. 446; *Dennick v. R. Co.*, 103 U. S. 11, 18, 26 L. Ed. 439; *St. Clair v. Cox*, 106 U. S. 350, 354, 1 Sup. Ct. 354, 27 L. Ed. 222; *Barrow Steamship Co. v. Kane*, 170 U. S. 109, 18 Sup. Ct. 528, 42 L. Ed. 964; *Knight v. R. Co.*, 108 Pa. 250, 56 Am. Rep. 200. See, also, *Reno on Nonresidents*, § 44 et seq.; *Minor's Conflict of Laws*, § 192. Of course, the right either of a nonresident or resident plaintiff to sue a foreign corporation upon a foreign cause of action is subject to this qualification: that it would not be against the policy of the state in which the suit is brought to enforce the cause of action arising outside of its jurisdiction. The comity or states would not require the courts of this state to enforce a cause of action when to do this would be contrary to the established policy of the state. Pol. Code 1895, § 9; *American Colonization Society v. Gartrell*, 23 Ga. 448. Subject to this qualification, foreign corporations may sue in this state on any cause of action, and may likewise be sued, provided they are found and duly served according to law. At common law service upon a corporation could be perfected only by serving its head officer, but whether service upon any other officer would be sufficient to bring the corporation into court is a matter to be determined by municipal law. The law of this state permits its own corporations to be brought into court by serving any officer or agent transacting the business of the corporation, and the statute is broad enough to allow service upon a foreign corporation in the same way. The state of Georgia either expressly grants to these foreign corporations the right to do business within its limits, or tacitly permits them to transact business here. They are allowed to open offices in this state, and here deal with our citizens and others who may be temporarily within its limits. The state protects them in the property which they hold. The courts of Georgia are open to them for the enforcement of any claim of any character which they may have against her citizens or citizens of other states passing through this state, subject only to the qualification above referred to. Can it be said that it is a hard rule, or a violation of any sound principle, that they should be put upon the same footing as to causes of action against them as our own corporations are placed upon by the law of the land? The case of *Bawknight v. Insurance Company*, supra, is in direct conflict with the modern authorities, and seems to us to be in conflict with the policy of the state as indicated by legislation which was in existence at the time the decision was rendered; and the reasons given by the learned judge for the conclusions in that case being not at all satisfactory, especially when viewed in the light of the present day, after ma-

ture consideration and reflection we have reached the conclusion that this case should be overruled, and the law of this state, so far as this question is concerned, put upon the sound principles promulgated in the well-considered cases in other jurisdictions above referred to. The record does not disclose whether the plaintiff was a resident or non-resident of the state, but this being now immaterial, and the foreign corporation which is defendant having been found and duly served according to law, the court has jurisdiction of the cause of action stated in the petition, notwithstanding it arose in another state, there being nothing in the cause of action which would make its enforcement contrary to the policy and law of this state.

Judgment reversed. All the Justices concur.

(121 Ga. 618)

SMITH v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

LARCENY AFTER TRUST—EVIDENCE.

1. An indictment for larceny after trust, charging that the accused, after having been intrusted with money for the purpose of paying it to "Dudley-Butts Lumber Co.," fraudulently converted the same to his own use, is sufficiently supported by evidence showing that the money which the accused converted was intended for payment to "Dudley-Butts Sash, Door & Lumber Company"; it appearing that the two names were applied to the same corporation, and that it was as well known by one name as the other. "The question is one of the identity of the party, * * * and not merely one of the identity of a name." *Jackson v. State*, 76 Ga. 568; *Rogers v. State*, 16 S. E. 205, 90 Ga. 463.

2. The motion for a new trial did not complain that the court committed any error of law, but was upon the general grounds that the verdict was contrary to law and the evidence. The evidence warranted a finding that the accused, a building contractor, was intrusted by the prosecutor with money to pay certain bills for materials; that these materials were used in the construction of houses that the accused had built under a contract with the prosecutor; that credit for the materials was extended to the prosecutor, and not the accused, and the accused so understood; and that the accused converted the money so intrusted to him to his own use and immediately left the county. The verdict of guilty of larceny after trust was, therefore, not contrary to the evidence.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; P. E. Seabrook, Judge.

H. C. Smith was convicted of larceny after trust, and brings error. Affirmed.

Cameron & Pinkston, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 706)

CRAWFORD v. GARRETT et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

MORTGAGE—FORECLOSURE—DAY OF SALE.

1. Where it was stipulated in a mortgage that upon default in the payment of the debt secured thereby the mortgagee, for the purpose of pay-

ing the indebtedness, was empowered to sell the mortgaged property at public outcry before the courthouse of a given county, after advertising the same for 30 days in the newspaper in which the sheriff of that county published his legal advertisements, the time for sale was fixed by the stipulation, and therefore it was not essential to a valid sale under the power that it be made on the day of the month designated by statute for public sales.

(Syllabus by the Court.)

Error from Superior Court, Clay County; H. C. Sheffield, Judge.

Action between J. A. Crawford and C. E. Garrett and others. From the judgment, Crawford brings error. Reversed.

J. D. & L. M. Rambo and W. A. Scott, for plaintiff in error. W. D. Sheffield and W. C. Warrill, for defendants in error.

FISH, P. J. The record in this case presents but one question for decision. It was stipulated in a mortgage that upon default in the payment of the debt it was given to secure the mortgagee was empowered to sell the mortgaged property at public outcry, in front of the courthouse of a given county, after advertising the same for 30 days in the newspaper in which the sheriff of that county published his legal advertisements. The question is whether a sale under such power, in order to be legal, had to be made on a public sales day—the first Tuesday in the month. Civ. Code 1895, § 4023, provides: "Power of sale in deeds of trust, mortgages and other instruments is to be strictly construed and must be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place and manner of the sale should be that pointed out for public sales." This section, as shown by the annotation, was codified from the decision in *Calloway v. Bank*, 54 Ga. 441. In that case there was a power of sale mortgage, in which it was stipulated that, if the indebtedness were not paid at maturity, the mortgagees were empowered to sell the mortgaged property, "after advertising the time, place and terms of sale for the space of ninety days in one or more newspapers published in the city of Macon, Georgia," etc. In rendering the opinion in the case, Judge McCay said: "We recognize the rule that such powers are to be strictly pursued, and to be honestly and fairly exercised. It is true, too, that if no time, place, or manner be pointed out in the deed, the mode ordinarily pointed out by law for public sales ought, in our judgment, to be pursued. This is in accord with the spirit of our law as indicated by the provisions for executors and trustees. Code 1895, §§ 2828, 2567. This deed clearly contemplates a public sale. It fixes the time; it provides for the advertisement, and fixes the time of publication; it leaves nothing open but the place, but, in effect, it also covers that." If the time of sale were fixed by the terms of the stipulation in the mortgage in that case, it is quite clear, we think, that the phraseology of the stipulation in the mortgage in the case now under consideration

has the like effect. Power to sell after advertising for 30 days was authority to sell on any week day for which the sale had been duly advertised for 30 days. It follows that a sale made by the mortgagee in accordance with the power, and on a week day other than the first Tuesday in the month, was not void. As the trial court ruled to the contrary, the judgment must be reversed.

Judgment reversed. All the Justices concur.

(121 Ga. 590)

GRAHAM v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

INTOXICATING LIQUORS—SALE TO MINOR—EVIDENCE.

1. Whether the liquor sold was intoxicating or not was a matter about which the evidence was in conflict, but that of the state was sufficient to warrant a conviction.

2. In a prosecution for the sale of liquor to a minor, under Pen. Code 1895, § 444, the burden is on the defendant to show written authority from the parent or guardian. *Reich v. State*, 63 Ga. 620; *Amos v. State*, 34 Ga. 531; *Hines v. State*, 18 S. E. 558, 93 Ga. 187 (2).

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

J. P. Graham was convicted of an illegal sale of liquor, and brings error. Affirmed.

T. L. Adams and Sam L. Olive, for plaintiff in error. T. J. Brown and L. C. Van Duzer, for the State.

LAMAR, J. Judgment affirmed. All the Justices concur.

(121 Ga. 721)

MOULTRIE LUMBER CO. v. JENKINS.

(Supreme Court of Georgia. Jan. 27, 1905.)

LABORER'S LIEN—FORECLOSURE—EXECUTION—COUNTER AFFIDAVIT—EFFECT—DISMISSAL.

1. An execution issued on the foreclosure of a laborer's lien operates as final process until arrested by a valid counter affidavit.

2. Where a client made the counter affidavit before a notary public, who, as attorney at law, was representing him in resisting the collection of the li. fa., the affidavit was void. *Wilkowski v. Halle*, 37 Ga. 631, 95 Am. Dec. 374; *Civ. Code* 1895, § 4417.

3. Such counter affidavit did not operate to convert the execution into mesne process returnable to court. There was no suit pending, nothing to amend, and the judge properly refused to consider the question as to the sufficiency of the levy.

4. There was no error in dismissing the proceeding.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Proceedings by J. C. Jenkins against the Moultrie Lumber Company to foreclose a laborer's lien. Judgment for plaintiff, and defendant brings error. Affirmed.

Jenkins made his affidavit to foreclose a laborer's lien under *Civ. Code* 1895, § 2816, for \$290.96, against the Moultrie Lumber

Company, claiming a lien upon all the personal property of the defendant, and particularly upon certain lumber and shingles therein described. Execution issued, and a levy was made on March 25, 1904. On March 30, 1904, a member of the defendant firm made a counter affidavit denying that the defendant was indebted to the plaintiff in any sum whatever. This affidavit was sworn to before Y. L. Watson, N. P. C. C. Ga. It does not appear where the affidavit was made, the caption simply stating the case, with the court to which it was returned. On the call of the case the defendant moved to dismiss the levy on the ground that some of the property was in Mitchell county and some in Worth county, and the return did not show that the sheriff of Mitchell county had levied on that which was only in Mitchell county. The plaintiff contended that the counter affidavit was void because sworn to and subscribed before Y. L. Watson, of counsel for the defendant, he being then and there attorney for the Moultrie Lumber Company. Thereupon the defendant offered in open court to have the affiant, who was then present in court, again swear to the same before a competent officer. This motion was denied by the court, and the counter affidavit was dismissed on the ground that the same was void, and not amendable. To this ruling the defendant excepted.

Bryan & Watson and Z. D. Harrison, for plaintiff in error. J. H. Powell, Ernest M. Davis, and R. J. Bacon, Jr., for defendant in error.

LAMAR, J. (after stating the facts). Where a laborer's lien has been foreclosed under *Civ. Code* 1895, § 2816, the execution issued thereon operates as final process. The office of the counter affidavit is to convert this final process into mesne process, and raise an issue which must then be passed upon by the proper tribunal. But until there is such an affidavit there is no case, nothing to be returned to a court, no pleading to be amended, and no issue to be tried. If, therefore, the counter affidavit was void, the defendant was not in a position, on this hearing, to have a ruling as to the validity of the foreclosure or levy. *Civ. Code* 1895, § 4417, expressly declares that "attorneys cannot take affidavits required of their clients unless specially permitted by law." The word "take" in this section was construed in *Wilkowski v. Halle*, 37 Ga. 631, 95 Am. Dec. 374, to mean that he cannot administer an oath to his client. The affidavit, being one which counsel was prohibited from certifying, was void. It should not have been received by the levying officer. It was ineffective to arrest the levy or to convert the final process into mesne process. There was nothing in court by which to amend. The case was properly dismissed.

Judgment affirmed. All the Justices concur.

(121 Ga. 621)

FISHER v. GEORGIA VITRIFIED BRICK & CLAY CO. et al.

(Supreme Court of Georgia. Jan. 28, 1905.)

INJUNCTION—CONTRACT WITH CITY—PERFORMANCE.

1. Where a petition for injunction sought to prevent the performance of a contract by the terms of which the defendant obligated itself to pave a street for a municipal corporation and to give a bond to keep the pavement in good repair for 10 years, the ground upon which an injunction was sought being that the contract was ultra vires and void, and there was evidence warranting a finding that the work of laying the pavement had been practically completed, and that the circumstances which would give rise to the necessity for enforcing the provisions of the bond were only remotely contingent, it was not error to refuse to grant an injunction.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Charles Fisher against the Georgia Vitrified Brick & Clay Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error. El. H. Callaway and C. H. Cohen, for defendants in error.

CANDLER, J. On June 23, 1904, the Georgia Vitrified Brick & Clay Company (which, for brevity, will be called the "Brick Company") executed a contract with the city of Augusta to do certain paving for the city and to do other specified work incidental to the paving. Prior thereto, Fisher, a stockholder and director of the brick company, had sought to enjoin the execution of the contract, on the ground that it was ultra vires; but an injunction was refused, and when the case was brought to this court the writ of error was dismissed. Immediately after the contract was executed the brick company began the work prescribed therein, and there was evidence that on October 21, 1904, the date when the present suit was filed, it had practically completed the paving and the other incidental work. By the terms of the contract the brick company was required to keep the pavement in good condition and repair for 10 years; to hold the city harmless from all claims for damages arising in connection with the work; to pay a forfeit of \$100 per day for each day that the contract might remain unfulfilled after the expiration of the time limit therein provided; and to give a bond in 45 per cent. of the amount of the contract, conditioned upon the faithful performance of the contract, and an additional bond to maintain the pavement in good condition for 10 years, and leave it in such condition at the end of that time. Fisher, having failed in his effort to enjoin the execution of the contract, instituted the present action to enjoin its performance. As before stated, when the suit was filed, the work of laying the pavement had been practically completed, the only dispute in the

evidence on this subject being as to how long would be required to consummate certain details necessary before the work could be turned over to the city. Nearly \$60,000 had been paid to the brick company on the contract, and there remained due a balance of only about \$7,000. The prayers of the petition were (1) that the brick company be enjoined from further performance of the contract, or any part thereof; (2) that the contract be canceled as ultra vires and void; (3) that the brick company and the city be required to settle and adjust their equitable rights growing out of the part performance of the contract, and the brick company thereafter released from any obligation arising thereunder; and (4) for general relief.

In the view that we take of this case it is not necessary to go into the question most urgently stressed by the learned counsel for the plaintiff in error, viz., the authority of the brick company, under its charter, to make the contract with the city of Augusta, the performance of which it is now sought to enjoin. Equity will not do a vain thing, and, of course, will not attempt to enjoin a thing that has already been done. The authorities for this proposition are too numerous to need citation. The evidence on the trial in the court below as to the exact status of the work undertaken by the brick company was somewhat in conflict; but the judge was authorized to find that the paving had been completed, and that the only thing remaining to be done before turning the work over to the city was to clear away the debris from the street, and a day's labor on a specified portion thereof. If this be true, the mischief, if any, has already been done; and the only thing left for the court to enjoin is the compliance with the condition of the bond given by the brick company to keep the street in repair for 10 years—a condition which at most is merely contingent. In the course of 10 years the street may or may not need repairing. There was evidence for the plaintiff to the effect that the paving was defective in certain particulars, which would materially shorten the duration of its usefulness, and that there would "necessarily be considerable risk in guarantying that the pavement shall be in good repair and have an unbroken surface at the end of ten years." On the other hand, the president of the brick company testified that the brick used in the pavement were of the best quality known; that the work of laying the pavement was properly done; that, "if the brick furnished by deponent's said company are of any value for paving material, there will never be any liability or expense incurred for the maintenance of said paving during the 10 years covered by said bond; that the only liability that can come upon said brick company as covered by said bond will necessarily be from the inherent defects and shortcomings of the brick furnished and used in constructing said pavement"; and "that

said bond does not amount to anything more than a guaranty of the quality of said bricks for street paving." In any view of the evidence, the bond has already been made, and the only thing that can now be enjoined is the performance of its condition. The circumstances which will give rise to a necessity for such performance are, even according to the evidence for the plaintiff, only possible—not threatened, or even definitely probable. Here, again, equity will not interfere. The injury sought to be prevented must be more than speculative or contingent; it must be threatened. *Rounsaville v. Kohlhelm*, 68 Ga. 668, 45 Am. Rep. 505; *Mayor v. Mitchell*, 74 Ga. 377; *Bacon v. Walker*, 77 Ga. 338. This is a well-settled principle of equity jurisprudence, and its application to the case at bar, in our opinion, settles adversely to the plaintiff in error his right to the relief sought.

Judgment affirmed. All the Justices concur. LAMAR, J., disqualified.

(121 Ga. 604)

PIKE v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

SEDUCTION—EVIDENCE—INSTRUCTIONS.

1. Evidence that the mother of the prosecutrix was dead, and that the defendant was the father of the child, was not irrelevant; nor is there any showing that it was harmful, or that any improper argument was based thereon.

2. The extracts from the opinion in *O'Neill v. State*, 11 S. E. 856, 85 Ga. 383, were correct statements of law, and there would have been no error in giving the same. But there is no assignment that the same principle was not otherwise given. An inspection of the charge found in the record shows that the court covered the principles involved in the requests to charge.

3. There was no error in giving the other charges complained of, nor in any other ruling on the trial.

4. The evidence, while conflicting, was sufficient to sustain the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Albert Pike was convicted of crime, and brings error. Affirmed.

On the trial of Pike for seduction the prosecutrix testified "that she lived with her father, stepmother, brother, and sister." Over objection of the defendant that the same was irrelevant, she was allowed to testify that the mother was dead. Over like objection she was permitted to testify that the defendant was the father of her child. Having been convicted, Pike moved for a new trial on these grounds, and also because the court refused written requests to give in charge certain propositions which were in the language of this court in *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856 (2), (4); because the court charged that the jury must inquire from the evidence whether it was by persuasion and promises of marriage that the defendant accomplished his purpose, and

whether she was an unmarried female, and virtuous; because the court charged that, if the prosecutrix was consenting to have sexual intercourse with the defendant, not under any promises of marriage, or from being overcome with persuasion, but was as willing to the intercourse as the defendant, then the defendant would be guilty of fornication; and because the court charged that it was for the jury to say how far the impeachment of any of the witnesses was successful. The motion was overruled, and the defendant excepted.

W. S. Humphreys and S. S. Bennett, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

LAMAR, J. (after stating the facts). 1. In prosecutions for seduction there is peculiar and special absence of any need for appeals in order to secure conviction. On this, as on all other hearings, the defendant is guaranteed a fair trial. Considering the peculiar character of the issue involved, the state is under the obligation to check, rather than inflame, passions aroused by the natural sympathy of those before whom the hearing in this class of cases is had. In the present record, however, there is no assignment that the testimony, if irrelevant, was harmful, and no suggestion that any improper use was made of the fact that the mother of the young woman was dead. But, looked at from the rules of evidence, we cannot hold that the testimony was irrelevant. It was admissible, not for the purpose of forming a basis of appeal to the sympathies of the jury, but to show her situation and environment, and to what extent she was protected or subject to the persuasions of the defendant. So, too, as to the evidence relating to the paternity of the child. The fact of its birth was a circumstance in proof of the fact that there had been sexual intercourse. This had to be established before there could be any conviction for seduction. Besides, the defendant subsequently admitted that on many occasions he had sexual intercourse with the prosecutrix. This admission is an answer also to the assignment of error on the use of the words "accomplished his purpose" by the court in its charge. It was not cause for granting a new trial that the court instructed the jury that they were to determine whether that admitted and "accomplished" connection had been brought about by persuasion and promises of marriage, or whether she consented because she was as willing to the intercourse as the defendant.

2. It is not always proper in a charge to use the language in the opinion of an appellate court. But, even if the paraphrase of the abstract propositions announced in the *O'Neill Case*, 85 Ga. 383, 11 S. E. 856, was such as could be used as a part of the instructions to the jury in the particular case on trial (*Jones v. State*, 90 Ga. 628, 16 S. E. 380 [4]), the judge elsewhere gave the prin-

ciple of the request. He instructed the jury that they must first find that the prosecutrix was a virtuous, unmarried female; that in determining that question they might consider any facts or circumstances tending to show a debauched mind and behavior; that it would not take direct or positive evidence of previous connection with some other person; any evidence that would satisfy their minds beyond a reasonable doubt that she had parted with her virginity would be sufficient.

3, 4. There were witnesses who were offered to impeach several witnesses for the defendant. There was no error in instructing the jury that it was for them to say how far the impeachment of any witness was successful. The motion for a new trial assigns as error that the judge instructed the jury that if the defendant, by promises of marriage or persuasion induced the female to have carnal connection, etc. But when his attention was called to this matter he stated that if he said "or" instead of "and," it was a slip of the tongue; that the jury must find, under the charge in the indictment, that the female yielded because of promises of marriage and persuasion. He thereby not only cured the error, but so emphasized the necessity of showing both promises and persuasion, as to help, rather than injure the defendant. We find no error requiring the grant of a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 551)

RHODES v. CITY OF LOUISVILLE.

(Supreme Court of Georgia. Dec. 21, 1904.)

MUNICIPAL BONDS—VALIDATING ACT—MISNOMER—NOTICE—PUBLICATION—SERVICE ON MUNICIPALITY.

1. The misnomer of the municipality in a petition to validate bonds under the act approved December 6, 1897 (Acts 1897, p. 82), does not vitiate the judgment of confirmation, where it appears that the officers of the municipality acknowledged service of the petition and answered the same under oath in its true corporate name, and the judgment of validation also sets forth the proper corporate name of the municipality.

2. The published notice prescribed in section 6 of said act is designed to give the citizens of the municipality, county, or division information of the pending proceeding, and a substantial compliance with the statute is sufficient.

3. Where the validating proceeding, which was served on the municipality, was described in the published notice by the caption, "State of Georgia vs. The Town of Louisville, Jefferson County," and there is no municipality in Jefferson county having the corporate name of the "Town of Louisville," but there is a municipality in that county with the corporate name of the "City of Louisville," such notice is sufficient to notify the citizens of the city of Louisville of the proceeding to validate the bonds of that municipality.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; A. F. Daley, Judge.

Action by E. H. Rhodes against the city of Louisville. Judgment for defendant, and plaintiff brings error. Affirmed.

G. H. Howard, for plaintiff in error. B. T. Rawlings, Sol. Gen., and Phillips & Phillips, for defendant in error.

EVANS, J. The plaintiff in error, in behalf of himself and other taxpayers of the city of Louisville, Ga., seeks to enjoin the city of Louisville, Ga., from selling certain bonds of that municipality, authorized by an election held in that city, and which were validated by the judge of the superior court of the Middle circuit. He attacks the judgment of validation on two grounds: (1) That the petition of the solicitor general to validate the bonds was brought against the town of Louisville, Ga., and not the city of Louisville, Ga.; and (2) that the published notice in the newspaper was of a proceeding against the town of Louisville, and not against the city of Louisville. For these reasons it is contended that the judgment of validation is void. On the hearing the facts were agreed upon, and the court denied the injunction. The exception is to the refusal of the injunction.

The judgment of validation was based on a petition of the solicitor general of the Middle circuit, reciting that "an election was held in the city of Louisville, Georgia; that the purpose of said election was to ascertain whether or not said town would issue bonds." The allegations as to the election, the result thereof, the amount, number, maturity of the bonds, and the rate of interest, the service of notice of the result of the election on the solicitor general within 20 days of declaring the result, were made with all the fullness and precision required by the act approved December 6, 1897. Acts 1897, p. 82. The first paragraph of the petition declared that the city of Louisville was the county site of the county of Jefferson. The prayer of the petition was "that an order be granted requiring said I. F. Farmer, mayor, and W. L. Phillips, L. R. Farmer, J. B. Polhill, J. O. Little, and J. F. Brown, aldermen, of the town of Louisville, to show cause before the judge of the superior court of the Middle circuit on the 22d day of July, 1904, why said bonds should not be validated." The judge of the superior court granted an order requiring the "defendants" to show cause before him at a named place and on a given date why the bonds should not be validated. Service of the petition and order was acknowledged by the mayor and council of the city of Louisville. Notice of the hearing of the petition was published in the proper gazette. The notice was a copy of the order of the judge, with the caption: "State of Georgia vs. The Town of Louisville, Jefferson County. Petition to validate bonds." The city of Louisville, by its officers, the mayor and councilmen, filed its answer under oath,

whereupon the court passed the following order: "Wrightsville, Ga., July 22, 1904. In the Matter of the Validation of Bonds of the City of Louisville, Ga. The above-stated matter coming on for hearing before me this day, as provided by order previously passed upon the petition of B. T. Rawlings, solicitor general of the Middle Judicial Circuit of Georgia, and the sworn answer of the mayor and city council of the city of Louisville, Ga., on this, the 22d day of July, 1904, after duly considering said petition and answer, together with the certificate of the clerk of the superior court of Jefferson county that the required notice has been published duly as required by law, it is ordered that the bonds, as contemplated in said petition, be issued, and that the issuance of said bonds is hereby confirmed and validated as prayed for."

1. Under the ruling in *Augusta So. R. Co. v. City of Tennille*, 119 Ga. 804, 47 S. E. 179, and cases therein cited, if the city of Louisville had not answered, but, on the other hand, had appeared to object to the proceeding because it was not brought against it in its corporate name, the court would have dismissed the petition. However, the city of Louisville answered the petition, and by its answer admitted that it was the corporation about to issue the bonds described in the petition, and for the validation of which the petition was brought. Notwithstanding the proceeding was against the town of Louisville, Ga., the petition recited the election was had in the city of Louisville, Ga. The city of Louisville answered this petition, and a judgment was rendered against the city of Louisville, eo nomine, confirming and validating the issuance of the bonds. If a person is sued by the wrong name, but is served, and pleads to the action, he is bound by the judgment. Even though a petition be defective for want of proper parties, yet, if such parties do in fact file their answer, such defect is cured. *Mayor & Council of Brunswick v. Finney*, 54 Ga. 318. So far as the misnomer of the municipality is concerned, the appearance of the municipality and pleading in its true corporate name cured this defect in the pleading. The city of Louisville is as effectually bound by that judgment as if the petition had been directed against it in the first instance.

2, 3. The notice prescribed in the sixth section of the act of 1897 (Acts 1897, p. 84) is designed to give information to the citizens of the municipality, county, or political division about to issue bonds of the pending proceeding to confirm and validate the same. Provision is made for any citizen desiring to contest the validity of the issue to become a party to the proceeding, and to sue out a writ of error to the Supreme Court from the judgment of validation. By this procedure the Legislature has declared the sound policy of determining, by judicial inquiry in advance of the sale, the validity of

the bonds about to be placed on the market. The machinery employed is a proceeding in the name of the state against the municipality, county, or political division intending to issue bonds, wherein is alleged a compliance with the constitutional requirements relative to incurring bonded indebtedness. The judgment of the superior court is against the municipality, county, or political division, confirming the issuance of the bonds as in compliance with the statutes and the Constitution. As an additional safeguard against possible carelessness or collusion, the clerk is required to publish in a gazette having general circulation in the territory affected notice of the time of hearing the application to validate the bonds. A substantial compliance with this section of the act is all that is required. No judgment in personam is sought against the individual citizen, but he is permitted and invited to investigate the proceeding, and to resist the legality of the proposed bond issue. If the notice is sufficient to put the individual citizen on notice that the municipality, county, or political division of which he is a resident is seeking to validate bonds, and the time of hearing of the proceeding, the statutory purpose has been subserved. The caption of the notice published by the clerk was of a proceeding against the "Town of Louisville, Jefferson County." Judicial notice will be taken of the corporate name of a municipality. Without proof, the courts know that the city of Louisville is a municipal corporation located in Jefferson county, and that there is no such corporation therein as the town of Louisville. This knowledge will be imputed to every citizen of the city of Louisville. It frequently happens that the corporate name of a town or city is more elaborate and comprehensive than the name of the town or city as used in ordinary speech. Sometimes the corporate name is styled the mayor and aldermen of such a town or village, and yet outside of legal procedure the full corporate name is rarely, if ever, used. No citizen of the city of Louisville could have been misled by designating his municipality as the town of Louisville. Only recently the election had been held, two-thirds of the qualified voters had expressed their concurrence in the proposition to bond the municipality, and acts of such notoriety would at once suggest to a citizen of the city of Louisville that the published notice had reference to that municipality.

It will be observed that there is a wide distinction between the necessity of alleging the correct name of the corporation as a party defendant in a legal action and the general notice to the public of a pending action against the corporation. In the first instance it is essential to the validity of the judgment that the defendant corporation be styled by its correct name; otherwise the judgment would not be against it. But where a notice is required to be given to the

public of a pending proceeding against a corporation the niceties of exact pleading are not demanded, and a notice sufficiently descriptive of the corporate name, so as to be easily and readily applied to the legal name of the corporation, will be deemed a substantial compliance. Accordingly, we hold that the published notice was a substantial compliance with the validating act of 1897.

Judgment affirmed. All the Justices concur.

(121 Ga. 651)

**CENTRAL OF GEORGIA RY. CO. v.
PRICE.**

(Supreme Court of Georgia. Jan. 27, 1905.)

**INJURY TO EMPLOYÉ—DANGEROUS PREMISES—
KNOWLEDGE OF PLAINTIFF—INSTRUCTIONS.**

1. It is reasonably to be expected of a railway employé, who is engaged in the performance of duties in and around one of the freight-yards of his master, that he shall avail himself of his opportunities to familiarize himself with his surroundings, and note the location of a culvert passing under an embankment along which tracks are laid, to the end that he may guard against the obvious danger of falling into the culvert in the event his duties call him in the nighttime to the point where it is situated; and if he be injured by falling into the same he cannot be heard to say that though he knew of its existence, and, notwithstanding he had previously had full opportunity to acquaint himself with its relative location, he did not in point of fact know exactly where it was, and that his master should have warned him of the danger of falling into it before sending him at night to attend to his duties on and around an engine which had been left directly over the culvert.

2. The charge of the court touching the right of the plaintiff to recover was not adjusted to the law and facts of the case on trial, and unjustly deprived the defendant company of one of its main defenses; irrelevant and prejudicial evidence was admitted over its objection; and these and other errors committed should have persuaded the trial judge to grant a new trial irrespective of the question whether the evidence sufficiently supported the finding of the jury.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Sam Price against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & Wimberly and J. E. Hall, for plaintiff in error. J. H. Hall and Clawson & Fowler, for defendant in error.

EVANS, J. This was an action for damages brought by Price against the Central of Georgia Railway Company, he having sustained personal injuries while in its employ as a locomotive fireman. The case made by his petition was, in brief, as follows: About half past 12 one night he was called on by the defendant company to go out on an engine about to leave the city of Macon, and went to the place in the company's yard where his engine had been stationed by other

employees whose duty it was to bring the engine from the roundhouse. The steam was on, and the engine was fully prepared to go out on what was known as the "South-western Division" of the company's road. He undertook, as it was his duty to do, to make an examination of the engine for the purpose of seeing that certain parts of it were in good order, and while in the discharge of this duty he stepped into an opening or hole on the premises of the company, very near the track on which the engine was standing, and received the injuries complained of. He had no reason whatever to apprehend that this opening or hole existed, and before he fell into the same did not see it, and could not, by the use of ordinary care on his part, have discovered the same. He was at the time in the full discharge of his duty at the place where the company required him to be, and was himself entirely free from fault. He had "no knowledge or notice of the existence of said hole or opening at that place." It was an opening in a culvert or waterway that passed under the tracks of the company at that place, and its presence was absolutely unknown to him up to that time, and he had no means of discovering it before he fell into the same. The hole was on one side of the engine, right at the point where the cow-catcher stood, and in passing around the cow-catcher for the purpose of examining the engine, he stepped into the hole; it being impossible for him, under the conditions existing at the time, to have discovered its presence in time to prevent the injury. He fell a distance of some 15 feet into a culvert or sewer, and as a result of the fall both bones of his left leg, just above the ankle, were broken, and badly splintered.

The plaintiff charged that the employees of the company were negligent in unnecessarily placing the engine so near the opening in the top of the sewer, and in failing to give him notice of the presence of this opening; that the company was negligent in sending him, without warning, to an unsafe place in which to perform his duties, when it had every means of discovering the dangerous locality, and he did not have equal means of discovering the same before he was injured; that the defendant was negligent in permitting or causing the opening to be made on its premises, and in not taking any means to give petitioner or any other employé notice of the existence of this dangerous place on its premises, where he was required to go in the performance of his work; and that the company was also negligent in failing to place any sort of guard or railing about said excavation in order to prevent persons going upon the premises of the defendant from falling into the same, and being thereby injured. The railway company filed an answer, wherein it made a denial of the facts upon which the plaintiff relied as showing negligence on its part. On the trial,

however, the jury returned a verdict in favor of the plaintiff, and it is to the refusal of the court to grant a new trial that the company excepts.

Before undertaking to deal with the several assignments of error set forth in the motion for a new trial, it may be well to give a brief summary of the evidence touching the character of the hole or opening into which the plaintiff fell, and its situation relatively to the track on which the engine was placed and other points in the immediate vicinity. This particular track was a "spur," which, together with other tracks, passed along an embankment some 14 feet in height. Through this embankment extended a brick culvert, built some time prior to the year 1875. From 1886 up to the time of the plaintiff's injury on February 17, 1902, this culvert had remained in the same condition, save for necessary repairs, in which it was on that date. The stream running through this culvert passed through the company's yards under about ten freight tracks, under its coal chute, then under two passenger tracks, and then under two tracks leading to its shopyard. At several points, between different sets of tracks, the ravine through which this stream ran was exposed to view, the coal chute being one of these points. The spur track on which the plaintiff found the engine on the night of his injury was the outside track, and was laid so close to the edge of the culvert that there was no passageway between the end of the cross-ties and the edge of the opening; nor was this opening guarded by any railing extending from one side of the embankment to the other. There was, however, a free passageway between this track and the one next to it, the spaces between the rails and those between the several tracks at this point where they crossed the culvert having been filled in with earth and cinders. The exposure on the outer side of the spur track, caused by its proximity to the edge of the culvert, was an open and obvious one. By day the situation could have been taken in at a glance by the casual observer. At night, one passing along the railway embankment might, in the darkness, fail altogether to observe the ravine on one side where it was not spanned by the culvert, especially if one were not familiar with the locality. It was customary for the company's hostlers, in the discharge of their duty, to bring engines from the roundhouse, and to place such of them as were to go out on the Southwestern Division upon this spur track. Engines had sometimes been placed below the culvert, though they were usually left the distance of a block or so above. On the night of the plaintiff's injury three engines were brought from the roundhouse and placed on this track in readiness for the engine crews; that on which the plaintiff was expected to go being the last in line, so that the others might start out ahead. It was left over the culvert, and the engineer and

the plaintiff were expected to locate it and take it in charge.

1. On the argument before us, counsel for the plaintiff in error very strenuously insisted that the evidence was not such as to support a verdict in favor of Price. The theory upon which he sought to recover was as follows: He was sent for in the middle of the night, and called on by the company to serve as fireman on engine 1001. He was expected to find this engine, and, after locating it, to go around it, and see whether or not it was in good order. Such being his duty, the company was bound to place the engine at a place where he could reach it in safety and perform his duty of inspection. Instead of choosing a safe place, the company's hostler left the engine over the culvert, negligently failing to observe the open ravine at this point, of which he had, or ought to have had, knowledge. Plaintiff received no warning of the dangerous locality in which the engine had been left; did not know of the existence of any culvert in that part of the company's yard; had never before been called on to take an engine so far down on the spur track; and had no reason to apprehend that the engine had not, as always theretofore, been left in a place of safety. After arriving at the company's yards, he went in search of engine 1001, going along the embankment between the spur track and that next to it; and, after locating the engine, he got on it, changed his clothes, attended to minor duties inside the cab, and then took his hammer, wrench, flambeau, and oil can, and started on his tour of inspection, getting off the engine on the same side from which he had boarded it, which was the side next to the adjoining track on the left. After examining the left side of the engine, he got in the middle of the track and looked at the headlight, turned it down, and then got on the pilot in order to reach and adjust the "spark slide." From the pilot he stepped to the outer rail, then upon the cross-ties, and started to go around on the right side of the engine, but fell over the culvert into the ravine below, sustaining the injuries of which he complains.

If this represents the real truth of the matter, then it was for the jury to say whether or not the plaintiff, on this occasion, acted with due caution and circumspection. But the contention of the company is that such does not constitute the entire truth surrounding the occurrence, even though the plaintiff gave a truthful account of the manner in which he received his injury. His stout avowal that prior to the night of February 17, 1902, he had no knowledge of the existence of a culvert in that immediate vicinity, and was unfamiliar with that particular locality, is as strongly denied by the defendant company. Moreover, it insists that, even if the plaintiff did not have actual knowledge of the precise location of this culvert and open ravine in its yards, his

opportunities for knowing all about the same had previously been such that he cannot now be heard to say that the company was under any duty to give him notice thereof, to the end that he might, on the night of February 17th, have watched out for and discovered the culvert, and have observed that engine 1001 had been placed directly over it. The defense thus interposed was such as, if sustained, would defeat any recovery by the plaintiff. *Blackstone v. Railway Co.*, 112 Ga. 762, 38 S. E. 79, and cases cited. And this defense was supported by testimony, which demonstrated that, if Price did not have actual knowledge of the existence and precise location of the culvert, his opportunities for knowing had been such that the law would impute knowledge to him.

On the argument before this court, counsel for the defendant in error conceded Price's general knowledge of the existence of the culvert, and the open ravine running through the company's yard, but contended that, relatively to the place where the locomotive was stationed, he did not know of the precise location of the culvert. The law charges the servant with what he ought to have known, and will not excuse him for not knowing in case he has been negligently unobservant. Price had worked in the yards of the defendant company first as section hand, afterwards as fireman on a switch engine, and at the time of the injury was employed as fireman on a freight train. His employment as fireman on a switch engine extended over a period of about two years. He had previously worked as a section hand about six months. During this time there had been no change in the physical appearance of the culvert. With such opportunities for obtaining knowledge of the location of the culvert, the conclusion is irresistible that an ordinarily prudent man, under similar conditions, would have known of its location.

2. On the trial the plaintiff sought to contrast his diligence on the night of his injury with that of the company's hostler. To this end the plaintiff showed that he walked down the railroad embankment between two tracks, and was therefore not in a good position to discover the culvert, whereas the hostler's post of duty was on the right-hand side of the engine, from which side he had full opportunity to observe the culvert as he approached it with the engine. The court charged the jury that should they believe from the evidence that the place in which the engine was left was not reasonably safe, and the company knew, or ought by the exercise of ordinary care to have known, of the danger, and "that Sam Price did not know of it at the time of the alleged injury, and had not equal means of knowing such danger, and could not, by the exercise of ordinary care and diligence at the time of the alleged injury, have known of such danger," then the plaintiff would be entitled to re-

cover. The court further instructed the jury that "the conduct of the parties to this case, the conduct of Sam Price, the conduct of the railway company as represented by its officers, servants, and employes, is to be tested by ordinary care and diligence at the time of the alleged injury—that care and diligence which every prudent man would exercise under the same or similar circumstances and conditions." The complaint made of these instructions is that the court thereby limited the jury to a consideration of the conduct of Price on the night of the injury, and entirely ignored the company's defense that he might previously have known all about this culvert, and ought to have become perfectly familiar with its location, even though he may not have had any actual knowledge concerning it prior to the time he was hurt. The criticism is just. Moreover, we find, upon inspecting the entire charge of the court, that in it no reference whatever was made to this aspect of the company's defense, but that it was wholly deprived of all benefit of the same.

The court further committed error in charging upon the assumption that the capacity of the plaintiff to earn money might have increased, there being no evidence to warrant such a charge.

Over the objection of defendant's counsel, the plaintiff was permitted to elicit from the company's engineer the statement that when, shortly before the plaintiff's fall, the witness had himself boarded the engine, he did not know it was over the culvert. This testimony was not only irrelevant, but prejudicial to the defendant. The engineer may or he may not have been a man who exercised ordinary care and diligence. His conduct on that night was not the subject-matter of investigation, and his failure to note the culvert could not illustrate the issue whether or not the plaintiff might, in the exercise of reasonable care, have discovered that the engine was over the same.

Complaint is made that the plaintiff was also allowed to show that at the end of a culvert near the coal chute the company had erected a guard rail. This evidence was certainly incompetent for the purpose of showing a quasi admission on the part of the company that the erection of guard rails in such places was a necessary precaution against injury to its employes. *Ga. So. & Fla. Ry. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; *Portner Brewing Co. v. Cooper*, 116 Ga. 175, 42 S. E. 408. The defendant had, it is true, brought out the fact that the plaintiff knew of that culvert at the coal chute, with a view to showing that he must have observed that the stream passing under the culvert into which he fell ran all the way across the company's yard, and that he was familiar with its general direction and its location relatively to other points in the yard, including the place where he usually boarded his engine. Had there

really been any pretense by the plaintiff that he did not know of the existence of a culvert at the point where he met with his injury, or at a point other than at the coal chute, the testimony objected to might have been competent to show that one seeing the condition of affairs at the coal chute would not be put upon notice that, if there were other culverts, there might be danger in attempting to go around an engine or car standing over one of them, because of the absence of guard rails. But as the plaintiff admitted he knew of the existence of the culvert across which the spur track ran, and that he had previously had full opportunity to observe that there was no guard rail erected along its outer edge, this testimony threw no light on any issue in the case, and ought to have been excluded as wholly irrelevant.

Exception is taken to certain charges of the court on the ground that by inadvertence the judge used language calculated to impress the jury that the imputation of negligence against the company was to be accepted as an established fact. Another charge, touching the measure of damages, is also criticised on the ground of inaccuracy of expression. We shall not, however, undertake to pass more specifically upon these assignments of error, as, if another trial be had, the court will doubtless so frame its charge as not to subject it to like criticisms.

Judgment reversed. All the Justices concur.

(121 Ga. 709)

CRUM v. BRAY, Marshal.

(Supreme Court of Georgia. Jan. 27, 1905.)

MUNICIPAL CORPORATIONS—ORDINANCES—HOGS RUNNING AT LARGE.

1. Under the general welfare clause in the charter of a municipal corporation, the mayor and council have authority to pass an ordinance providing that hogs shall not be allowed to run at large within the corporate limits.

2. In order to make such an ordinance effectual, such mayor and council have authority by ordinance to empower the marshal to seize and impound such hogs as are at large in the streets, and to provide that, after giving notice to the owner by advertising for 10 days, he shall, at the expiration of that time, sell such hogs unless they are redeemed by the owner's paying the costs of feeding, and an impounding fee of 50 cents for each hog.

3. Such an ordinance is not illegal, as providing for the forfeiture of the animals impounded.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by D. A. R. Crum against G. B. Bray, marshal. Judgment for defendant, and plaintiff brings error. Affirmed.

Crum & Jones, for plaintiff in error. E. F. Strozler, for defendant in error.

SIMMONS, C. J. The city council of Cordele passed an ordinance which provided:

"It shall be unlawful for hogs to run at large upon the streets and sidewalks of the city of Cordele, the same being declared a nuisance. All hogs found at large upon the streets and sidewalks of said city * * * shall be impounded by the marshal or policeman in a suitable pound and, when so impounded, shall be advertised at the post office and council chamber by the marshal for ten days, at the end of which time they shall be sold if not redeemed by the owner. The owner of said hog or hogs shall pay all cost of feeding and fifty cents additional as an impounding fee for each hog so impounded." Under this ordinance the marshal of Cordele seized and impounded one suckling pig, of the value of 50 cents, belonging to Crum, the plaintiff in error. Thereupon Crum brought an action of trover against the marshal to recover the pig. The marshal set up the foregoing ordinance in justification of his acts, and stated that he stood ready to deliver the pig to the plaintiff upon the payment of the impounding fee prescribed in the ordinance. The case was heard by the trial judge upon the petition and answer, and he held that the marshal was in lawful custody of the pig, and that plaintiff was not entitled to recover it without paying the fees prescribed in the ordinance. To this ruling, Crum excepted.

The assignments of error in the bill of exceptions are very meager and indefinite, but in his argument the plaintiff in error contended (1) that the mayor and council had no power to declare a thing a nuisance which was not a nuisance at common law or by statute, and that even this right was limited by the charter of Cordele; and (2) that the enforcement of the ordinance providing for the sale of hogs amounted to a forfeiture of his property without due process of law.

1. We think it clear that, under the general welfare clause in the charter of the city of Cordele, the mayor and council had authority to pass the ordinance above set out. This clause of the charter is similar to that occurring in most of the charters granted to municipal corporations by the Legislature of this state. This general welfare clause confers broad and general powers upon the city authorities. Under such a clause the municipal authorities can pass any reasonable ordinance for the health, safety, protection, comfort, and good government of the people of the city which is not in conflict with the special provisions of the charter or with the Constitution and laws of the state. The charter of Cordele did give special power to remove, as nuisances, certain buildings, chimneys, fences, and porches which should become dangerous to the public or an obstruction of the city streets, but this special enumeration was clearly not intended to be exhaustive of the powers of the city with regard to declaring what should be considered nuisances or with

regard to abating nuisances. Under the general welfare clause the city had authority to provide for the abatement of any nuisance not dealt with in the provisions of the charter which gave these special powers. Even at common law, permitting hogs to run at large upon the streets of a city is a nuisance. *Hellen v. Noe*, 25 N. C. 493. It is therefore clear that the city authorities had full power and authority to pass an ordinance making it unlawful to permit hogs to run at large upon the streets and sidewalks of the city.

2. Incidental to this power, and in order to make such an ordinance effectual, the city had authority to provide that the marshal should seize and impound hogs found at large upon the streets and sidewalks, and, after 10 days' advertisement, to sell the same unless they were redeemed by the owner's paying the cost of feeding and the impounding fee of 50 cents.

3. To the question whether the ordinance amounted to a forfeiture, we have devoted considerable time and study. After reading many authorities, we have come to the conclusion that the municipal authorities have power to seize and impound animals unlawfully upon the streets, and have them sold for the purpose of paying the reasonable cost of feeding and the impounding fee, provided there is sufficient notice given. This view is sustained by the great weight of authority as found both in decisions and in textbooks. Ordinances providing for the seizure and sale of animals found at large, without any provision for notice to the owner, have been held to amount to a forfeiture, especially where the proceeds of the sale were disposed of in some way other than by deducting the expenses and paying over the remainder to the owner of the animals sold. So ordinances providing for the sale of the animals, and the deduction from the proceeds of the reasonable impounding fee and expenses, and for a fine imposed upon the owner, without notice or judicial inquiry, have been held invalid as depriving the owner of the right of trial, and as forfeiting or confiscating his property without due course of law. Very different from such cases is the present one. Here there is no fine imposed as a penalty upon the owner of the impounded hog. His property is seized because it is upon the streets, and has become a nuisance which should be abated. Its detention for 10 days is itself one form of notice to him—a form of notice similar to that given in attachment. The ordinance also provides for public advertisement for 10 days, which is also constructive notice. There is no forfeiture of the property, but it is sold to pay the reasonable expenses unless the owner prefers to redeem it by paying those expenses. If the seizure and detention of the hog are unlawful, the owner is not without his remedy by due course of law. He can be fully heard, and have all material

questions judicially determined by an action of trover, which, in this state "may be employed in any case in which replevin, detinue, or trover could be used at common law." *Mitchell v. Georgia & A. Ry.*, 111 Ga. 762, 36 S. E. 971, 51 L. R. A. 622. This is, indeed, the remedy pursued by the plaintiff in error in the present case. For these reasons, we think the contentions of the plaintiff in error unsound.

One of the ablest opinions upon this subject which we have found is that of Valentine, J., in *Gilchrist v. Schmidling*, 12 Kan. 263. That case arose under an ordinance which provided for the impounding of cattle running at large in the streets of the city in the nighttime, and which in other respects was similar to that involved in the present case. In the opinion Justice Valentine said: "Now, it will be admitted that, where the law or an ordinance provides that the owner of cattle shall, in addition to the cost of taking them up, impounding and keeping them, pay for the damages they may do to private individuals while unlawfully running at large, the question of damages and the amount thereof can be determined only by judicial investigation, and generally in a suit between the parties interested. *Bullock v. Geomble*, 45 Ill. 218. And it will also be admitted that, where fines or forfeitures or anything of a penal or criminal nature or character is imposed, the question of whether the owner of the stock is liable for the same can only be determined by judicial investigation. Const., Bill of Rights, § 10; *Poppen v. Holmes*, 44 Ill. 360 [92 Am. Dec. 186]; *Willis v. Legris*, 45 Ill. 289. It will also be admitted that some notice of some kind must be given, in order to render a sale of the property valid. *Rosebaugh v. Saffin*, 10 Ohio, 32. And it will also be admitted that the ordinance must be authorized by law or the charter of the city in order to be valid. See, as sustaining these propositions, *Rockwell v. Nearing*, 35 N. Y. 302, 307; *Campbell v. Evans*, 45 N. Y. 356; *Happy v. Mosher*, 48 N. Y. 313; *Ames v. P. M. L. D. & B. Cos.*, 11 Mich. 147 [83 Am. Dec. 731]. But when nothing is attempted to be imposed upon the owner of the stock as damages or penalty, but only the reasonable cost of taking up, impounding, and keeping the same, and sufficient notice is provided for, and the ordinance authorized by the city charter, it is believed that no court has ever held the law, or the ordinance founded thereon, to be unconstitutional or invalid, although the sale may not be made under judicial process, although there may be no provision for a judicial investigation, except the general remedies to determine whether the law or the ordinance has been complied with, and although the notice provided for may not be a personal notice, but only a notice by publication or by posting. The ordinance which we are now considering does not attempt to impose upon the owner of the

stock any damages or penalty, but provides merely for payment for taking up, impounding, and keeping the stock, and for posting notices of sale and making the sale. * * * Only the charge for taking up and impounding applies in the present case, for no other charges had yet accrued when the cattle were replevied, and no other charges were required from the owner before the officers were willing to surrender the cattle to the owner. Every charge authorized by said ordinance must be considered as remedial, in contradistinction to penal, and therefore does not come within those decisions which declare that a penalty can be imposed by judicial determination. Cattle running at large in the nighttime in a city are supposed to be a nuisance, or at least such a thing is supposed to be against the best interests of the public; hence they are taken up and impounded, not as a penalty against the owner, but as a protection to the public; and the fees are fixed merely as reasonable compensation for the trouble of taking them up and keeping them, and not in any sense as a penalty. These fees immediately become a lien upon the cattle, and can only be discharged by payment, and the owner has no right to the possession of his cattle until he makes this payment and discharges this lien. This is as far as this case goes, and this far the law and the ordinance must be valid beyond all doubt. No sale was attempted to be made in this case, and no fees were charged, except for taking up and impounding the cattle. Whether the officers could have made a valid sale of the cattle if they had not been replevied, it is not necessary now to determine, but yet we think they could. The officers were required to keep them at least six days before they offered them for sale, and could not then or at any time sell them without first giving at least three days' notice of the sale by posting notices in at least three public places in said city. * * * That ordinances and proceedings similar in their main features to those we are now considering are valid, we would refer to the following authorities: *Hellen v. Noe*, 25 N. C. 493; *Whitfield v. Longest*, 28 N. C. 268; *Goosefink v. Campbell*, 4 Iowa, 296; *Gilmore v. Holt*, 4 Pick. 257; and *Rockwell v. Nearing and Campbell v. Evans*, supra. Such proceedings as these do not determine a man's rights without giving him his day in court. He has his action of replevin from the very moment that the officers take possession of the property until the statute of limitations bars such an action to try the legality and validity of the proceedings whereby his property is taken. And if any irregularity or injustice should intervene that would render the taking up of the property void, the same would also render the sale, and all other proceedings connected therewith, void. And all this could be shown in an action of replevin. For instance, if some enterprising city marshal or other officer should take up

a cow in the daytime, or should take her from an inclosure in the nighttime, or should go beyond the city limits to find her, these facts could be shown in an action of replevin, and after the sale as well as before, and would render the sale, and every proceeding connected therewith, or with the taking up of the cow, void. Thus the owner of the cow or the owner of any other stock taken up and impounded has 'for injuries suffered' an ample remedy by due course of law.' In addition to the case cited above, see *Mayor, etc., Cartersville v. Lanham*, 67 Ga. 753; *Mayor, etc., Knoxville v. King*, 7 Lea, 441; *Moore v. State*, 11 Lea, 35; *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; *City of Waco v. Powell*, 32 Tex. 258; 2 Cyc. 437-439; 1 Dillon, Mun. Corp. (4th Ed.) §§ 348-351.

Judgment affirmed. All the Justices concur.

(121 Ga. 587)

WOLFE v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)
CRIMINAL LAW—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

1. There being nothing in the evidence or the statement of the accused which would authorize a finding that the act charged was brought about by his criminal negligence, a charge to the effect that criminal negligence would supply the place of intent was calculated to mislead the jury, and it was error to refuse to grant a new trial on an assignment of error complaining of such charge.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Tom Wolfe was convicted of assault with intent to murder, and brings error. Reversed.

Claude Payton, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

COBB, J. The accused was tried for the offense of assault with intent to murder, and convicted of the offense of shooting at another. He assigns error upon the refusal of the court to grant a new trial. The evidence for the state abundantly authorized, if it did not demand, a verdict of assault with intent to murder. The statement of the accused authorized a verdict of acquittal, upon the theory that the shooting was accidental. The judge instructed the jury in several places in his charge that if there was no intent to kill, but if the shooting was the result of criminal negligence, the accused would still be guilty. Error is assigned upon those portions of the charge, upon the ground that there was no evidence of criminal negligence. Under the state's evidence the shooting was with an intent to kill, and under the statement of the accused the shooting was the result of an accident unmixed with negligence. In such a case a charge that criminal negligence will supply

the place of intent is calculated to mislead the jury, and a new trial should have been granted because of such instruction. The motion for a new trial contains numerous other assignments of error, some of them relating to matters which will probably not occur upon another hearing. No error seems to have been committed in the admission of the evidence which was objected to, and the other portions of the charge excepted to do not seem to be subject to the objections made thereto.

Judgment reversed. All the Justices concur.

(121 Ga. 579)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CRIMINAL LAW—PROCEDURE—NEW TRIAL—MOTION IN ARREST.

1. Where one convicted of a criminal offense made a motion in arrest of judgment and a motion for a new trial, and insisted upon both motions, it was not error for the judge, over the objection of the movant, to first hear and decide the motion for new trial, though the filing of the motion in arrest was prior to the filing of the motion for new trial. And where, under such circumstances, a new trial was granted, it was not error to then dismiss the motion in arrest, as the effect of the grant of the new trial was to set aside the judgment.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Lige Williams was convicted of crime, and from an order denying a motion in arrest he brings error. Affirmed.

R. M. W. Glenn and Payne & Payne, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 708)

McKENZIE v. POUND.

(Supreme Court of Georgia. Jan. 27, 1905.)

EXECUTION—EXCESSIVE LEVY—SALE—TITLE ACQUIRED.

1. This was a suit in ejectment, the plaintiff claiming under a sheriff's deed made in pursuance of a sale under a tax execution. It appeared that the property was worth \$1,500 or \$2,000, and that it was sold under an execution for \$17.81. It also appeared that the defendant in execution owned at the time two other lots, less valuable than the one in controversy, and that the lot levied on was susceptible of division, though the value of the whole would have been impaired by such a division. Held, that the levy of the execution was grossly excessive and void, and the purchaser at the sale acquired no title as against the owner or those claiming under him, and it was not error to direct a verdict for the defendant. Jones v. Johnson, 60 Ga. 260; Roser v. Georgia Loan Co., 44 S. E. 994, 118 Ga. 181.

(Syllabus by the Court.)

Error from Superior Court, Dooley County; Z. A. Littlejohn, Judge.

Action by G. H. McKenzie against B. B. Pound. Judgment for defendant, and plaintiff brings error. Affirmed.

49 S.E.—44

E. F. Strozier and Whipple & McKenzie, for plaintiff in error. J. T. Hill, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(121 Ga. 580)

ERWIN v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. On the trial of one charged with the illegal sale of intoxicating liquors, it was error to admit evidence of such a sale by the accused more than two years prior to the date of the accusation, and to charge the jury that they might "consider these transactions as circumstances in arriving at a proper verdict."

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

John Erwin was convicted of an illegal sale of intoxicating liquors, and brings error. Reversed.

James B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

CANDLER, J. Judgment reversed. All the Justices concur.

(121 Ga. 587)

RICHARDS v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

1. No error of law was complained of, and the evidence was sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Moses Richards was convicted of crime, and brings error. Affirmed.

J. S. Peebles, Jr., and E. L. Stephens, for plaintiff in error. David W. Meadow, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 579)

ADCOCK v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The evidence authorized the verdict, and there was no error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Mollie Adcock was convicted of crime, and appeals. Affirmed.

James B. Conyers, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concur.

(121 Ga. 693)

MELTON v. CAMP.

(Supreme Court of Georgia. Jan. 27, 1905.)

WILL—CONSTRUCTION—NATURE OF ESTATE—HEIRS—LIEN OF JUDGMENTS.

1. Testator died, leaving his property to his wife for life or widowhood, and giving her power to dispose of it during such time, with remainder over, of all that might be undisposed of upon her death, to his lawful heirs, or, if she remarried, then to his lawful heirs; including her as one of such heirs. *Held*, (1) that the widow took an estate for life or widowhood, and also a power of disposal; (2) that the testator's lawful heirs at the time of his death, other than his wife, took a vested remainder in the property, subject to be defeated by the widow's exercising her power of disposal, and subject, in the event she remarried, to having her included among the remaindermen; (3) that, where one of such heirs died after the testator died, and the widow subsequently died without having remarried or disposed of the property, children of such deceased heir could take only through him, and his interest was subject to the lien of judgments against his estate.

(Syllabus by the Court.)

Error from Superior Court, Marion County; W. B. Butt, Judge.

Garnishment proceedings between E. E. Melton and Effie Camp. Judgment for Camp, and Melton brings error. Reversed.

Cameron & Pinkston and W. D. Crawford, for plaintiff in error. John C. Butt and J. J. Dunham, for defendant in error.

SIMMONS, C. J. Judgment was obtained and *fi. fa.* issued for about \$475 against the administrator of the estate of W. T. Melton, deceased. The estate being insolvent, the plaintiff in *fi. fa.* sued out summons of garnishment, and had the same served upon the administrator *de bonis non cum testamento annexo* of Mitson Melton, deceased. The garnishee answered that, as administrator, he had in his hands \$140.29, arising from the proceeds of the estate of the testator, which was the amount W. T. Melton would have taken under the provisions of the will of the testator. The garnishee further stated in his answer that the heirs of W. T. Melton claimed title to this fund, not subject to the lien of the judgment, and he prayed that these heirs be made parties. Mrs. Ella Melton, the widow of W. T. Melton, and Mrs. Effie Camp, his daughter, claiming to be his only heirs at law, asked to be made parties, and filed a claim to the fund in the hands of the garnishee. They were made parties, but subsequently the name of Mrs. Melton was stricken, and the claim allowed to proceed in the name of Mrs. Camp alone. The case was submitted to the judge, without the intervention of a jury, upon the will of Mitson Melton and an agreed statement of facts. The judge decided in favor of the claimant, and the plaintiff in *fi. fa.* excepted.

The will of Mitson Melton disposed of his property as follows: "I do hereby give and bequeath all my estate both real and personal and all things to me belonging to beloved wife Julian Melton, to be by her con-

trolled, managed and disposed of with full power, liberty and privilege of selling and buying, trading and trafficking as seems right and proper to her, trusting all to her discretion as long as she remains a widow, or in case she should never marry any more, then during her natural life, and at any time while the property is under her control she may help any of the children that may marry and be in need, but this shall be at her discretion, but if she should marry again then the entire remainder or balance of the property shall be equally divided among my lawful heirs and she shall be entitled to receive an equal part with the other heirs, and at her death the entire balance or remainder shall be equally divided among my lawful heirs." From the agreed statement of facts it appeared that the testator, Mitson Melton, had died April 24, 1881, leaving his widow and eight children, one of whom was W. T. Melton; that the widow did not remarry, but died in March, 1902; that W. T. Melton died in November, 1901, leaving as his only heirs at law his widow and Mrs. Camp, the latter being his only child; that each of the distributive shares of the estate of Mitson Melton in the hands of the administrator at the time of the service of the summons of garnishment was \$140.29.

We think that the court below erred in holding that Mrs. Camp was entitled to a share of the estate of her grandfather, free of the lien of her father's debts. The will is inartificially drawn, but its intention seems clear. The testator's widow took an estate for life or widowhood, and also a power of disposal. Indeed, neither party to this case could travel, except on the theory that the widow took such an estate, and not a fee. The will expressly limits her estate to one for life or widowhood, and therefore the addition of the power of disposal does not enlarge this estate into a fee. *Wooster v. Cooper*, 53 N. J. Eq. 682, 33 Atl. 1050; *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, 609; *Shaw v. Hussey*, 41 Me. 495. It is true, the words "as long as she remains a widow" and "during her natural life" follow the words giving the power of disposal, but this does not make them apply any the less to the estate given. They affected both the quantum of interest in the estate and the power of disposal. *Stuart v. Walker*, 72 Me. 146, 39 Am. Rep. 311. A power is not property, but a mere authority, and an absolute power of disposal is not inconsistent with an estate for life only. The gift of such power will not enlarge the life estate previously given, but confers an authority in addition thereto. The widow therefore took an estate for life or widowhood.

The limitation over to the lawful heirs of the testator was neither an executory devise nor a contingent remainder. It was to a class, and the objects thereof must be determined in this case as of the time when such will took effect; that is, at the death of the

testator. These objects were certain at that time when the widow's estate commenced, and there was some one to take possession eo instanti upon the termination of the particular estate. The remaindermen were certain, and the particular estate had to be determined by a necessary event—the remarriage or death of the widow. There was therefore no contingency about the remainder, and there was nothing about the limitation over to make it conflict with the rules of law so as to require it to be construed as an executory devise. It is true, the remainder might be defeated by the widow's disposing of the property, but this did not make it a contingent remainder in a legal sense. The persons to take were certain and ascertained at the time of the testator's death, and the happening of the event was necessary. The uncertainty as to the mere quantum of property to be possessed did not make the remainder contingent. The remainder was subject to be divested, in whole or in part, by the widow's disposing during her widowhood of the whole or some part of the property left by the testator, but this contingency did not deprive the remainder of its character as vested. Until the happening of the divesting contingency, the remainder had all the incidents of an indefeasible interest, and when the contingent event was no longer possible the estate became absolute. *Sumpster v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274. An able discussion of a will much like that here under consideration will be found in *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23. See, also, *Wiley v. Gregory*, 135 Ind. 647, 35 N. E. 507; *Rail v. Dotson*, 14 Smedes & M. 176.

The widow's estate could be terminated either by her death, in which case the heirs of the testator took all of the property that was left, or by her remarriage. In the latter event the widow was entitled to share as an heir in the property remaining. This, however, did not change the character of the remainder left to the heirs at law of the testator. *Wilbur v. McNulty*, 75 Ga. 458. There was a vested remainder to them, but in the event of her remarriage the class was to enlarge to receive her, and she was to share as one of the class. The particular estate was to end, and she to take her place as one of the remaindermen.

W. T. Melton was one of the heirs at law of the testator at the time of the latter's death. He was therefore one of the remaindermen, and had a vested remainder in his pro rata part of the property devised—this remainder subject to be divested or defeated by the widow's exercising her power of disposal, and his pro rata interest subject to diminution by the widow, in the event of her marriage, being classed as one of the remaindermen. The widow died without having remarried, and some, at least, of the property remained undisposed of by her. The remainder had not been defeated by a dis-

posal of the property, and the property remaining went to the remaindermen. W. T. Melton had died prior to the death of the widow, but, as his remainder had been a vested one, his interest belonging to his estate. Mrs. Camp could take no interest in it under the will, but merely as one of the heirs of W. T. Melton, her father. As the property came through his estate, it was subject to the lien of the judgment against his estate, and the court below erred in holding that Mrs. Camp took it free of her father's debts.

Judgment reversed. All the Justices concur.

(121 Ga. 699)

LUTTRELL et al. v. WHITEHEAD.

(Supreme Court of Georgia. Jan. 27, 1905.)

DEED—DESCRIPTION—EJECTMENT—POSSESSION—EVIDENCE—DOWER—ASSIGNMENT.

1. The description of the land in a deed must be sufficiently certain to afford means of identification. A deed purporting to convey land, which is so indefinite in description that the land is incapable of being located, is inoperative either as a conveyance of title or as color of title.

2. Possession of land cannot be established by family repute.

3. In an action of ejectment between an administrator of an intestate and one not a privy in estate it is error to admit in evidence the application of a former administrator for leave to sell the land of his intestate.

4. The description of land assigned as dower must be sufficiently certain to locate the premises before third persons will be affected by the dower proceedings.

(Syllabus by the Court.)

Error from Superior Court, Harris County; W. B. Butt, Judge.

Action by A. H. Whitehead, administrator, against W. H. Luttrell and others. Judgment for plaintiff. Defendants bring error. Reversed.

J. H. Martin and J. B. Burnside, for plaintiffs in error. Hatcher & Carson, for defendant in error.

EVANS, J. This was a common-law action of ejectment. The title relied on by the plaintiff was a deed from James W. Echols to John T. Whitehead, dated October 9, 1844, and possession of the land by Whitehead until his death; after his death, possession by Pitts, his administrator; assignment of dower to Catherine Whitehead, widow of John T. Whitehead, and possession by the dowress in 1866; the death of the dowress in 1901, and letters of administration on John T. Whitehead's estate to A. H. Whitehead in September, 1901. The defendant filed pleas of not guilty and of title by prescription. The verdict was for the plaintiff, whereupon the defendant made a motion for a new trial, to the denial of which he excepts.

1. When the plaintiff tendered in evidence the unrecorded deed from James W. Echols

to John T. Whitehead, dated October 9, 1844, as an ancient document, the defendant objected to its admission in evidence on the ground that the deed was void, and of no effect, because of insufficient description of the land which it purported to convey. The description of the land was as follows: "All that tract or parcel * * * containing two hundred and fifty-five acres, more or less, it being part of the lot 270, and part of lot 271, and part of lot 274, and part of lot 272, all in the 17th District of Harris County." The court allowed the deed in evidence. The description is too vague and indefinite for the deed to have effect as a conveyance of title. It neither indicates the shape of the tract nor the metes and bounds of the land purporting to be conveyed. A deed is not invalid where the description is imperfect, if the instrument refers to extrinsic data by means of which the land may be identified. Likewise an ambiguous descriptive clause may be aided by allunde evidence. But such imperfect or ambiguous descriptions must not be confounded with a description utterly lacking in definiteness. A deed which fails to describe any particular land or to furnish any key to the confines of the land purporting to be conveyed is void. *Huntress v. Portwood*, 116 Ga. 351, 42 S. E. 513.

Was the deed admissible as color of title? The answer to this query must depend on what is meant by "color of title." In *Beverly v. Burke*, 9 Ga. 444, 54 Am. Dec. 351, it was defined to be "a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law." And in *Veal v. Robinson*, 70 Ga. 816, it was said that color of title "is anything in writing purporting to convey title to land which defines the extent of the claim; it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title." There are other decisions of our court giving substantially the same definition. From this it will be seen that it is immaterial as to the character of the instrument. It is not necessary that the color of title be executed in the form of a deed. Thus it has been held that a purchase at sheriff's sale and payment of the purchase money, evidenced by a written memorandum and receipt by the sheriff who made the sale, is sufficient to constitute color of title in aid of possession. *Field v. Boynton*, 83 Ga. 239. A forged bond for title, accepted by the obligee as genuine, without knowledge of the fraud, operates as color of title under our statute of prescription. *Griffin v. Stamper*, 17 Ga. 108; *Millen v. Stines*, 81 Ga. 655, 8 S. E. 315. Varied as the different instruments are which have been held sufficient to constitute color of title, all of

our decisions hold that it is necessary that the extent of the claim should be defined in the instrument. Unless the land is sufficiently described in the instrument itself, or the description is of such a character that it furnishes the means of identification, the extent of the claim cannot be defined. The description in an instrument offered as color of title must afford the means, by the application of allunde proof, of identifying the land; and, if it is utterly defective in this respect, the instrument is not good as color. Title by prescription may result either from twenty years' adverse, actual possession without deed, or from seven years' possession under color of title. The only distinction between these two titles by adversary possession is that, where actual possession is relied on without the aid of a deed, twenty years is necessary before prescription will ripen; but where the adversary possession is held under color of title the possession need not extend beyond seven years. In the latter case the color of title aids the possession, and, unless there is some description in the instrument which will aid the possession by disclosing the character and extent thereof, the instrument relied on as color of title will be of no advantage to the possessor. Actual possession of a part of the land held under paper title will be extended to the boundaries of the paper title, and the prescriber may thus acquire a prescriptive title to land of which he has only constructive possession. But the "description in a deed to realty introduced as color of title will not be extended beyond its terms because of a belief by the holder under it that it covered land not embraced in that description, nor because of any unexpressed intention in the mind of the grantor that it should cover land not described in the deed itself." *Williamson v. Tison*, 99 Ga. 791, 26 S. E. 768. And if the instrument relied on as color of title be fatally indefinite in description of the premises therein referred to, the actual occupancy of a part cannot be adverse to the extent of any boundaries whatever. The necessity of a sufficiently certain description is therefore apparent. While the exact point has not, perhaps, been heretofore definitely raised in this court, the correctness of the proposition has been assumed. See *Tumlin v. Perry*, 108 Ga. 520, 34 S. E. 171. And this conclusion is in accord with the general current of authority. *Barker v. Ry. Co.*, 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658; *Masterson v. Todd*, 6 Tex. Civ. App. 131, 24 S. W. 682; *Williams v. Thomas*, 18 Tex. Civ. App. 472, 44 S. W. 1073; *Stumpf v. Osterhage*, 111 Ill. 82; *Holbrook v. Forsythe*, 112 Ill. 306; *Wray v. R. R. Co.*, 86 Ill. 424; *Wilson v. Johnson* (Ind. Sup.) 43 N. E. 930; 1 Cyc. 1090, 1091; 3 Wash. Real Prop. § 1981. It was therefore error to admit the deed in evidence.

2. Possession of land by one's ancestor cannot be proven by general family reputa-

It is a fact which must be established by evidence which is not hearsay. Family tradition of possession of the ancestral home is objectionable as hearsay testimony. The Civ. Code 1895, § 5177, which permits descent, relationship, birth, marriage, and death to be established by general repute in the family, can have no reference to proof of possession of land by the ancestor of the claimant of the title. The proposition is too clear for argument, and evidence of family history as to the possession of the premises in dispute by the plaintiff's intestate was erroneously admitted.

3. Complaint is made that the court allowed in evidence the minutes of the court of ordinary containing the application of one Pitts, as administrator of plaintiff's intestate, for leave to sell certain land therein described. If the purpose of this evidence was to show possession of the land by a former administrator of plaintiff's intestate, it was open to the objection of irrelevancy. An application for leave to sell land by an administrator is neither evidence of possession nor title in his intestate. An administrator may apply for leave to sell land which is held adversely to him at the time of the application. Indeed, if his purpose is to recover land held adversely by an heir, an order of sale is a necessary prerequisite. *Head v. Driver*, 79 Ga. 179, 3 S. E. 621. It cannot be said that an application for leave to sell could, in any view, be a link in the plaintiff's chain of title. The court should have repelled this evidence.

4. The return of the commissioners appointed by the superior court of Harris county to admeasure and assign dower to the widow of J. T. Whitehead was admitted in evidence over the objection of the defendant. The only part of the land described in the return which related to the premises involved in the suit was described as "ten acres in front and north of the house, cut from lot 272," and the objection to the evidence was that the description was void for uncertainty, and not legal evidence of title. The other land assigned to the widow in the return of the commissioners was definitely and particularly described; but there was no description of the premises which are the subject-matter of the present suit. For this reason the dower proceedings, as to the 10 acres referred to in the return, were wholly ineffectual. The extent of the widow's claim should appear from the return of the commissioners, because the widow is entitled only to possession of the land which has been defined by them and admeasured to her as dower. The admeasurement of dower must, with reasonable clearness, disclose the lines of demarcation between the land which the heirs are entitled to presently enjoy and that the enjoyment of which has been postponed till the widow's death. "The return of the commissioners should include a particular description of the land admeasured

and laid off to the widow, although errors in the description—as a mistake in the lot or section number—will not be fatal." 14 Cyc. 1008. See, also, *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407. A return by commissioners that they had laid off "four acres around the house" was, in *Stevens v. Stevens*, 8 Dana (Ky.) 371, held to be fatally indefinite. There is no essential difference in the procedure for admeasuring dower and for setting apart a year's support in land; and in a proceeding to assign a year's support out of 150 acres of land, to which proceeding a caveat had been filed, it was held by this court that a verdict giving to the widow "fifty acres of land where dwelling house now stands" was, as to this land, too vague and uncertain to be capable of enforcement. *Lee v. English*, 107 Ga. 152, 33 S. E. 39. The location of the 10 acres, which the dower commissioners described as being "in front and north of the house, cut from lot 272," cannot be definitely ascertained without a resort to extrinsic evidence as to what was the tract of land which the commissioners intended should be set apart to her as dower out of lot 272. It might be a square, a rectangle with a short or long base, or any irregular figure. The description of it set forth in the commissioners' return was too vague and uncertain to support an assignment of dower covering any part of land lot 272. This being true, the return had no relevancy to any issue in the case, and the court should have rejected the same.

The foregoing disposes of all the questions which it is necessary to discuss, as the other assignments of error relate to matters which cannot arise on another hearing of the case.

Judgment reversed. All the Justices concur.

(121 Ga. 704)

PITTS v. WHITEHEAD.

(Supreme Court of Georgia. Jan. 27, 1905.)

DEED—VALIDITY—DESCRIPTION—EJECTMENT—EVIDENCE.

1. A deed in which the description is so indefinite as to afford no means of identifying any land is inoperative either as a conveyance of title or as color of title.

2. In a suit in ejectment by an administrator, where the defendant was the plaintiff's predecessor as administrator of the estate, but claims the land under a deed from another, evidence of an application by defendant, as administrator, to sell certain lands of the estate, and of an order of the court of ordinary granting this application, the land sued for not being embraced in either the application or the order, is irrelevant.

3. The other questions made will probably not again arise in this case, and therefore will not be passed upon.

(Syllabus by the Court.)

Error from Superior Court, Harris County; W. B. Butt, Judge.

Action by A. H. Whitehead, administrator, against I. H. Pitts. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. Martin and J. B. Burnside, for plaintiff in error. Hatcher & Carson, for defendant in error.

SIMMONS, C. J. An action of ejectment was brought against Pitts by A. H. Whitehead, as administrator of the estate of John T. Whitehead, to recover a tract of land, part of lot 271, in the Seventeenth District of Harris county, Ga. Plaintiff relied upon a deed from Echols to John T. Whitehead, and the possession of John T. Whitehead and of plaintiff as administrator; also upon an assignment of dower to Catherine T. Whitehead, the widow of John T., and the termination of the dower estate by the death of the widow. The defendant pleaded the general issue, title by prescription, based on twenty years' adverse possession and possession for seven years under deed from Mary Whitehead. The evidence was conflicting, the case turning principally upon the question as to the location of a dividing line. There was a verdict for the plaintiff, and the defendant made a motion for a new trial. This was overruled, and the movant excepted.

1. Complaint was made of the admission in evidence of the deed from Echols to John T. Whitehead, purporting to convey "all that tract or parcel of land containing two hundred and fifty-five acres, more or less, it being part of lot 270, and part of lot 271, and part of lot 274, part of lot 272, all in the 17th District of Harris County." The objection made was that this deed was void for uncertainty, there being no sufficient description of the land conveyed. That the description in this particular deed was so indefinite as to afford no means of identifying the land sought to be conveyed, and that the deed was, therefore, inadmissible in evidence either as a conveyance of title or as color of title, see *Luttrell v. Whitehead* (this day decided) 49 S. E. 691.

2. Complaint was made of admitting in evidence the minutes of the court of ordinary showing (1) the application of Pitts, the present plaintiff in error, who had preceded defendant in error as administrator of the estate of John T. Whitehead, for leave to sell certain lands of the intestate; and (2) the order of the court of ordinary granting this application. Neither the application nor the order embraced any part of lot 271, in which is located the land involved in the present suit, and upon this ground defendant objected to this evidence. The application and order had nothing to do with the land in dispute. They did not embrace it or refer to it, and were not admissible for any purpose.

3. For the errors above pointed out, the judgment refusing a new trial must be reversed. The only other grounds of the motion for new trial related to charges of the court which were excepted to because of certain verbal inaccuracies. Against these the

trial judge will doubtless guard on the next trial, and it is not necessary, nor would it be profitable, to discuss them at length.

Judgment reversed. All the Justices concur.

(121 Ga. 673)

ROBY et al. v. NEWTON.

(Supreme Court of Georgia. Jan. 27, 1905.)

REMAINDERMAN—RIGHT OF POSSESSION—WASTE—TENANT IN DOWER—FORFEITURE—PROCEDURE—ISSUES—DAMAGES.

1. Under Civil Code 1895, § 3090, a remainderman is not entitled to claim immediate possession as a result of a forfeiture of the interest of the tenant for life, unless it appears that there has been both permissive and voluntary waste by the tenant, or one for whose conduct he is responsible, and it must also appear that the voluntary waste was committed wantonly, and in a manner evidencing an utter disregard of the rights of the next taker.

Fish, P. J., and Lamar, J., dissent.

2. A petition by heirs at law against a doweress alleged acts of waste, and prayed for a forfeiture of the estate of the tenant in dower, and in the alternative for damages in the event the evidence did not establish a forfeiture. There was no special demurrer to the petition. *Held*, that at the trial the judge should have submitted both issues to the jury without any written request asking the submission of the question of damages.

3. There was no evidence to authorize a forfeiture, but there was evidence which would have authorized a finding in favor of the plaintiff on the question of damages, and it was error not to submit this issue to the jury.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action by Kate M. Roby and others against Cornelia Newton. Judgment for defendant, and plaintiffs bring error. Reversed.

This was an action by the heirs at law of a decedent against his widow, who was in possession of a tract of land which had been set apart as her dower, upon which land was situated the mansion house and other improvements. It is alleged that the widow has committed waste, in that she has allowed the improvements to become out of repair, and has also actually destroyed other improvements, as well as having cut timber growing upon the land. It is also alleged that the acts complained of were done wantonly, with a deliberate intention to injure the plaintiffs; that the defendant is insolvent, and has no property except her dower, unless it be some small personal property of trifling value, which is incumbered by liens exceeding in amount the value of the property; and that the defendant has cleared up lands, and threatens to clear up other lands and destroy the timber thereon, while the cleared land and uncleared land is now in that proportion that a prudent person would desire. The prayers were that the plaintiffs recover the land as forfeited to them by the acts of waste complained of; that, in the event this prayer is denied, they recover damages; and that the defendant be restrained

ed from further acts of waste tending to the permanent injury of the freehold. The answer of the defendant, was, in effect, a general denial of all the material allegations of the petition. The trial resulted in a verdict for the defendant, and the case is here upon an assignment of error by the plaintiffs complaining of the overruling of their motion for a new trial.

J. D. Kilpatrick, for plaintiffs in error.
Greene F. Johnson, for defendant in error.

COBB, J. 1. By the ancient common law the only persons punishable for waste were guardians in chivalry, tenants in dower and by the curtesy. Lessees for life and for years were not liable. This distinction was made for the reason that tenancies of the character first named were created by law, and the law must therefore furnish a remedy for a violation of the rights of the owner of the inheritance; and lessees for life or for years acquired their interest by contract with the owner of the fee, who could have protected himself against loss in this respect. The punishment for waste by the common law was single damages. 2 Scribner on Dower (2d Ed.) 795. This was also the punishment under the statute of Marlbridge. 3 Wash. Real Prop. (6th Ed.) p. 534. By the statute of Gloucester all tenants for life or years were made liable for waste, and it was provided that the tenant should forfeit "the thing that he hath wasted," and also pay treble damages. Id. It was determined that under the words above quoted the place was also forfeited, and that, if the waste be here and there over a wood, the whole wood should be forfeited, or, if in several rooms of a house, the whole house; but if it should be done in only one end of the wood or in one room of the house, if these places could be conveniently separated from the rest, the thing wasted and subject to forfeiture would be such places only, and not the whole estate. 2 Bl. Com. 283. There are statements that at common law a dowress was liable for permissive as well as voluntary waste; but Mr. Park, in his work on Dower, says that the researches of Mr. Hargrave, as well as his own, failed to find any authority to that effect. See Park on Dower, p. 357. In 28 Am. & Eng. Enc. Law (1st Ed.) p. 894, we find the statement that the better opinion seems to be that the tenant in dower is not liable for mere permissive waste, and that this is especially true if she deals with the estate as a prudent person would deal with it if he owned it absolutely. See, in this connection, 14 Cyc. 1014 et seq. In Parker v. Chambliss, 12 Ga. 235, it was held that the dowress was liable for waste committed on the estate, but that she did not thereby forfeit her estate and treble damages, as provided by the statute of Gloucester; the remedy against her being an action on the case in the nature of waste to recover the actual damage done to the estate, or injunction to

restrain her from committing waste. It appears from the original record that that case was tried upon an agreed statement of facts, which set forth merely that the dowress had "committed" waste. It does not appear whether the waste was permissive or voluntary, but the use of the word "committed" would lead to the inference that the waste was of the latter character. The ruling in that case was to the effect that the statute of Gloucester was of force, so far as it made a tenant in dower liable in damages for waste, but that the harsh and stringent remedy of forfeiture and treble damages, which was doubtless intended for the benefit of the feudal heir, was not adapted to our conditions, and therefore never became a part of our law. The question as to what would be waste by a dowress was distinctly left open. The Code which went into effect in 1863 embraced within it the provisions now contained in the Civil Code of 1895, § 3090, which is as follows: "The tenant for life is entitled to the full use and enjoyment of the property, so that in such use he exercises the ordinary care of a prudent man for its preservation and protection, and commits no acts tending to the permanent injury of the person entitled in remainder or reversion. For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainderman, if he elects to claim immediate possession." The dowress being a tenant for life, she holds her estate with all the privileges of such a tenant, and, unless otherwise provided, subject to all the liabilities of tenants of that character. See, in this connection, Rusk v. Hill, 121 Ga. —, 49 S. E. 261. This section does not distinctly declare that a tenant for life is liable for actual waste, or will be enjoined from committing threatened waste, but it has been held since the Code that such is the law. Dickinson v. Jones, 86 Ga. 97; Smith v. Smith, 105 Ga. 106, 81 S. E. 135 (2); Kollock v. Webb, 113 Ga. 762, 39 S. E. 339. In Woodward v. Gates, 38 Ga. 213, it was said that the effect of the Code was to restore that part of the statute of Gloucester in reference to forfeiture for waste, but that the rule as to treble damages was not re-enacted. While the section of the Code does not use the terms "permissive waste" or "voluntary waste," or the term "waste" at all, still an analysis of that section will indicate that its author had in mind the distinction between the two classes of waste. It imposes upon the life tenant the duty of exercising the ordinary care of a prudent man for the preservation and protection of the estate, and the failure to do this is permissive waste; and it also prohibits the commission of any act tending to the permanent injury of the person entitled in remainder or reversion, and the commission of such acts is voluntary waste. A liability both for permissive and voluntary waste is therefore imposed upon the tenant

for life, and all such tenants are liable to the reversioner or remainderman for actual damages resulting from waste of either character.

It is now to be determined when waste will work a forfeiture. The Code does not use the language of the statute of Gloucester, and limit the forfeiture to the thing wasted, but when a forfeiture results it is the "interest" of the tenant, which would seem to be his entire interest in the premises, without reference to what portion of the estate was the particular subject of the waste. After declaring the degree of care that the tenant shall exercise, and the acts which he is prohibited from doing, the Code provides that a forfeiture results "for the want of such care and the willful commission of such acts," if the remainderman elects to claim immediate possession. It is said that "and" should be here construed "or," and that the section should read that "a forfeiture results from the want of such care or the willful commission of such acts," or should read, "for the want of such care, as well as for the commission of such acts"; thus making a forfeiture result either from permissive or from voluntary waste. It is also contended that the word "willful" should be construed to mean simply intentional, and not to convey the idea of malice, evil intent, or wantonness. Forfeitures are not favored by the law. Statutes providing forfeitures, and thereby imposing upon individuals penalties greater than the payment of the actual damages which their wrongful acts have caused others to suffer, are penal in their nature, and must be construed strictly against the persons claiming the forfeitures; practically the same rule of construction being adopted as is usually followed in the interpretation of criminal laws. See 22 Am. & Eng. Enc. Law (2d Ed.) 654. In a penal statute the word "willful" generally means with a bad purpose; an evil purpose; without ground for believing the act to be lawful. *Hateley v. State*, 118 Ga. 81, 44 S. E. 852, and *cit.* While in interpreting statutes it is sometimes permissible to read "and" "or," we do not think that in a statute which imposes a forfeiture or a penalty this change in wording should be made by construction when by the terms of the statute as framed it requires the concurrence of two things to work a forfeiture or impose the penalty, and the result of a change in the verbiage would have the effect to bring about a forfeiture or penalty by an existence of only one of the two things. The statute, in effect, says that a forfeiture shall result whenever the tenant is guilty of both permissive and voluntary waste, and voluntary waste of that character which is committed wantonly and in such a way as to evidence an utter disregard for the rights of those who are thereafter to take. There was nothing in either the statute of Marlbridge or of Gloucester which required that acts of waste should be

willful in the sense just referred to, and it may be that neither of these statutes was intended to apply to permissive waste; there being some language in each, and especially in the former, from which it might be inferred that the remedies provided in those acts were to be resorted to in case of voluntary waste only. But whether this be so or not it is unnecessary for us to determine, as we feel satisfied that our Code makes the forfeiture dependent not only on the concurrence of permissive and voluntary waste, but voluntary waste of that character which is above indicated. See, in this connection, *Austell v. Swann*, 74 Ga. 281. The tenant is liable in damages for waste of any character, but he is not liable to forfeiture unless he commits that character of waste which a court of equity would enjoin as equitable waste in a case where the tenant holds without impeachment of waste; and the rule is clear in such cases that the waste must be wanton, and committed in such a manner as to indicate an utter disregard of the rights of those who are thereafter to take. See *Belt v. Simkins*, 118 Ga. 894, 39 S. E. 430.

2. While a forfeiture of an estate for life will not result from waste unless there is both permissive and voluntary waste, and the latter is of the character above indicated, still the one who is to take after the termination of the life estate is entitled to damages for waste which is either permissive or voluntary. The permissive waste which, according to our Code, would authorize a recovery of damages, is that resulting from a failure to use the ordinary care of a prudent man for the preservation and protection of the property; and the voluntary waste is the commission of acts which tend to the permanent injury of him who is to take in the future. The tenant for life is entitled to the full use and enjoyment of the property; the only restriction upon this use being that the estate of those who are to follow him in possession shall not be permanently diminished in value by neglecting to do that which an ordinarily prudent person would do in the preservation of his own property, or by doing those things which are not necessary to the full enjoyment of the particular estate, and which have the effect to permanently diminish the value of the future estate. Many things were held to be acts of waste at common law which would not be such in this state. The clearing of land was waste in England, but such is not waste in Georgia, provided the land cleared still leaves the proportion of cleared land to uncleared land such as an ordinarily prudent person would maintain upon his own property. *Chapman v. Schroeder*, 10 Ga. 325; *Woodward v. Gates*, 38 Ga. 205 (5); *Small v. Slacumb*, 112 Ga. 281, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. Rep. 50. The feudal system, which furnished the reasons for the common-law rule that a dowress was liable in damages for waste, and which brought about the stat-

utes above referred to applying the same rule to other tenants for life, and imposing harsh penalties not known to the common law, never having been of force in this state, the harsh and stringent rules applied in some English cases in determining what was waste are not, and never were, suited to the conditions of our people, and therefore never became a part of our law. Therefore our law determines the question as to what is waste by looking alone at the rights of two individuals, one in possession of the estate for a limited time, and the other who is to take after the lapse of that time, without regard to any system of tenures of which the estates in question formed a component part. In England the courts were bound to look, not only to the rights of the individuals who were owners of the estate, but also to the rights of the lord paramount under the system which public policy demanded should be maintained. Therefore under our law the tenant for life must not be harassed and disturbed by the interference of the reversioner or remainderman, unless it be clearly shown that the rights of the latter as the ultimate owner of the property are imperiled by the conduct of the tenant. Dower is favored by the law, and a tenant in dower, of all other tenants, is entitled to the enjoyment of her estate free from the undue espionage and intermeddling of the heirs of her husband, or those who claim under them. When waste of a character which will work a forfeiture has been committed, the reversioner may elect either to claim damages or to claim immediate possession. Can he claim immediate possession, and also pray that, in the event his evidence does not authorize such claim, damages to the estate in reversion may be assessed? That is, can a suit be brought in which the petition contains two counts, one alleging facts upon which a forfeiture is claimed and immediate possession prayed for, and another allege facts upon which damages are claimed? It may be that under our liberal system this would be allowed, but certainly a petition which, although not separated into two counts in accordance with the rules of good pleading, has prayers in the alternative praying for a forfeiture if forfeiture is established, and, if not, for damages, would be maintainable unless there is a special demurrer filed at the first term complaining of the misjoinder and of the informal way in which the two claims are pleaded together. The petition in the present case being of the character just referred to, and there being no special demurrer to the same, the plaintiffs were entitled to have both issues submitted to the jury, and it was the duty of the judge to submit the same, even though no written request was made to that effect.

3. The evidence did not authorize a finding that the estate had been forfeited. But there was some evidence from which a jury might

find that there was permissive waste proved in some instances, as well as acts of voluntary waste, which would result in a depreciation of the value of the inheritance, and thereby entitle the plaintiffs to damages. As the judge failed to submit the question of damages to the jury, a new trial should have been granted on this ground.

There was no error in allowing the doweress to testify as to the motive with which she committed the alleged acts of waste. See *Acme Brewing Co. v. Railroad Co.*, 115 Ga. 495, 42 S. E. 8 (9); *Baxley v. Baxley*, 117 Ga. 62, 43 S. E. 436 (4). There was no error in failing to charge on the subject of a permanent injunction against waste, as the evidence did not show any threatened waste which rendered an injunction necessary. While the judge, in an equity case, may, in his discretion, submit the issues of fact to the jury by appropriate questions, the statute declares that he shall do this when either party makes a request to that effect after the case is called for trial, and before the beginning of the introduction of evidence. Civ. Code 1895, § 4849. The record does not show that the request that the case be submitted to the jury in the form of questions was made before the introduction of evidence, and this may have been the reason why the judge refused to submit the issues in this manner.

Judgment reversed. All the Justices concurring.

LAMAR, J. (concurring specially). As clearly shown in the foregoing opinion by Judge COBB, the law applicable to the forfeiture of estates as contained in the Civil Code of 1895, § 3090, is peculiar to this state. It differs from that at common law and from the ancient English statutes. On this branch of the case, therefore, the decision cannot be controlled by a consideration of general authorities. The principle announced is far-reaching. It covers any life estate created by deed or will, and is not limited in its application to dower, the favorite of the law. While I concur in the judgment and in the ruling as to the effect of the evidence, I am unable to agree to the proposition announced in the first headnote that there must be a concurrence of permissive and voluntary waste before a forfeiture can result. The practical effect of that construction will be that in hardly any instance could a forfeiture result, no matter how great the waste or how serious the consequences to the remainderman. For rare, indeed, will be the case where the damage results from the operation both of action and inaction at the same time. Taking, for example, the case of a city lot with a house thereon, I understand the ruling to involve the proposition that, if the life tenant should permit the building to rot to the ground, no forfeiture could be declared, because, while the waste was permissive, it was

not at the same time voluntary. On the other hand, if the life tenant should willfully tear down the house, a forfeiture could not result, because, though the waste was voluntary, it was not also permissive. But the result to the remainderman is the same, and the purpose of the statute is to protect him against both classes of misconduct. This is sought to be accomplished in each case in the same way, and by imposing a forfeiture as a penalty whether the waste be by acts of omission or commission. This view is sustained by the recognition in the Civil Code of 1895, § 3090, of the existence of the two classes of waste; by the separation of the two classes in the first sentence, although they are united by the word "and." The word "and" there is clearly separative, and operates as a disjunctive. It has the same effect in the last sentence, which deals with the two classes of acts out of which the forfeiture may grow. This is made specially apparent by an examination of the punctuation. "For the want of such care, and the willful commission of such acts, he forfeits his interest to the remainder." The use of the comma before the word "and" makes the last clause parenthetical, and fully justifies a reading that for the want of such care he forfeits his interest, and likewise for the willful commission of acts tending to the permanent injury of the person entitled in remainder he forfeits his interest to the remainder. The first sentence prohibits waste by permissive acts and also by voluntary acts. The penalty is adjusted to this double prohibition. It makes a forfeiture result from the want of such care, and also result from the willful commission of voluntary acts amounting to waste. Of course, forfeiture will never result from slight acts of waste. This is clearly involved in the language of the section. The penalty is imposed for such serious acts as tend to the permanent injury of the person in remainder, or to that class of negligence which fails to preserve and protect the corpus. But when by action or inaction the character, quality, or value of the property is being destroyed, the wrongdoer must suffer the penalty of a forfeiture. Nor can he complain, for it is brought about by his own disregard of the rights of the one who is to come after. Nor will it do to say that the remainderman has a remedy by injunction to stay waste, or for damages for waste already committed. The remainderman is frequently so far removed as not to know what is being done with the property. Injunction could not restore what had been destroyed. Damages might not be recoverable out of an insolvent life tenant. The adequate means by which the law secures the rights of one and the performance of duty by the other is the declaration in advance that a forfeiture shall result from these serious transgressions. And while forfeitures are not favored, they are

not so far disfavored as to be unenforceable in a case expressly provided for by law.

In these views I am authorized to state that Justice FISH concurs.

(121 Ga. 697)

DORSEY v. COLUMBUS R. CO.

(Supreme Court of Georgia. Jan. 27, 1905.)

ACTION FOR WRONGFUL DEATH—PETITION.

1. The amendments allowed when the case was returned to the court below did not cure the defect apparent in the petition when it was before this court on a former occasion (46 S. E. 635, 119 Ga. 363), to wit, that it was necessarily inferable from the plaintiff's allegations that her son, for whose homicide she sued, could, by the exercise of reasonable care, have avoided the consequences of the defendant's negligence; and it was therefore not error to sustain the demurrer to the petition as amended.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Action by Louis Dorsey against the Columbus Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Hammond and John D. Little, for plaintiff in error. L. F. Garrard, F. U. Garrard, J. H. Martin, and Cecil Neill, for defendant in error.

CANDLER, J. This case has once before been before this court on exceptions to the overruling of a demurrer to the plaintiff's original petition, and the judgment of the lower court was reversed on the ground that the petition showed that the plaintiff's decedent could, by the exercise of ordinary diligence, have avoided the consequences of the defendant's negligence which it was alleged caused his death. See *Columbus R. Co. v. Dorsey*, 119 Ga. 363, 46 S. E. 635, for a full statement of the allegations of the original petition. When the case was again called in the court below, and before the remittitur from this court had been made the judgment of that court, the plaintiff, by leave of court, amended her petition. To the petition as amended the defendant again demurred, and its demurrer was sustained. Error is now assigned on the judgment sustaining the demurrer to the amended petition.

In the original petition it was alleged that the plaintiff's son, for whose homicide she sued, while in the exercise of his duty as a lineman of a telephone company on whose poles the wires of the defendant were strung, came in contact with a wire of the defendant from which the insulation had been negligently allowed to wear off, and that "by reason of said contact he received a heavy and dangerous charge of electricity through his body, by means of which he was instantly killed." From the opinion of Mr. Justice Turner delivered when the case was here before it appears that in the argument at that

time "it was conceded by counsel for the defendant in error [now the plaintiff in error] that it was to be presumed that this unfortunate lineman did know that the wire of the plaintiff in error was strung upon the pole of the telephone company, and that he also knew that at or near the pole, and for several feet on each side of it, the wire was naked, or without necessary insulation." The amendment offered and allowed when the case went back to the lower court is not altogether consistent with the original petition. It is now alleged that "there would have been no danger in the said Claude Dorsey's coming in contact with said uninsulated wire unless he had likewise at the same time come in contact with some conductor connected with the earth, thereby completing an electrical circuit; that he passed the dangerous wire in safety going up the pole; and that by an accident the wood of the pole in which one of the spurs attached to his foot was fastened gave way, the spur slipped, and he fell in such a way that his foot came in contact with the defendant's uninsulated wire and his head with one of the wires of the telephone company, thus completing an electrical circuit, and causing his body to receive the current of electricity which brought about his death. It is also alleged that "said Claude Dorsey was not an experienced lineman, but was new in the business, * * * and because of his inexperience he did not know and fully understand the danger of coming in contact with said wire, unless at the same time he was handling the telephone wires above, and therefore was not guilty of negligence in coming in contact with the same, he not being engaged at the time in handling the telephone wires above, but only in fastening braces to the cross-arms which supported said telephone wires." Here, we think, is the key to the whole case. By necessary inference from the amendment Dorsey knew that an electrical circuit formed by the contact of his body with the uninsulated wire on the one hand and the grounded telephone wire on the other would be dangerous to life. He knew that the defendant's wire was defectively insulated, for he passed it on his way going up the pole. While not "handling" the telephone wires, he was in close proximity to them—fastening braces to the cross-arm that supported them. He must have known (there is no allegation to the contrary) that the position of a lineman at the top of a telephone pole is not secure, and that there is ever present the hazard of a slipping spur or a rotten piece of wood. With full knowledge of the defective insulation of the defendant's wire, and of the certainty of receiving the death-dealing current should he come in contact with that wire and another grounded wire at the same time, he placed himself in a position where that combination of circumstances was likely to be brought about, and was brought about. The amend-

ment made no better case than did the original petition, and it was not error to sustain the demurrer.

Judgment affirmed. All the Justices concur.

(121 Ga. 593)

DE FLORIN v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

LOTTERY—WHAT CONSTITUTES.

1. A "suit club," whose members pay to a tailor \$1 per week, and which holds weekly drawings, as a result of which the member holding the lucky number receives from the tailor a suit of clothes, and then ceases to be a member of the club, is a scheme in the nature of a lottery. This is so although an unlucky member, who continues to pay his \$1 weekly for 30 weeks is entitled to a \$30-dollar suit of clothes regardless of the result of the drawings.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Richard De Florin was convicted of carrying on a lottery, and brings error. Affirmed.

Chas. P. Pressley and Bryson Crane, for plaintiff in error. D. G. Fogarty, for the State.

CANDLER, J. The sole question presented for our decision is whether, under the facts stated below, the accused was guilty of the offense of carrying on a lottery. De Florin operated what was known as a "suit club." The plan of the club was as follows: Thirty men paid \$1 each to De Florin, who was a tailor, and received cards bearing numbers from 1 to 30. Once a week slips of paper bearing numbers corresponding to those on the cards of the members were placed in a box, and some disinterested person drew therefrom one slip. The member who held the lucky number was then entitled to a suit of clothes made by De Florin, worth \$30. This member then dropped out of the club, and his place was supplied by some one else. If a member paid \$1 a week for 30 weeks he was entitled to a suit whether he drew the lucky number or not. We do not hesitate to hold that this scheme constituted a lottery. We do not deem it necessary to go into a full discussion of the law on this subject, for in the case of *Meyer v. State*, 112 Ga. 20, 37 S. E. 98, 51 L. R. A. 496, 81 Am. St. Rep. 17, Mr. Justice Cobb has given such an exhaustive review of the decisions of this and other courts in regard to lottery devices that nothing can be added thereto. We will merely quote from the opinion of Robertson, J., in *Shumate's Case*, 15 Grat. 653, which is quoted with approval in the *Meyer Case*, as covering the only point in the case at bar about which there can be the slightest doubt: "It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that

each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain, but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." So, in the present case, the fact that a member who was unlucky in the drawing of prizes might, by continuing to pay \$1 a week for 80 weeks, receive a suit of clothes regardless of the result of the drawings, does not make the transaction any the less a lottery, for the lucky members of the club won prizes varying in value from \$1 to \$29. We are clear that the rulings of the trial judge on the agreed statement of facts and on the demurrer to the accusation were correct.

Judgment affirmed. All the Justices concur.

(121 Ga. 614)

GRINER v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CRIMINAL LAW—INSTRUCTIONS—CONFESSIONS—CIRCUMSTANTIAL EVIDENCE.

1. It was not error to refuse to instruct the jury, as requested, that "evidence of confessions is the weakest and least to be relied on of any evidence known to be competent in law" (Calvin v. State, 44 S. E. 848, 118 Ga. 73), especially when the court charged the jury that confessions of guilt should be received with great caution, and that a confession alone, uncorroborated by other evidence, will not justify a conviction.

2. "The law of circumstantial evidence is not, without qualification, applicable in a case where the state proves a positive confession of guilt." Perry v. State, 36 S. E. 781, 110 Ga. 234. Therefore in such a case it was not error to fail "to charge the jury on the law of circumstantial evidence," or that, "to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused."

3. "When, after a proper preliminary examination as to their free and voluntary nature, confessions * * * are adjudged competent and received in evidence, there is no room for any question touching the propriety of having conducted the preliminary examination in the presence of the jury." Fletcher v. State, 17 S. E. 100, 90 Ga. 468.

4. The alleged confessions were properly held admissible.

5. The instructions given to the jury fully covered the requests to charge that "proof of the corpus delicti may be, but is not necessarily, sufficient corroboration of a confession of guilt," and that "the law does not fix the amount of corroboration—the jury are the judges."

6. Before a confession can be considered as evidence, it must appear to have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. Pen. Code 1895, § 1006.

(a) If induced by another, by hope of benefit or fear of injury, it is involuntary, although such inducement be held out by one person, and the confession be subsequently made to another, who has no knowledge of such inducement, and who offers none himself. Where there is evi-

dence of a confession before the jury, it is for them to determine from all the evidence whether the confession was voluntary.

(b) Accordingly, where the principle is applicable to the case, either under the evidence or the statement of the accused, it is error for the court to refuse to instruct the jury, in compliance with a written request so to do, that if the accused made a confession under inducement of hope or fear previously held out by persons other than those to whom it was made, though not in the presence of those holding out the inducement, it should not be considered as evidence.

(c) In the present case the principle above announced was applicable, both under the evidence and the statement of the accused, and the refusal of the court to give in charge a written request properly setting forth such principle was cause for a new trial, even though the court otherwise properly instructed the jury upon the law of confessions.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; A. F. Daley, Judge.

Jimpsey Griner was convicted of crime, and brings error. Reversed.

E. C. Collins, W. F. Gray, Isaiah Beasley, and Geo. C. Spence, for plaintiff in error. John C. Hart, Atty. Gen., B. T. Rawlings, Sol. Gen., and Alfred Herrington, Sol. Gen., for the State.

FISH, P. J. Judgment reversed. All the Justices concur.

(121 Ga. 708)

GEORGIA & A. RY. et al. v. SHIVER.

(Supreme Court of Georgia. Jan. 27, 1905.)

DEED—DESCRIPTION—PAROL EVIDENCE—IDENTIFICATION—CONFLICTING EVIDENCE.

1. Where a deed conveys a warehouse and lot in a certain city and county and on the south side of a named street, "being the warehouse and lot formerly occupied by the A. P. & L. Warehouse and Compress Co., and now occupied by the Americus Grocery Co.," and there is a controversy as to the extent of the land conveyed, there is no error in admitting parol evidence to show what land had been occupied by the companies named. Nor is there any error in charging the jury that such evidence can be considered not to contradict, vary, or enlarge the terms of the deed, but to identify the land conveyed by the deed, and to ascertain what land is covered by the description in the deed.

2. The evidence was conflicting as to the extent of the possession of the companies above indicated, but was sufficient to support the verdict of the jury. That verdict having been approved by the trial judge, this court will not interfere with his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by J. W. Shiver against the Georgia & Alabama Railway and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. A. Hawkins, for plaintiffs in error. W. P. Wallis, Hooper & Dykes, and A. L. Miller, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 619)

BAZEMORE v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CONSTITUTIONAL LAW—POLICE POWER—REGULATING SALES OF COTTON SEED—UNLAWFUL PURCHASE—INDICTMENT—EVIDENCE.

1. Under the police power laws may be passed for regulating common occupations which, from their nature, afford peculiar opportunity for imposition and fraud.

2. Because of its value, the ease with which it is taken from the field, and the difficulty of detecting the thief, the state may regulate the sale of seed cotton, and fix a punishment upon the person who buys in violation of the terms of the statute.

3. The question as to the constitutionality of the local act for Muscogee county is controlled in principle by the decision in *Jenkins v. State*, 46 S. E. 628, 119 Ga. 430.

4. The indictment followed the terms of the statute, and was not subject to demurrer because of the failure to describe the land on which the seed cotton was grown. The evidence supported the verdict, and it was not error to refuse to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; P. E. Seabrook, Judge.

Charles Bazemore was convicted of purchasing seed cotton in violation of law, and brings error. Affirmed.

Bazemore was charged with the offense of a misdemeanor, for that, without the written consent of the owner of the land whereon the same was produced, and without the written consent of the agent of such owner, he did, between the 1st of August and the 20th of December, to wit, on the 10th of November, unlawfully purchase 98 pounds of cotton in the seed from one Leonard Huling. The defendant demurred on the ground that the local act creating such an offense (Acts 1889, p. 1391) was void under the Constitutions of Georgia and of the United States, in that it deprived a person of the use of his property without due process of law, and deprived a citizen of the rights, privileges, and immunities created by the Constitution of Georgia and of the United States, and was not a valid exercise of the police power of the state. He specially demurred for the further reason that the indictment did not set forth or describe the premises whereon the cotton was grown, or the name of the owner thereof, so that the defendant could be informed of what he was expected to defend. The demurrer was overruled. The evidence showed that Huling got the seed cotton from Bryant; that he carried it to Bazemore, who asked to let him have the cotton; whereupon Huling said he understood that everybody could not buy cotton without a license; to which Bazemore replied that there was no such law, and that anybody could buy cotton who wanted to. Thereupon Huling sold the cotton to Bazemore for \$3. He carried no written order of any kind allowing him to sell the cotton; did not know on whose land the cotton was raised. The defendant was convicted, and assigns error

on overruling the demurrer and refusing to grant a new trial.

T. T. Miller, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

LAMAR, J. (after stating the foregoing facts). The right to be at large without the right to act would be but to live in a prison of extended bounds. The liberty which is guaranteed by the Constitution means far more than freedom from servitude. An integral and essential element is the right to use all one's powers of mind and body, to engage in any lawful occupation upon such terms as he may choose, and to make contracts with other citizens who are as free as himself. Presumptively every one may agree upon the terms on which he will sell his own property or buy that of another. This right can only be limited and made penal by necessity of preserving the public health, the public morals, or the public safety, included in which would be the necessity of protecting the property of the public. Instances may be found in liquor laws; in statutes requiring the written consent of parents or friends before liquor or opium can be sold to certain persons; the requirement as to inspection of fertilizers, turpentine, flour, and similar statutes too numerous to mention. The act in question is in pursuance of the police power (Civ. Code 1895, § 5734), which includes the right on the part of the state "to enact rules for the conduct of the most necessary and common occupations, when, from their nature, they offer peculiar opportunities for imposition and fraud." *Cooley's Con. Lim.* (7th Ed.) 887; *Turner v. Maryland*, 107 U. S. 41 et seq., 2 Sup. Ct. 44, 27 L. Ed. 370. Seed cotton, while an article of value, is not ordinarily an article of commerce. Usually it is ginned and packed before being offered for sale. Even small quantities, however, are so much more valuable than similar weight of corn, wheat, oats, or other farm products, as to afford special temptation for petty larceny. When stolen from the field of the owner, it is almost impossible to be identified. It is therefore especially difficult to make laws relating to larceny or receiving stolen goods effective in preventing the crime by punishing the thief. The evil is sought to be met by prohibiting the sale at night, or, as in the act now under consideration, by requiring the written consent of the owner of the land on which it was grown, so as thereby to afford a means by which the property may be traced, and the thief punished if it was in fact unlawfully taken. The present case does not involve any question as to what language must be used in such consent, or whether a bill of sale from the planter would be sufficient. The validity of a similar statute was recognized in *Jenkins v. State*, 119 Ga. 430, 46 S. E. 629. To require the state to prove the ownership or to describe the land on which the cotton had

been grown would nullify the statute as completely as to declare it unconstitutional. There is no rule of pleading which requires a decision which would bring about such a result. The indictment follows the statute, and was not subject to the demurrer. Compare Pen. Code 1895, § 929; *Hill v. Dalton*, 72 Ga. 314 (1); *Williams v. State*, 89 Ga. 483, 15 S. E. 552.

Judgment affirmed. All the Justices concur.

(121 Ga. 615)

SHROUDER v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

INDICTMENT—SURPLUSAGE—WITNESS—USE OF MEMORANDA—CRIMINAL TRESPASS—EVIDENCE.

1. Allegations in an indictment, wholly foreign to any element in the offense charged, may be disregarded as surplusage, and need not be proved. The rule is otherwise as to averments which are descriptive of some element in the offense, though more precise and detailed than was absolutely necessary.

2. A witness may use any written instrument for the purpose of refreshing his recollection, provided he ultimately testifies from his recollection as thus refreshed, even though he did not himself write the instrument.

3. While it is not necessary to allege, in an indictment under Pen. Code 1895, § 219, par. 3, that the act of trespass was done "willfully," a conviction cannot be had where the act was done without any criminal intent; and where the act alleged to be a trespass was committed in good faith under a claim of ownership, there can be no lawful conviction.

4. The evidence did not authorize the verdict, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

S. C. Shrouder was convicted of removing the fence of another without his consent, and brings error. Reversed.

Pearson Ellis and Crum & Jones, for plaintiff in error. E. F. Strozler and Whipple & McKenzie, for defendant in error.

COBB, J. 1. The indictment was under Pen. Code 1895, § 219, par. 3, and, in addition to charging the accused with pulling down and removing the fence of the prosecutor without his consent, alleged that this was done after the accused had been personally forbidden to do so by the prosecutor. The allegation that the accused had been forbidden by the prosecutor to pull down the fence was entirely unnecessary. It related to no element which was a necessary ingredient of the offense charged, and therefore could be properly treated as surplusage, and not necessary to be proved. See 1 Bish. New Cr. Proc. § 478; *Tigner v. State*, 119 Ga. 114, 45 S. E. 1001.

2. A witness who was being examined as to the existence of certain mortgages was allowed to refresh his recollection by referring to the record of mortgages, and after

so doing testified positively that his recollection was refreshed, and that, when so refreshed, he could recall distinctly the facts referred to in the papers. This evidence was objected to on the ground that a witness could not refresh his recollection by referring to a paper which he did not himself prepare. The Code declares: "A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he finally speaks from his recollection thus refreshed, or is willing to swear positively from the paper." Civ. Code 1895, § 5284. In *Printup v. James*, 73 Ga. 583, Mr. Chief Justice Jackson doubted whether it was possible for the recollection of a witness to be refreshed by an instrument which he did not prepare. In *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317, there is, however, a distinct ruling that the recollection of a witness may be refreshed by such an instrument, provided he ultimately swears from his recollection as thus refreshed; but that, in order to testify positively from the paper itself he must either have made the paper himself, or at some time when the facts were fresh in his memory knew the facts stated in the paper to be correct.

3. 4. In *Wilcher v. State*, 118 Ga. 196, 44 S. E. 995, it was held that an indictment under the paragraph of the section under which the present indictment was framed need not allege that the act of trespass was done "willfully"; but it was not ruled that one could be convicted under that paragraph where the act was done in good faith under a claim of ownership. While the act need not be willful, the element of criminal intent must be present; and while this intent might be presumed from the act, where nothing more appeared, yet where it is affirmatively shown that the trespass was committed in good faith under the belief that the accused was the owner of the land, the presumption of criminal intent is rebutted, and there can be no conviction. An honest mistake might result in civil liability for the wrong, but the party committing the trespass would not, by reason of such mistake, be subject to a criminal prosecution. The prosecutor claimed to own the land and the fence. The accused claimed to own the land, and therefore asserted what she believed was her right to remove the fence, which she did because it interfered with the cultivation of the land. The question of ownership of the land is, under the evidence, close and doubtful. The husband of the accused was at one time owner of the land. He conveyed it to Mrs. Clements. After this conveyance a homestead was set apart to the husband as the head of a family. The conveyance to Mrs. Clements was for the purpose of securing a debt due to her. After the death of the husband, Mrs. Clements was proceeding to eject the accused, and Raines, at the request of the accused, seems to have paid up an amount which satisfied Mrs. Clements'

claim upon the land, and a deed was made to Raines. There was an agreement between the accused and Raines that he should hold title to the property, not only until the amount paid Mrs. Clements was repaid, but also an additional sum which the accused owed to him. The accused claims that she has paid Raines the entire sum that she owed him. It is claimed by Raines that he and the accused agreed to divide the land—the accused to take the south half and he the north half; that a deed was made and delivered to the accused by virtue of this agreement; and that thereafter Raines sold the north half to the prosecutor. The accused admits the existence and payment of the Clements claim by Raines, but she denies the agreement as to the division of the land, and denies that she ever accepted the deed to the south half, though she admits that the paper was delivered to her son, who was living with her, and attending to her business, and that it was found among his papers after his death. The rights of Raines, and therefore of the prosecutor, depend largely upon the question as to what interest in the land the homestead attached to. If it attached to the equity of redemption after the payment of the Clements claim, the accused had no right, after the death of her husband, to sell or incur this homestead interest; and a deed from her to any interest in the property to which the homestead had attached would be absolutely void. See *Whittle v. Samuels*, 54 Ga. 548. From what has been stated it is apparent that this controversy between the accused and the prosecutor is not one which the law contemplates as proper for solution upon the criminal side of the court. What might be the legal rights of the accused claiming under her husband or the equities of the prosecutor claiming under Raines are questions too intricate and delicate to be settled by a jury in the trial of a misdemeanor case. A new trial should have been granted on the ground that there was no evidence to authorize the verdict.

It has been more than once said by this court that the indictable trespass act of 1866 was not intended to be used as a substitute for the action of ejectment, and we avail ourselves of this opportunity to announce that neither was it intended that it should take in our jurisprudence the office or dignity of a bill in equity.

Judgment reversed. All the Justices concur.

(121 Ga. 707)

SEABOARD AIR LINE RY. v. HARRIS.

(Supreme Court of Georgia. Jan. 27, 1905.)

CARRIERS—DELIVERY OF BAGGAGE—DELAY—DAMAGES.

1. Where a traveling salesman, whose compensation is based on commissions on such orders secured by him as his employer approves, shipped his trunks of samples over the line of

a common carrier, and they were unreasonably delayed, he cannot, in a suit for breach of the contract to convey, recover as damages for such delay the profits from orders which, tested by past experience, he would have secured during the period he was without his trunks. Such damages are too remote and speculative, grow out of an enterprise collateral to the contract to ship the trunks, and are not such as the parties contemplated when the contract was made as the natural result of its breach. Civ. Code, 1895, § 3798; *Georgia Railroad v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by J. A. Harris against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant brings error. Reversed.

E. A. Hawkins, for plaintiff in error. J. H. Lumpkin, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(121 Ga. 607)

HARRELL v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

ARSON—OWNERSHIP — EVIDENCE—WITNESS — IMPEACHMENT—CONSPIRACY — ACCOMPLICE—CORROBORATING TESTIMONY—INSTRUCTIONS.

1. The offense of arson is not so much against the property interest in the house as it is against the security of the house, and an allegation of ownership in an indictment is sustained by proof of occupancy by the alleged owner under a claim of right. There was no error in admitting the evidence complained of, to establish the ownership of the burned building.

2. While it is competent to show any relevant fact indicating that a witness is testifying as he does because of inducements influencing him to favor one of the parties to a case, it is not competent to establish that fact by proof of an appeal for clemency made by the prosecuting attorney in his argument to the jury in another case, in which the witness whose credit is sought to be attacked was the defendant.

3. The evidence established a conspiracy between the accomplice and the accused, and the acts of the accomplice pending the criminal enterprise were admissible against the defendant.

4. In a case of felony, where the evidence relied on for a conviction is that of an accomplice and circumstances corroborating his testimony, it is not error to charge that the corroborating circumstances, independently of the accomplice's testimony, should be such as lead to the inference of the defendant's guilt, and that grave suspicions raised by the circumstances would not be a sufficient corroboration of the accomplice's testimony to authorize a conviction.

5. A defendant is entitled to a concrete application of the law to the particular facts of a case, if he presents a timely written request to charge, but he is not entitled to an elaboration of the abstract law upon a single phase of the case to such an extent as will give to it undue prominence.

6. There was sufficient evidence to warrant the verdict, which has the approval of the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

A. S. Harrell was convicted of arson, and brings error. Affirmed.

Blalock & Cobb, J. W. Walters, and Geo. Y. Harrell, for plaintiff in error. F. A. Hooper, Sol. Gen., J. B. Hudson, S. R. Stevens, J. F. Souther, and S. P. Gilbert, for the State.

EVANS, J. H. B. Morgan and A. S. Harrell were jointly indicted for the offense of arson at the April term, 1904, of Webster superior court. The defendant Morgan was tried at that term and convicted, and on review of the case by this court his conviction was upheld. See 120 Ga. 499, 48 S. E. 238. At the next term of the court, Harrell was put on trial, and was convicted under the first count in the indictment, charging him with being a joint principal. On this trial Morgan was offered as a witness for the state, and his testimony was to the effect that Harrell was the actual perpetrator of the crime. There was other testimony tending to connect him therewith. To the overruling of his motion for a new trial he excepts.

1. The first ground of the amended motion was abandoned. The second, third, fourth, and fifth grounds relate to the admission of evidence touching the ownership of the building described in the indictment, which was therein alleged to be the "frame storehouse of J. R. Stapleton, who then and there owned and occupied [the same] as trustee in bankruptcy of the corporation of Stapleton & Nicholson Company." The court allowed J. R. Stapleton to testify that he was at the time of the fire in possession of this storehouse as trustee in bankruptcy of the Stapleton & Nicholson Company, which was a chartered company. The court then admitted a certificate of the referee in bankruptcy that Stapleton had been appointed trustee of the bankrupt corporation, and also the judgment adjudicating that company a bankrupt, signed by the referee.

In cases of arson the offense is not so much against the property interest in the house as it is against the security of the house, and an allegation of ownership in an indictment is sustained by proof of the occupancy of the alleged owner under a claim of right. Even if it was error to allow the witness to testify that his possession was that of a trustee in bankruptcy, the error was cured by the subsequent admission of the certificate of his appointment as trustee by the referee in bankruptcy. This certificate was admissible to prove that fact. *Morgan v. State*, 120 Ga. 502, 48 S. E. 238. The adjudication of bankruptcy was not necessary to establish the appointment of the trustee by the referee; the regularity of such appointment not being in issue, and the presumption being that there had previously been a proper adjudication of bankruptcy.

2. It appears that one Bill Ellis Sheppard had been tried at the same term of court for the crime of murder, that the same counsel who was conducting the state's case

against Harrell was employed in the prosecution of Sheppard, and that this attorney, in his argument to the jury in the Sheppard case, appealed to the jury to recommend a sentence of life imprisonment in the event they should find him guilty. The accused offered to prove these facts for the purpose of showing that Sheppard, who testified as a witness for the state in the present case, was induced by the appeal for leniency made by the prosecuting attorney in his case to give testimony favorable to the state in its prosecution of Harrell. The court very properly rejected this proffered evidence. While it is competent to show any relevant fact indicating that a witness is testifying as he does because of inducements influencing him to favor one of the parties to a case, it is certainly not competent to establish that fact by the declarations of a prosecuting attorney, made during the trial of another case, in which the witness was interested. What counsel said to the jury in the Sheppard case did not amount to an inducement held out to him to swear falsely in the present case. It was *res inter alios acta*. The testimony rejected was not such as would have justified the jury in discrediting the testimony of Sheppard, on the theory that, in testifying as he did, he was undertaking to pay a debt of gratitude which he thought he owed to the prosecuting attorney for the manner in which he had conducted the prosecution against him (the witness). He had been convicted, and was paying the penalty of his crime; and, for aught that appears, he had nothing to gain or to lose by swearing to what he knew concerning the commission of the crime then under investigation.

3. Exception is taken to the refusal of the court to rule out the testimony of one Jim Jordan as to what Morgan did with reference to procuring a bottle of oil from one Ollie Jordan. The motion to rule out this testimony was put upon the ground that proof of the acts of Morgan was inadmissible until after the alleged conspiracy between him and the accused was shown. When this testimony was first brought out, no objection to it was made, and the motion to rule it out was presented after the state had introduced all of its direct evidence. At the time the motion was made, there was evidence tending to establish the alleged conspiracy, and therefore the court rightly declined to sustain the motion.

4. Complaint is made of the following charge of the court: "Now, in that respect, gentlemen, I charge you that the corroborating circumstances must be such as to satisfy the jury, and it should be such as, independent of the accomplice's testimony, to lead to the inference, that the defendant is guilty. It must be such as, independently of the accomplice's testimony, to lead to the inference that the defendant is guilty. And grave suspicions raised by the circumstances would not, under the law, be a sufficient cor-

roboration of the testimony of the accomplice to authorize a conviction." The contention is that this charge was misleading and calculated to confuse the minds of the jury, and was an incorrect statement of the law. There cannot lawfully be a conviction of a felony where the only witness is an accomplice unless his testimony is aided by proof of corroborating circumstances. Pen. Code 1895, § 991. But "it is not essential that the corroborating testimony shall in and of itself be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular." *Dixon v. State*, 116 Ga. 186, 42 S. E. 357 (7). The charge of the court to which exception is taken was a correct statement of the law with reference to the sufficiency of the corroboration of an accomplice. If the aliunde evidence be such as to lead to the inference that the accused is guilty, it will be sufficient. The judge expressly cautioned the jury that grave suspicion raised by the circumstances would not be sufficient to corroborate the testimony of the accomplice, but the corroborating circumstances should and must be of a character which, independently of his testimony, lead to the inference of the defendant's guilt. This was a clear statement of the law on the subject, and the charge is not open to the objections urged against it.

5. Twelve written requests were presented to the judge, invoking instructions on the subject of reasonable doubt and the probative force of circumstantial evidence. None of these requests contained a concrete application of the law to the particular facts of the case on trial, but set forth a mere abstract statement as to what would or would not raise a reasonable doubt in cases where the state relied for a conviction on circumstantial evidence. The charge of the court is set forth in full in the record, and an examination of the same discloses that the judge gave an exhaustive instruction to the jury as to the law bearing on reasonable doubt, and as to the degree and strength of the circumstantial evidence required to authorize a conviction. It has been held that "in a close and doubtful case it is error for the judge to refuse to give to the jury, upon an appropriate written request submitted in due time, a charge applying to the facts, as shown by the evidence for the party making the request, the law applicable thereto," and that in such a case the error is one which requires the grant of a new trial, "although the judge, in his charge, states the abstract principle of law applicable to those facts." *Roberts v. State*, 114 Ga. 450, 40 S. E. 297. But even conceding that each of the written requests embodied a correct statement of the abstract law as heretofore announced by this court, the trial judge properly declined to give them in charge, for to have done so would have been to unduly stress this feature or phase of the case. A defendant is entitled to a concrete application of the law to the peculiar facts

of the case if he presents a timely written request to charge, but he is not entitled to an elaboration of the abstract law upon a single phase of the case to such an extent as will give to it undue prominence. The court having fully charged the law upon the subjects covered by the requests to charge, it was not error to refuse to give them in charge.

6. There was abundant evidence to establish the fact that the crime charged in the indictment had been committed by some one, the fire evidently having been of incendiary origin. It is contended, however, that the verdict was contrary to the evidence, in that there were no corroborating circumstances shown connecting the accused with the perpetration of that offense. The record discloses that Morgan, the alleged accomplice, was a relative and boon companion of Harrell; that for many months prior to the commission of the crime they had been on unusually intimate terms, had led a more or less intemperate and dissipated life, and were frequently seen together. One entire side of the town of Preston was burned. One of the storehouses was owned by a corporation in which a relative of Harrell had an interest, but, whatever this interest was, it had been lost because of the insolvency of the corporation. The mercantile firm of Cobb & Montgomery occupied a store in the burned district. This firm, a short time before the fire, had caused a levy to be made on property belonging to the defendant's father, and the defendant had expressed resentment towards the members of that firm for causing the levy to be made. A few days before the fire the accused procured a warrant to be issued against a nephew of Mr. Nicholson, a stockholder of the Stapleton & Nicholson Company. The defendant said to a witness who was discussing the proposed prosecution of Nicholson's nephew that, if the witness had come to intercede for the young man at the instance of Nicholson, he would not entertain the idea of abandoning the prosecution, because "Nicholson hadn't treated him right." "Harrell seemed to be fretted with" Nicholson, and "used some rough language in connection with" this statement; expressing at the same time his suspicion that Nicholson had sent the witness to him in order to persuade him to withdraw the warrant. The defendant "seemed to be mad" because of Nicholson's attempt to thus shield his nephew, as he supposed, and told the witness about "some trouble that his father and Nicholson had about some property . . . that Nicholson had sold them," saying "he wouldn't show him any favors unless he would whack up with them about a piece of property that had been sold to them" in the town of Preston. Defendant went so far as to say that, were it not for the witness, "he would be glad to see the town burned or sunk, or something of that kind." Just before dark on the night of the fire, the defendant and Morgan left the town of Preston

ton in the former's buggy, and drove to his house, where they took supper. Morgan was drunk. Defendant left his house with Morgan immediately after supper, but returned about 11 o'clock that night, and was not again seen at home until the next morning about daylight. There was then clearly visible on his forehead a red mark, such as might have been made by the band of a hat pulled tightly down upon his head, and worn so for some time, from which fact one of the witnesses who swore he was at the house said he had inferred that the defendant had but recently returned home. The morning of the fire, defendant was seen about 8 o'clock in Preston, in the near vicinity of the burned district, sitting in his buggy; yet, two hours later, when told by an acquaintance whom he met on the road some distance from Preston that there had been a fire in the town, the defendant affected surprise at this information, and expressed his regret that the town had been burned. It also appeared that Morgan was arrested the day after the fire, and that after his arrest the defendant said to Morgan's wife: "I am expecting them after me every minute." He further told her that, if she "knew anything to keep it to [herself]. It was always best." The state introduced further testimony tending to establish its contention that the accused, in company with Morgan, went to the plantation of the defendant's father about 11 o'clock on the morning of the day before the fire occurred, and that they sought to procure a negro living on the plantation to burn the town, but he refused to do so, whereupon Morgan said, "If you are afraid to burn up Preston, by God! I ain't," and "Harrell laughed at that," and went off with Morgan in his buggy, driving towards Preston. The accused admitted having been away from his home during the night of the fire, and not returning with his horse and buggy until daylight, but attempted to establish an alibi by showing he had not driven to Preston, but in another direction, to the house of a relative, where he had stayed until early in the morning. According to the defendant's statement, and the testimony of the witnesses he offered to establish this alibi, all of whom were relatives, he left home after supper with Morgan, but returned alone about 11 o'clock; then, remembering that a relative who owed him some money for cotton seed contemplated moving to another county, he drove to the house of this relative, some six miles distant, where he sat up the remainder of the night talking with his kinsman in a room wherein his relative's wife, recently confined, was lying in bed. Notwithstanding his express purpose was, he said, to collect a debt, one of the witnesses testifying in his behalf swore that he made no demand on his relative for the money. After sitting up the remainder of the night, as stated, the defendant declined to take breakfast at his relative's house, and, according

to his statement, left in his buggy shortly before daylight, arriving at his home about sunup. The account given by the defendant as to his movements and whereabouts after leaving his home at 11 o'clock at night, on the errand stated, was a most improbable story, viewed in the light of the circumstances brought to light by the evidence introduced by the state, viz., his expression of a wish to see the town of Preston burned or sunk, were it not for a single person, towards whom he felt friendly, and who he did not desire to injure; his attempt to procure a negro on the plantation of his father to burn the town by setting fire to the building in which the fire originated; his close association with Morgan, who had been jointly indicted with him for the crime, and who had been found guilty, and who testified that the defendant was the actual perpetrator of the offense with which they had been charged; the defendant's feigned ignorance of the occurrence after he had driven to town early in the morning and had viewed the burned district; his ill feelings towards at least three of the property owners who had suffered by the fire, and his indifference for others for whom he felt no friendship; and, lastly, his cherishing of a grievance against the town because of a general dislike for its inhabitants, who, he asserted, had shown him no consideration or regard. These and other circumstances, such as the remarks he made to Mrs. Morgan indicating that he had reason to apprehend his arrest, were sufficient to connect him with the commission of the crime, irrespective of Morgan's testimony. It was not necessary that the testimony of Morgan, his alleged accomplice, should be corroborated in every material particular. The corroboration which the law requires is that the circumstances shall, independently of the testimony of an accomplice, connect the accused with the perpetration of the offense charged. The testimony relied on by the state met this requirement of the law. The verdict of the jury has the approval of the presiding judge, and no reason is shown why it should be set aside.

Judgment affirmed. All the Justices concur.

(121 Ga. 602)

OGLESBY v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

INTOXICATING LIQUORS—TITLE OF ACT—CONSTITUTIONAL LAW—INDICTMENT—PROHIBITION—ELECTION—JUDICIAL NOTICE—GRAND JURY—SPECIAL PRESENTMENT—CRIMINAL LAW—CONTINUANCE—NEW TRIAL—EVIDENCE.

1. The title of an act being "An act to prohibit the sale of" liquors of a given character, in a named county, "and for other purposes therein mentioned," legislation in the body of the act was authorized, providing that the prohibition against the sale of the liquors should not become effective in such county until an election was had, and the result was in favor of such prohibition. See *Mayor of Macon v. Hughes*, 36 S. E. 247, 110 Ga. 795; *Mayor of*

Americus v. Perry, 40 S. E. 1004, 114 Ga. 871, 37 L. R. A. 280.

2. When an act makes penal the sale of intoxicating liquors, and in a subsequent section provides that the prohibition shall not prevent practicing physicians from furnishing such liquors to their patients, it is not necessary, in an indictment for a violation of the act, to allege that the sale was not by a practicing physician. *Kitchens v. State*, 43 S. E. 258, 116 Ga. 847; *Rumph v. State*, 45 S. E. 1002, 119 Ga. 121.

3. The courts will take judicial notice of the result of a prohibition election, whether the same was held under the general local option liquor law, or a local act providing for such election. *Woodard v. State*, 30 S. E. 522, 103 Ga. 498, and citations.

4. When in the progress of an investigation of a case by the grand jury it develops from the testimony of a witness that an offense has been committed altogether disconnected from the case under consideration, it is entirely proper for the grand jury to cause a special presentment to be preferred for such offense, and require the witness to appear and be sworn on the consideration of the presentment thus preferred. It is not only the privilege, but the duty, of the grand jury to present all offenders where the offense comes to their knowledge during the time of their service, and it is immaterial in what way the information is received.

5. Where a motion is made to continue a criminal case upon the ground that the accused is physically unable to go to trial, and upon such question the testimony of medical experts introduced as witnesses is conflicting, the discretion of the trial judge in overruling the motion will not be controlled. *McDaniel v. State*, 30 S. E. 29, 103 Ga. 269.

6. That a person accused of crime was improperly brought into court under an order of the judge cannot properly be made a ground of a motion for new trial. *McDaniel v. State*, *supra*.

7. When a criminal case is called for trial, and a motion for a continuance is made, the judge has a discretion to either continue the case, or postpone the same until a later day in the term; and this is true whether the term lasts longer than 30 days or not. The act of 1893 (Acts 1893, p. 56) now embraced in Pen. Code 1895, § 961, does not interfere with the exercise of this discretion by the judge; that act merely providing that, where the court lasts more than 30 days, a continuance shall not be had if the ground upon which it is sought can be removed before the end of the term.

8. It is not an abuse of discretion to refuse to postpone a case to a later hour in the day, in order to allow counsel time to prepare a demurrer and plea, when no reason appears why such demurrer and plea were not prepared before the case was called for trial; and when it appears that the matters upon which the plea was based could have been ascertained before the case was called, and that the court suspended the trial in order to allow counsel time to prepare the demurrer and plea, such refusal will not be held erroneous.

9. Even if a motion to continue a criminal case can be properly entertained in the absence of the accused, the judge is not required to do so. If the absence is due to providential cause, this will be a sufficient answer to a rule nisi on a forfeiture of the bond.

10. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

N. B. Oglesby was convicted for violation of the liquor law, and brings error. Affirmed.

Sam L. Olive, for plaintiff in error. Thos. J. Brown, Sol., for the State.

COBB, J. The accused was arraigned in the city court of Elberton upon a presentment charging him with a violation of a local act prohibiting the sale of liquor in Elbert county. Acts 1884-85, p. 520. He filed a general and special demurrer and plea in abatement to the presentment, each of which being overruled, he filed a plea of not guilty. After conviction he made a motion for a new trial, and assigns error upon the overruling of this motion, and on the overruling of the demurrer and plea in abatement.

The principles stated in the headnotes are controlling upon the various questions involved. While the record does disclose some irregularity in the manner in which the accused was brought into court for trial, this irregularity did not afford any reason for granting a new trial. If the accused, after having been brought into court, had moved for a discharge upon the ground that he was in the custody of his bail, who had not surrendered him, and that the court could not proceed to bring him into court by force until his bond had been forfeited, he might have been entitled to a release. But if the judge committed any error in this respect, it cannot be taken advantage of by a motion for a new trial. A ruling of the court in reference to the matter should have been invoked, and exceptions pendente lite filed if the ruling was adverse to the accused. The case of *McDaniel v. State*, cited in the headnotes, seems to be controlling, in principle, upon this point. We see no reason for reversing the judgment in this case.

Judgment affirmed. All the Justices concur.

(121 Ga. 578)

COOPER v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

WRIT OF ERROR—DISMISSAL—BILL OF EXCEPTIONS—SERVICE.

1. Under the decision in *Bush v. Keaton*, 65 Ga. 296, where it does not affirmatively appear that service of a bill of exceptions was made or waived after the certificate of the presiding judge was attached, the writ of error must be dismissed upon motion.

(Syllabus by the Court.)

Error from City Court of Douglas; Levi O'Steen, Judge.

Jim Cooper was convicted of cheating, and brings error. Dismissed.

R. A. Hendricks, for plaintiff in error. M. D. Dickerson, Sol., and W. C. Lankford, for the State.

SIMMONS, C. J. After conviction of cheating and swindling, Cooper sued out a bill of exceptions complaining of the overruling of a demurrer to the indictment, and of the refusal of the lower court to grant a

new trial. From the bill of exceptions it appears that the motion for new trial was overruled on October 22, 1904. When the bill of exceptions was certified, does not appear; the certificate being undated. Under date of November 2, 1904, counsel for the state acknowledged "due and legal service of the within bill of exceptions," and waived "copy and all other and further notice and service." In this court a motion was made to dismiss the writ of error on the ground that "it does not appear that the bill of exceptions was certified before the acknowledgment of service by the solicitor of the city court of Douglas." In support of this motion several cases were cited—among them, that of *Bush v. Keaton*, 65 Ga. 296. There was no request to review and overrule that case, and it is controlling here. Its facts were almost identical with those of the present case, and the writ of error was dismissed because the acknowledgment did not affirmatively appear to have been made after the judge had certified the bill of exceptions. It is true that the case as reported appears to have been put upon two grounds, and that both headnotes were made by the reporter; but an examination of the minutes of this court shows that the judgment of the court was put upon one ground, which was that just stated. That case is therefore controlling here, and must be followed. Civ. Code 1895, § 5566, is not applicable here. Under that section an undated certificate will be presumed to have been in time, but the section does not otherwise afford any presumption as to the date of a certificate. It is no authority for presuming that a dated acknowledgment was made after the undated certificate, when the contrary might have been true, and the certificate still have been made in time. *Vickers v. Sanders*, 106 Ga. 266, 32 S. E. 102.

Writ of error dismissed. All the Justices concur.

(121 Ga. 580)

McDUFFIE v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

ARREST—DE FACTO MARSHAL—MURDER—MANSLAUGHTER—EXCESSIVE FORCE—THREATS—INSTRUCTIONS—EVIDENCE—FLIGHT—REMARKS OF COURT—INSTRUCTIONS—NEWLY DISCOVERED EVIDENCE.

1. A de facto marshal of a municipal corporation is authorized to make an arrest. *Robinson v. State*, 9 S. E. 523, 82 Ga. 533.

2. In view of the evidence, there was no error in refusing to charge that the deceased had no right to arrest the defendant. *Burns v. State*, 7 S. E. 88, 80 Ga. 547.

3. Had the arrest been lawful, and conducted in a lawful manner, the admitted killing would have been murder.

4. The verdict of manslaughter necessarily implies that the jury found that the arrest was either originally unlawful or that the officer put himself beyond the cover and protection of his authority by the use of undue violence, but that such violence was not sufficient to arouse the fears of a reasonable man, so as to make the killing justifiable.

5. An officer may lawfully arrest his bitterest enemy, or he may unlawfully arrest his best friend. The legality of the arrest, the right of the defendant to resist the use of excessive force in making it effectual, and the extent of his right to resist if it was originally unlawful, were entirely independent of the motive actuating the marshal.

6. The evidence as to the threats by the deceased to make an arrest and of threats by the defendant to kill in resisting arrest warranted the charge of the court, and fully sustained his statement as to the contentions of the parties.

7. While the defendant could show that the state's witness had unkindly feelings toward him, it was not competent to go into details of the difficulty between the witness and the defendant.

8. The fact that a witness may have been in a lewd house was irrelevant to any issue on trial, and it was not error for the court to refuse to compel him to answer the inquiry as to why he was there.

9. The refusal to permit a witness to testify that five days after the homicide he saw bruises and contusions on the defendant's head was not harmful, other undisputed evidence as to the bruises upon the head of defendant immediately after the killing having been submitted by other witnesses.

10. The marshal's stick was before the jury, who could determine as well as a nonexpert whether it was a weapon likely to produce death. *Moran v. State*, 48 S. E. 324, 120 Ga. 848.

11. There was not enough to connect the absence of the knobs on the stick with the violent use thereof at the time of the killing to warrant a reversal because of a failure to allow evidence that the knobs were on the stick a considerable time before the homicide and absent therefrom some time after the killing.

12. The only evidence as to flight was offered by the defendant, with his explanation thereof. It was not, under the circumstances detailed in the record, error to exclude evidence of a voluntary surrender, offered by a witness for the defendant before the conclusion of the state's case in rebuttal of a theory not then advanced.

13. The introductory remark of the court as to the importance of the case because involving a matter of death or imprisonment could not have harmed the defendant. The contention that it excluded the idea of acquittal is not sustained by the record, it appearing that in immediate connection therewith the judge impressed upon the jury the fact that they were as much under obligation to acquit an innocent man as to convict one who was guilty.

14. The assignments relating to the instructions of the judge on the subject of murder are immaterial, the jury not having found the defendant guilty of murder, but of manslaughter.

15. The charge as to manslaughter was correct, and, if the defendant desired more specific instructions on that subject, appropriate requests therefor should have been submitted in writing.

16. So far as the requests to charge were proper, they were included in the general instructions given by the court.

17. The newly discovered evidence was either cumulative or impeaching in its nature. The evidence was conflicting, but sufficient to sustain the verdict. No error of law requiring the grant of a new trial appears.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; T. A. Parker, Judge.

Ashley McDuffie was convicted of manslaughter, and brings error. Affirmed.

Ashley McDuffie was charged with the murder of John Blue and found guilty of voluntary manslaughter. He made a motion for a new trial, which was overruled, and he ex-

cepted. While the killing was admitted, the evidence was sharply conflicting as to the circumstances attending the homicide. For the state there was evidence tending to show that Blue was marshal of Pineview; that, hearing firing of pistols in the corporate limits, he went towards the place where the shots were fired, and met McDuffie returning from that locality. A witness for the state testified that McDuffie fired the shot. This was denied by defendant and another witness. When the marshal met McDuffie, a conversation took place between them as to whether McDuffie had fired the weapon, during which time it is claimed that McDuffie became boisterous, and cursed, and when threatened with arrest stated that he would not submit; that Blue put his hand upon him, telling him to consider himself under arrest. Immediately thereafter blows passed, though who struck first did not appear from the evidence for the state. That for the defense was to the effect that Blue struck the first blow with his club. There was some evidence as to a blow on Blue's head and of blows and contusions on the head of McDuffie. In the altercation McDuffie fired, killing Blue. There was also evidence that in talking to a party who had been arrested by Blue, McDuffie said the latter could not arrest him, and that he had procured a pistol on the day of the homicide, stating that he was going to kill a man with it if he tried to arrest him that night; and that on another occasion he stated if Blue ever attempted to arrest him he was going to kill him. For the defense this was denied. There was testimony of statements by Blue that he wanted an opportunity to arrest McDuffie, and that he would lock him up, or do as Barfield had done Miller. This was supplemented by testimony as to a difficulty between Barfield and Miller. The defense attempted to go into the particulars of this trouble, showing the bad feeling between a state's witness and McDuffie. The witness admitted that his feelings had been bitter, but that they were not so at the time of the examination. The court refused to allow the particulars of the trouble to be inquired into. The defendant excepts to this ruling, and also to the refusal of the court to allow counsel to ask a witness for the state why he was in a certain house, the witness objecting to make answer, and it appearing from the brief here that it was intended to be shown that it was a lewd house.

M. E. Laud, D. B. Nicholson, W. L. & Warren Grice, Fort & Grice, and Arnold & Arnold, for plaintiff in error. Hal Lawson and J. F. De Lacy, Sol. Gen., for the State.

LAMAR, J. (after stating the foregoing facts). 1. Pen. Code 1895, §§ 885, 832, recognizes marshals as peace officers. Under the principle embodied in Pol. Code 1895, § 223, and Civ. Code 1895, § 5168, it was held in *Robinson v. State*, 82 Ga. 535, 9 S. E. 528,

and in *Garrett v. State*, 89 Ga. 446, 15 S. E. 533, that a de facto marshal stands upon the same footing as to the right to make an arrest as one regularly appointed. In the present case, while his commission was not produced, it appeared from all the evidence that Blue was marshal, was accustomed to make arrests, and that such fact was well known to McDuffie.

2. The defendant strenuously insists that as there was no proof of the existence or terms of any ordinance prohibiting disorderly conduct, the court should have charged that there was no evidence that Blue had a right to make the arrest. There was evidence of disorderly conduct. Without proof of an ordinance it was said in *Burns v. State*, 80 Ga. 546, 7 S. E. 88, that a policeman had a right to arrest one in Savannah who was disorderly, and was justified in using such force as was necessary to compel submission. But, irrespective of the question of disorderly conduct, there was no error in refusing to instruct the jury as requested. There was at least some evidence that McDuffie was carrying a concealed weapon. Watts, one of the witnesses for the defendant, testified that Blue told McDuffie there had been some shooting, and he believed McDuffie had done it, and he would have to arrest him. He took out his pistol and showed him five cankered cartridges in it. The defendant, in his statement, also claimed to have "pulled out his pistol and showed it to Blue." There was evidence from other bystanders that they had not seen a pistol. While the issue was not distinctly presented, there was enough evidence of carrying a concealed weapon to warrant a refusal to charge that there was no proof to show that Blue had the right to arrest.

3. If the arrest had been lawful, and conducted in a lawful manner, the resistance culminating in homicide would have amounted to murder.

4. Had the jury found McDuffie guilty of murder, any error of omission or commission on the subject of the law of arrest would have been more important than it can possibly be under the present record. Here he was found guilty of manslaughter. This necessarily implies that the jury found either that the arrest was originally unlawful, or that it was being made in an unlawful manner, so as to put Blue beyond the cover and protection which the law affords a peace officer when properly in the discharge of his duty. An examination of the entire charge, however, shows that the judge fully and fairly presented all the issues raised by the evidence. He instructed the jury as to the rights of an officer making a lawful arrest and the extent of a citizen's right to resist an unlawful arrest, and also fully and fairly instructed them as to the right of McDuffie to resist force with force in case he was being unlawfully arrested, or lawfully arrested and unlawfully beaten.

5. There was evidence of bad blood between the two men, but that did not in any way affect the rights of either. A marshal may lawfully arrest his worst enemy, or may unlawfully arrest his best friend. The motive would not determine the legality of the act. Whether it was originally a lawful arrest properly conducted, or lawful with improper force, justifying resistance by commensurate force, or assault and battery, would be determined without regard to the motive with which the arrest was begun or attempted to be made effectual. There was no error, therefore, in refusing to charge, as requested, on the subject of the motive with which Blue made the arrest. If the arrest was lawful, it did not become the less so because of any ill will towards McDuffie.

7. It was competent to show that a witness for the state entertained feelings of ill will towards the defendant. Civ. Code 1895, § 5289. But that did not warrant an investigation of the particulars of the difficulty or the cause of the hostility. To admit such testimony would multiply issues and tend to confuse the jury. *Andrews v. State*, 118 Ga. 4, 43 S. E. 852; *Bishop v. State*, 9 Ga. 121 (1). Had the witness replied that he had no ill will, it would have been proper on further cross-examination to ask if he and the defendant had not had a fight. Had he denied that, the accused would have been entitled to prove the contrary. *Daniel v. State*, 108 Ga. 206, 29 S. E. 767. But this would not justify an investigation of a mere collateral issue or the particulars of the difficulty.

11. Before the evidence for the state was concluded, the defendant was allowed to introduce a witness out of the regular order. The court refused to allow him to testify as to a voluntary surrender by the defendant. There are cases which hold that such evidence is inadmissible because in the nature of self-serving declarations. *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216. That question is not presented, the assignment being that the evidence was in rebuttal and explanation of the flight already proved by the state. The only evidence on the subject of flight which we find is that subsequently offered by the defendant himself, and at the time there was nothing to warrant its admission in rebuttal or for the purpose for which it was offered.

The other grounds of the motion for a new trial are sufficiently dealt with in the headnotes. We find no error requiring the grant of a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 585)

WALEA v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

CERTIORARI—ISSUANCE—TIME—DISMISSAL.

1. If the clerk fails to issue the writ of certiorari before the term to which it is return-

able, the plaintiff may, if there has been no laches on his part, move the court for an order directing the clerk to issue the writ.

2. Without such order, the clerk has no authority to issue the writ of certiorari subsequently to the term to which it was originally returnable.

3. Where the writ of certiorari was issued subsequently to the term to which it was properly returnable, without any order of court, and served upon the judge whose judgment was sought to be reviewed, who answered the same, the court rightfully sustained a motion to dismiss the certiorari proceedings on the ground that the writ had not been issued and served as provided by the statute.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; A. F. Daley, Judge.

Jack Walea was convicted of a misdemeanor, and brought certiorari. From an order dismissing the certiorari, he brings error. Affirmed.

Williams & Moring and Daniel & Kirkland, for plaintiff in error. W. W. Larsen, Sol., and B. T. Rawlings, Sol. Gen., for the State.

EVANS, J. The plaintiff in error was convicted of a misdemeanor in the city court of Swainsboro. Within 30 days after his conviction, he submitted to the judge of the superior court his petition for certiorari, which petition was duly sanctioned and filed in the office of the clerk of the superior court on December 29, 1903. The writ should have been issued and made returnable to the April term, 1904, of Emanuel superior court, but the writ was not issued by the clerk until August of that year. On the same day the writ was issued, the petition and writ were served on the city court judge, who filed his answer to the October term, 1904, of the superior court. When the case came on to be heard in that court, the certiorari was dismissed on the ground that the judge of the city court had not been served with the writ within the time prescribed by law, and had not answered the certiorari within the time fixed by law, and proper diligence had not been shown by the plaintiff in certiorari to have the service duly perfected.

1. When a petition for certiorari has been sanctioned and filed in the office of the clerk, it is his duty to promptly issue the writ, returnable to the next term of the court which convenes 20 days after the filing of the petition. Civ. Code 1895, § 4637. The clerk's authority to issue the writ ceases after the term to which it should be made returnable has passed. If the clerk fails to issue the writ as provided by statute, and the plaintiff in certiorari has been diligent, he may move for the issuance of the writ at a subsequent term. *Hopkins v. Suddeth*, 18 Ga. 518; *Mitchell v. Simmons*, 58 Ga. 166; *Zachery v. State*, 106 Ga. 124, 32 S. E. 22.

2. Without an order of court, the clerk cannot issue the writ after the term to which it should have been made returnable has gone by. Being wholly without authority to do so, in the absence of an order of court

so directing, his issuance of the writ after that term has expired is a mere nullity.

3. The plaintiff in certiorari will not be injuriously affected by the carelessness or misprision of the clerk, if it be shown to the court that his failure to issue the writ was not due to any laches on the part of the plaintiff in certiorari. On motion by the plaintiff, the court will, in such a case, grant an order authorizing the issuance of the writ, and making it returnable to a subsequent term. Proper diligence, however, requires that the plaintiff in certiorari shall make a timely motion for the granting of such an order. If he fails to do so, the clerk cannot cure his negligent omission to issue the writ within the time prescribed by law. In the present case no diligence on the part of the plaintiff in certiorari was shown, and it was not error for the court to sustain the motion to dismiss.

Judgment affirmed. All the Justices concur.

(121 Ga. 641)

ATLANTA & W. P. R. CO. v. WEST.

(Supreme Court of Georgia. Jan. 26, 1905.)

MASTER AND SERVANT—RELATIONSHIP—VOLUNTEER—LIABILITY OF MASTER—INFANCY OF PLAINTIFF.

1. To create the relation of master and servant there must be some contract or some act on the part of one person which expressly or impliedly recognizes another as his servant.

2. One into whose service another volunteers without his assent, express or implied, is not under the duties of a master toward a servant, or required to anticipate or discover the peril of such volunteer, but is only bound, relatively to such volunteer, to use care not to injure him after notice of his peril.

3. Where a defendant has been guilty of no breach of any duty owing to the plaintiff, there can be no legal liability.

4. Where a volunteer engages in work undertaken in compliance with an unauthorized request of an employé of the defendant, the latter owes him none of the obligations of a master toward a servant, but is only bound to use care not to injure him after notice of his peril. The fact that the volunteer is of tender years, and without sufficient mental capacity to appreciate the danger, while it might be an element of notice to the defendant of the peril of the volunteer, cannot change the relations of the parties, or impose upon the defendant any duty not ordinarily imposed by law relatively to volunteers. *Rhodes v. Georgia R. & Bkg. Co.*, 10 S. E. 922, 84 Ga. 320, 20 Am. St. Rep. 362, in part disapproved.

5. If the defendant had been negligent, and relied upon the concurrent negligence of the plaintiff to defeat or diminish the recovery, then the infancy of the plaintiff would be material to the determination of his diligence; but plaintiff's infancy cannot change the relations of the parties, or supply the place of negligence on the part of the defendant.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by Wilks West, administrator, against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, W. G. Post, and H. A. Hall, for plaintiff in error. W. C. Wright and J. B. S. Davis, for defendant in error.

SIMMONS, C. J. An action for damages for personal injuries was brought by Simmie L. West, a minor, by his next friend, against the Atlanta & West Point Railroad Company. Pending this action Simmie L. West died, and his duly appointed and qualified administrator was made a party in his stead. To the petition as originally filed the defendant had demurred. Subsequently the petition was amended in several particulars. The defendant renewed its grounds of demurrer, and also filed other demurrers to the petition as amended. The court overruled the demurrers, and the defendant excepted. The petition, after amendment, set up the following facts: On the morning of June 14, 1901, a freight train of the defendant became uncoupled because of a defective or broken coupling. For the purpose of repairing such coupling, and while the repairs were being made, a portion of the train stood upon and obstructed the crossing. One of the tools used by the train hands in repairing the coupling was an iron crowbar weighing about 50 pounds. While the repairs were in progress, young West, who came thither on his way to perform an errand for his father, after waiting for some time for the crossing to be cleared, went to the caboose or cab of the train to inquire when the crossing would be clear. When he approached the caboose, one of the brakemen on the train came up with a lot of tools which had been used to repair the coupling, among them the above-mentioned iron crowbar, and requested West to ascend the platform of the caboose and open the door so that the tools could be laid in the caboose. West, seeing no danger to himself in complying with this request, ascended the platform, and was proceeding to unbolt and open the door, when the brakeman handed him the crowbar, standing it up endwise, and letting one end rest on the platform, and requested West to take hold of it. West took hold of the crowbar, and was supporting it with one hand, the other being upon the door knob, and West being in the act of opening the door, when "suddenly and violently, and without warning signal, and without warning to" West, the train was coupled together, the section attached to the engine coming in contact with the other section, of which the caboose formed a part, "with great force, and said train was then suddenly and quickly jerked and put in motion and with a sudden jerk, by reason and on account of which sudden coupling and contact and sudden starting and jerking of said train" West was thrown back and down, the door slammed upon his right hand, and the crowbar fell upon and broke his right leg. West suffered great pain in his hand and leg. The injury to the leg

resulted in necrosis, and the leg had finally to be amputated. When West was requested by the brakeman to ascend the platform and open the door of the caboose and take hold of the crowbar, both sections of the train were perfectly still, and he had no reason to suppose or presume that they would be suddenly coupled together with great force and jar, and the train put in motion with a jerk, without notice to him. The brakeman was a man of long experience, and apparently about 50 years of age, while West was only 15 years and 2 months of age, and "without mental capacity, knowledge, and experience to know or comprehend that there was any danger" in complying with the request of the brakeman, "and without sufficient knowledge, mental capacity, and experience to avoid any danger" to which so doing might subject him. On account and by reason of West's tender years and inexperience he did not know, while he was on the platform, that the train might be coupled together suddenly and violently, and without warning, and put in motion with a sudden jerk. At the time of the injury "West did not have the mental capacity, knowledge, and experience of an ordinary boy fourteen years old." West was without fault, and in the exercise of due care, diligence, and circumspection, and his injuries were due wholly to the carelessness and gross negligence of defendant, its officers, agents, and employes. The petition charged that "defendant was negligent on account of its said employé requesting [West] to ascend the platform of said cab and open said door, and in handing said iron crowbar up to [West] with the request that [West] take hold of same; and especially was defendant, its agents, officers, and employes, grossly negligent in suddenly, violently, and with great force and jar coupling said sections of said train, and causing them to come in contact as aforesaid, and then suddenly putting said train in motion with a jerk while petitioner occupied the position hereinbefore described, and in so coupling and starting said train without signal, and without any notice or warning to [West]." Damages were laid in the sum of \$15,000.

The defendant's demurrers were based upon several grounds. It demurred generally, and on the ground that the petition failed to show that on the occasion when West was injured defendant owed him any duty, or that the acts and doings of the defendant were any breach of any duty owing by the defendant to West. The other grounds of demurrer it is unnecessary here to mention.

1. It is virtually conceded that West was a volunteer, and not a servant of the defendant. There was no contract of employment, nor any act on the part of any authorized agent of the defendant which expressly or impliedly recognized West as the servant of the company. *Rhodes v. Georgia R. & Bkg. Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362. "A person cannot be sub-

jected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring." 2 Labatt, Mast. & Serv. § 630.

2. One who, without any employment whatever, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, and not entitled to that degree of diligence on the part of the master which the latter is bound to exercise with reference to his servants. There are a great many cases which state that such a volunteer stands in the place of a servant, but in each such case which we have examined this position was taken in order to defeat the claim of the volunteer. In other words, the court held that the volunteer certainly stood in no better position than that of a servant, and that, conceding he stood in the position of a servant, he could not recover. Such cases not infrequently arise where, if the volunteer had been a servant, he could not recover because injured by the negligence of a fellow servant in the course of their common employment. A number of such cases will be found in the note to section 631 of Labatt on Master and Servant, vol. 2. In Georgia the rule as to the liability of the master for the negligence of fellow servants had been abrogated in railroad cases, and the claim of a volunteer cannot be defeated by treating him as though he were a servant. It is necessary to assign him to his true position. He is not a servant, and cannot charge the defendant with the obligations of a master. The defendant does not, as master, owe the volunteer any duty whatever. The obligations of master and servant do not arise between them. The defendant is only bound not to injure the volunteer willfully, and to use care not to injure him after notice of his peril. See *Church v. Railroad Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Everhart v. Railroad Co.*, 78 Ind. 292, 41 Am. Rep. 567.

3. The petition clearly does not make out a case of injuries inflicted willfully, or because of a want of care after notice of West's peril. There is no allegation that the defendant's agents or employes who coupled and moved the train knew anything of West's danger or of his position. Even the brakeman who requested West to get upon the platform does not appear to have had any notice that West's mental capacity was less than that usually possessed by boys of his age. The train was at a public crossing, but it does not appear that West could not get by it, or that this had anything to do with his compliance with the brakeman's request to assist him. The brakeman does not appear to have had any authority to make West or any one else the servant of the defendant. There is no allegation that the brakeman had any authority, and his request cannot be imputed to the defendant. The

brakeman had no authority to invite West to get upon the platform, and the defendant was under no duty to anticipate that he would do so, or to see that no injury resulted. Leaving out of consideration the minority of West, the case is simply that of a volunteer who places himself in a position of danger, and who is injured by acts of the defendant, which, relatively to a volunteer, do not constitute negligence. So far as appears from the petition, the defendant was guilty of no breach of any duty which it owed West, and therefore cannot be liable. Legal liability arises only upon the breach of some legal duty.

4. We think enough has been said to show that, had West been an adult, the defendant would not have been liable. West voluntarily engaged in work undertaken in compliance with the unauthorized request of the brakeman, and the defendant owed West none of the obligations which grow out of the relation of master and servant. The defendant was bound, through its agents and employes, to use care not to injure West after notice of his peril, and was bound not to injure him willfully; but no breach of this duty appears. Defendant in error, however, contended that the demurrers were properly overruled because of the allegations as to the minority and mental deficiency of West, relying upon the case of *Rhodes v. Georgia R. & Bkg. Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362. After examining that case, and also many decisions by other courts, we think this contention unsound. Infancy or want of mental capacity on the part of the plaintiff is often very material where the defense calls in question the plaintiff's own diligence. In other words, where the defendant has been negligent, and claims that the plaintiff could, by the exercise of due care, have avoided the injury, or that the plaintiff did not use due diligence to lessen the damages, or that plaintiff's negligence contributed to the injury, then the plaintiff's infancy or mental capacity is material. Whenever the plaintiff's diligence is under investigation, his mental capacity is relevant, as will be seen in many decisions in this and other states. In investigating the diligence of the defendant, the plaintiff's infancy or evident lack of mental capacity may sometimes become relevant as an element of notice to defendant of the plaintiff's peril. But in determining the relations of the parties the infancy of the plaintiff is not material, nor can it supply the place of negligence on the part of the defendant. West was a mere volunteer. His age and mental capacity could not change this. If young and mentally deficient, he was no less a volunteer, relatively to the defendant, than if old and experienced. The defendant did not, as master, owe him any duty. The defendant was not guilty of a breach of any duty which it did owe him. The infancy of West could not supply the place of negligence on the

part of the defendant, and there can be no recovery. The *Rhodes* Case, supra, seems to conflict with this view, though the headnote recognized that there could be no recovery unless the defendant had been negligent. The decision in that case is by but two judges, and not binding, and, in so far as it conflicts with what is here ruled, will not be followed. It has more than once been criticized by able law writers (3 Elliott on Railroads, § 1305; 2 Labatt on Master and Servant, § 636), and is, we think, unsound. We are clear in the present case that West's lack of mental capacity did not change his relations toward the defendant, or impose upon it any of the obligations which ordinarily arise from the relation of master and servant; that the petition showed no breach of duty toward West as a volunteer; that West's infancy cannot supply the place of negligence on the part of the defendant; and that the court below erred in overruling the defendant's demurrer. See, in relation to the relevancy of the volunteer's infancy, *Flower v. R. Co.*, 69 Pa. 210, 8 Am. Rep. 251, and the numerous cases cited in the notes in the two textbooks last above cited.

Under the above view of the case it will not be necessary to notice all of defendant's special demurrers.

Judgment reversed. All the Justices concur.

(121 Ga. 669)

SCOVILLE BROS. v. VARNER et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

JUSTICES OF THE PEACE—JURISDICTION—OBSTRUCTION IN STREETS.

1. The act of December 24, 1832 (Acts 1832, p. 207), conferring jurisdiction upon the justices of the peace of the Indian Spring district of Butts county to remove obstructions from the streets of the Indian Spring (or McIntosh) Reserve, is not applicable to the walks and promenades on the 10-acre lot embracing the mineral spring. The streets referred to in this act were those laid out in the plan of subdivision of the original McIntosh Reserve in conformity with the act of 1827 (Acts 1827, p. 119).

(Syllabus by the Court.)

Error from Superior Court, Butts County: L. S. Roan, Judge.

Action by Joe and Amanda Varner against Levi and George Scoville. Judgment for plaintiffs before a justice was affirmed on certiorari, and defendants bring error. Reversed.

M. W. Beck and Mills & Wall, for plaintiffs in error. O. M. Duke, Dessau, Harris & Harris, and Pope S. Hill, for defendants in error.

EVANS, J. Misses Joe and Amanda Varner caused a summons to be issued by the justice of the peace of the Indian Spring district of Butts county, directed to Levi and George Scoville, requiring them to appear at the next justice's court to answer the com-

plaint of the Misses Varner for the removal of an obstruction from a street of the Indian Spring Reserve. Attached to the summons was the complaint of the plaintiffs, which alleged, in substance, that the defendants were conducting a hotel business, and were residents of said district; that they had obstructed a street extending from the hotel of the Misses Varner to the spring, the obstruction being immediately in front of the Wigwam Hotel, conducted by the defendants; that this street had been used by plaintiffs and the guests at their hotel for more than 20 years, had been in existence as far back as the year 1817, and had been constantly and uninterruptedly used as an approach to the spring by plaintiffs and their ancestors during all that period of time; and that the obstruction was of such a character as to render it impossible for invalid guests of plaintiffs to reach the spring, and such as to render it impossible for any person to reach the spring by means of this street without climbing over the obstruction. It was alleged that demand had been made on the defendants to remove the obstruction, which they failed and refused to do. Plaintiffs asked for an order requiring the removal of the obstruction, and for a judgment in behalf of themselves and the county school commissioner of Butts county for \$2 for each day since the erection of the obstruction. The summons was served on the defendants, who appeared and filed a plea to the jurisdiction on the ground that they were residents of Fulton county, and not of the Indian Spring district, which plea was held insufficient and was stricken by the court. The defendants then interposed a demurrer to the complaint on the grounds that the court had no jurisdiction of the subject-matter, the superior court of Butts county alone having jurisdiction thereof, under the act of 1889 (Acts 1889, pp. 171, 172), and that the state of Georgia was a necessary party, and there was a nonjoinder of parties. The magistrate overruled this demurrer. The defendants thereupon filed their answer, in which they denied obstructing any street, and in which they alleged that they were lessees from the state of Georgia of the Indian Spring Reserve, and only amenable to the state under their lease contract for any act done by them with reference to the improvement and control of the Indian Spring Reserve. After hearing evidence, the magistrate adjudged that the structure complained of amounted to an obstruction, and ordered its removal. The defendants sued out a writ of certiorari, assigning error on the judgment of the magistrate overruling their demurrer, on the admission of certain testimony, and on the final judgment rendered on the merits. When the certiorari came on to be heard in the superior court, it was overruled, and the defendants bring the case here for review.

What is known as the Indian Spring (or

McIntosh) Reserve was acquired by the state of Georgia from the Creek Indians by the treaty of 1825. A subdivision of the reserve into lots and streets, and the sale of all the lots except one containing the spring, was authorized by the act of December 22, 1827 (Acts 1827, p. 119). The plan of subdivision was that the mineral spring should be included, as nearly as possible, in the center of a square lot of 10 acres, and around this lot there were to be laid off two successive ranges of lots, containing 2 acres, intersected by streets of not less than 33 feet in width, running east and west, north and south, at right angles; next to the range of 2-acre lots, there were to be laid off around them a range of 4-acre lots; and next to the range of 4-acre lots, still another range of lots was to be laid off, each lot to contain not less than 20 nor more than 30 acres; and the balance of the reserve was to be surveyed into lots of not less than 30 nor more than 50 acres. All the lots were to be separated from each other by streets. To prevent encroachment upon and obstruction of the streets laid out in conformity with this act, the justices of the peace of the Indian Spring district of Butts county were given jurisdiction to remove any house, fence, or other obstruction placed in such streets, at the expense of the individual placing the same in said streets, or using and occupying the same. Acts 1832, p. 207. The justices of the peace of this district were not only empowered to remove obstructions from the streets, but the penalties imposed by the act were collectible in the justice's court of that district by suit at the instance of an informer. Subsequently the Legislature authorized the commissioners of the Indian Spring Reserve to sell such of the streets as they might deem not of public use for streets. Acts 1838, p. 142. The legislative scheme was to dedicate to public use the 10-acre lot containing the mineral spring. This lot was set apart as a park or place of rendezvous for members of the general public attracted to the spring. The approach to the 10-acre lot was by means of the streets intersecting the surrounding lots, and the summary proceeding by the justice of the peace to remove obstructions from the streets of the reserve related to the streets laid out under the act of 1827. It was never contemplated in any of the statutes or resolutions of the General Assembly relating to the Indian Spring (or McIntosh) Reserve that permanent streets should be established within the lot embracing the spring. Thus in the lease acts of 1847 and 1869 (Acts 1847, p. 193; Acts 1869, p. 174) the lessees were empowered to make roads, promenades, and walks, and to plant flower gardens, on such portions of the grounds as they might select as best adapted and calculated to render the grounds more pleasant and useful, with the proviso that roads or paths of ample width, admitting an easy approach to

and from the spring, should be at all times kept open for public use. The present lease act (Acts 1889, p. 171) imposes on the lessees the duty to "lay out and maintain walks upon the said reserve, and build and keep in repair all bridges and approaches to the spring," and declares that "the public shall be permitted to use said water at the spring and to carry it to hotels, boarding houses and private residences for use." The "walks" which the lessees in the various lease acts were empowered to lay out were not "streets," but promenades or approaches to the spring. The lease act of 1889 requires of the lessees that roads of ample width, admitting an easy approach to and from the spring, shall at all times be kept open for public use. The fifth section of that act makes the violation of any of its provisions a cause of forfeiture of the lease contract, but there can be no ouster of the lessee until after final judgment of forfeiture in the superior court of Butts county. Whether the remedy provided by the act of 1889 for the obstruction of an approach to the spring be confined to an action to forfeit the lease, it is certain that, as to obstruction of ways within the 10-acre reservation itself, the remedy provided in the act of 1882 is not applicable. This latter act relates solely to an obstruction of the permanent streets established in the plan of subdivision of the original reservation, and not to roads, walks, and promenades on the 10-acre lot.

The act of 1838 did not authorize the sale of all the streets previously laid out by virtue of the act of 1827, but only those which were unused at the time, or which the commissioners of the Indian Spring Reserve did not deem of public advantage. As to these unsold streets, the jurisdiction of the justice of the peace of the Indian Spring district, given by the act of 1832, may still obtain, but as to the particular subject-matter involved in the case under review the magistrate was without jurisdiction. If, then, as affirmatively appears on the face of the pleadings, the court wherein the case originated had no jurisdiction of the subject-matter, the entire proceeding before the justice of the peace should, by a court of review, be treated as an absolute nullity. *Blocker v. Boswell*, 109 Ga. 239, 84 S. E. 289. Direction is accordingly given that the judgment excepted to be set aside, and that the superior court remand the case to the justice's court, with instructions to dismiss the action.

Judgment reversed, with direction. All the Justices concur.

(121 Ga. 592)

WHITE v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

CITY COURTS—WRITS OF ERROR—TOWNS.

1. The General Assembly has no power to create a city court and provide for a direct writ of error therefrom to the Supreme Court in any municipality other than an incorporated

city. *Lampkin v. Pike*, 42 S. E. 213, 115 Ga. 827, 90 Am. St. Rep. 153, and cit.

2. A recital in an act establishing a city court that the court is established in a named "city," when the municipality referred to is in fact not a city, is not binding upon the courts. *Savannah Ry. Co. v. Jordan*, 39 S. E. 511, 113 Ga. 687; *Lampkin v. Pike*, 42 S. E. 213, 115 Ga. 827, 831, 90 Am. St. Rep. 153; *Mitchell v. Lassester*, 40 S. E. 287, 114 Ga. 275, 281.

3. The municipality of Sylvester being a town at the date of the establishment of a city court therein, no writ of error lies to the Supreme Court from that court.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Wade White was convicted of misdemeanor, and brings error. Dismissed.

Claude Payton, for plaintiff in error. J. H. Tipton, for the State

COBB, J. The act creating the city court of Sylvester was approved August 11, 1904. It provided that it should take effect immediately upon the passage of an act abolishing the county court of Worth county. Acts 1904, p. 207. The act abolishing the county court was approved August 13, 1904. Acts 1904, p. 240. By an act approved on the date last referred to the city of Sylvester was incorporated, and this act provided that it should take effect immediately upon the passage and approval of an act abolishing the charter of the town of Sylvester, which latter act was approved August 15, 1904. Acts 1904, pp. 644, 645. If the dates of the approval of the acts incorporating the city and establishing the city court are to control, the city court was established two days before the municipality was incorporated as a city, and, under the decisions cited in the headnotes no writ of error would lie to this court from such a court. If the dates when the respective acts went into effect are to control, a like result is reached, for the act incorporating the city did not go into effect until August 15th, whereas the act establishing the city court went into operation on August 13th. The recital in the city court act that the court was established in the "city of Sylvester" does not bind the courts. It follows that the city court of Sylvester is not a constitutional city court, and that no writ of error lies from that court to the Supreme Court.

Writ of error dismissed. All the Justices concur.

(121 Ga. 696)

EQUITABLE MORTG. CO. v. MONTFORT.

(Supreme Court of Georgia. Jan. 27, 1905.)

EXECUTION—AFFIDAVIT OF ILLEGALITY—STAY—TRIAL OF ISSUE—PART PAYMENT—EVIDENCE.

1. Where the ground of an affidavit of illegality interposed to the levy of a common-law execution is that it has been partially paid, the amount admitted to be due must be paid, in order to stay the execution. Civ. Code 1895, § 5661; *White v. Mandeville*, 72 Ga. 705; *Starford v. Connery*, 11 S. E. 507, 84 Ga. 731-745; *Brinson v. Birge*, 30 S. E. 261, 102 Ga. 802.

But where the ground of the illegality is that the execution has been fully paid, then the sheriff is bound to accept it, and await the result of the trial of the issue so made. If, upon the trial of such issue, it should be proved that the execution has been only partially paid, the plaintiff would be entitled to a verdict that the execution proceed for the balance shown to be really due thereon, and not for the amount apparently due from the execution itself. *Stanford v. Connery*, supra.

2. There was evidence before the jury from which they could have found that, prior to making the affidavit of illegality, defendant had made a payment on the execution to the attorney of record for the plaintiff, for which he had received no credit. The court erred in excluding evidence tending to show that, prior to making the affidavit of illegality, defendant had made another payment on the execution to plaintiff's attorney, in pursuance of a parol agreement, though varying a former written contract, which payment had not been entered as a credit on the execution. The direction of a verdict that the execution proceed for the full amount apparently due from the execution itself was error. A new trial was properly granted.

(Syllabus by the Court.)

Error from Superior Court, Taylor County; W. B. Butt, Judge.

Proceedings on affidavit of illegality between D. T. Montfort and the Equitable Mortgage Company. From finding for the company, and from an order granting new trial, it brings error. Affirmed.

Payne & Tye and J. A. Noyes, for plaintiff in error. J. J. Bull and O. M. Colbert, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 594)

COLEMAN v. STATE.

Supreme Court of Georgia. Jan. 26, 1905.)

SAIL—RECAPTURE OF PRINCIPAL—POWER OF THIRD PERSON—ARREST BY PRIVATE CITIZEN.

1. A bail, in person or by duly authorized agent, may lawfully recapture his principal.

2. Without proof of authority so to do, the son of the bail cannot empower a third person to make such arrest.

3. Unless properly deputized, a private citizen cannot justify an arrest merely because he has in his possession a warrant for the arrest of the person sought to be taken.

4. Treating the arrest as having been made without warrant of law or authority of the bail, the case is to be governed by the law of assault, culminating in a homicide by the original wrongdoer.

5. So treating it, if the defendant began the unlawful arrest with an intent to kill if necessary to make it effective, and by a show of a deadly weapon put the deceased in the fear of his life, and the latter thereupon drew and fired, the defendant, having provoked and created a necessity, could not meet the same, but would be guilty of murder if under such circumstances he took the life of the party legally resisting the illegal arrest.

6. A citizen, being unlawfully arrested, has a right to resist force with force proportioned to that being used in detaining him.

7. If the force used in repelling the unlawful arrest was excessive and disproportioned to that needed to avoid detention, such force is not to be treated as lawful resistance, but as an unlawful attack.

8. If an unauthorized person seeks to make an arrest, but does nothing to put the other in real or apparent danger of life, and if the mere assault is met by drawing and firing a deadly weapon upon the person making the arrest, the latter, not having forfeited his right to live, and not having created a legal necessity for such deadly resistance, may defend himself against the excessive and unjustifiable counter assault.

9. Under the evidence, there was no question of killing in hot blood. The real issue was whether the defendant was guilty of murder, or justified on principles of self-defense. It was error to give the law of manslaughter in charge.

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; A. F. Daley, Judge.

Elzie Coleman was convicted of murder, and brings error. Reversed.

At the April term, 1902, of Bulloch superior court, John Griffin was indicted for aiding Oglesby to escape from jail. Griffin gave bail, with Collins as surety. Griffin having failed to answer, the bond was forfeited. R. E. Collins, the son of the surety on the bond, called on the officers to have Griffin arrested; it appearing that at the time he was in the county. According to the testimony for the defendant, the officer stated that he could not attempt to make the arrest just at that time, but advised that an offer of a reward be made. In compliance with this suggestion, R. E. Collins, the son, offered a reward to Remer Coleman and Elzie Coleman if they would arrest Griffin. At the same time he put in their hands a warrant issued by I. W. Martin, and addressed to any sheriff, deputy sheriff, coroner, constable, or marshal of this state, commanding them to arrest the body of Griffin, who was charged, on the affidavit of R. E. Collins, with the offense of "resisting legal process." Elzie and Remer Coleman, having this warrant, proceeded to the place where Griffin lived, and found him in the cotton field. They invited him to go hunting. Griffin consented. He had a pistol in his pocket, and carried a Winchester rifle. The party drove off; Griffin being seated in the foot of the buggy, and the two Colemans on the seat. There were no eyewitnesses to the transaction. The state offered as a witness Lawson Mercer, who testified that Elzie Coleman "said they had started hunting, and he said he didn't even think he would have to kill this man. He said he thought the man would give up. He didn't think he would have to kill him. He said they were going to try to arrest him; and he said, when they got down there a piece, it seemed like he went to draw his pistol, and told Griffin to consider himself under arrest, and the other gentleman, Mr. Griffin, he drew his—just commenced to pull his, I think, as he took his out and told him to consider himself under arrest. When he told him that, Mr. Griffin made up in here [left breast pocket] for his, and it seemed that Mr. Griffin fired at him, and he slapped the pistol down, and that time he said he had to fire himself to save his life. And he said then Mr. Griffin jumped out of

the buggy, and went to make around the buggy, and dashed off, and went a piece, and fell." On cross-examination the witness testified: Coleman said "he had a warrant in his pocket, and told Mr. Griffin to consider himself under arrest, and at the same time he told him that he then and there prepared himself for any resistance that might be made by Griffin by going for his gun. He took out his revolver, and before he got his revolver Griffin out with his and shot. That Griffin got the pistol from under his coat or vest and shot at Coleman, and Mr. Coleman told me that, after he had been fired upon, that he then shot Griffin. I won't say whether he was in the buggy when he shot him or when he turned around the buggy. But it was after Coleman had been shot. He said that, as Griffin shot at him, he slapped the pistol down as he fired. Griffin was known as a lawbreaking man, and had the reputation of being a bad man in the community." Another witness testified that Griffin was shot in the left side, the ball ranging down. For the defendant there was testimony that Griffin had been out of the county for some time, and that as to one warrant he had said that he "was not going to submit, but would die before he would be arrested." His reputation for violence was bad. Remer Coleman, who was in the buggy at the time of the occurrence, testified that he heard Elzie Coleman, the defendant, tell Griffin to consider himself under arrest, and the firing commenced at once; "that Griffin drew his pistol and fired at Elzie; that about that time Elzie shot him." The defendant, in his statement to the jury, said that after driving "about a quarter of a mile I told Griffin to consider himself under arrest, and when I did so he drew his pistol from a pocket in his overalls, and when he drew his pistol I drew mine, and, just as he threw it in my face, I knocked it down time enough to save it from shooting me in my face, and, when he fired, I fired." Coleman exhibited to the jury a place on his left leg where Griffin's shot took effect.

The judge charged on the law of murder, manslaughter, and justifiable homicide; and, after the jury had been out some time, they returned and asked to be charged on the subject of involuntary manslaughter, to which the court replied, "The law of involuntary manslaughter is not applicable in this case," and then gave instructions as to murder and voluntary manslaughter where the homicide was in a heat of passion. Error is assigned on this charge, on the ground that there was no evidence tending to show the deed was done in the heat of passion, but the contention being that it was done on a sudden impulse, when dealing with a notorious character for violence, to protect one's own life.

Herrington & Lee, L. J. Cowart, and Saf-fold & Larsen, for plaintiff in error. B. T. Rawlings, Sol. Gen., and G. H. Howard, Sol. pro tem., for the State.

LAMAR, J. (after stating the foregoing facts). 1, 2. Where one accused of crime is released on bond, he is transferred from the custody of the sheriff to the legal, but friendly, custody of the bail, whose "dominion is a continuance of the original imprisonment," but they may at will surrender him again to the custody of the law. If the accused refuses to surrender, the bail can seize and hold him in order to make delivery in discharge of the bond. But the surety may be a woman, or a man physically too weak to cope with the accused, or the person charged with the crime may be at a distant point and out of the reach of his bondsman. For these and other reasons, the bail may lawfully deputize an agent to seize the body and deliver him to the custody of the sheriff. *Clark v. Gordon*, 82 Ga. 613, 9 S. E. 333; *Pen. Code 1895, § 935*; *Taylor v. Taintor*, 16 Wall. 371, 21 L. Ed. 287. While this is true, a new trial cannot be granted here because of the court's refusal to give the charge requested as to the right to make such arrest by an agent. There was no evidence in the present case to show that the bail had appointed Coleman to recapture Griffin, and nothing to show that he authorized his son, R. E. Collins, to make such arrest, or delegated to him any power to appoint agents for that purpose.

3. The warrant which R. E. Collins delivered to Coleman was in usual form, and directed as required by the Penal Code. The defendant, Coleman, was not himself a peace officer, not a member of a posse, and had not been deputized to execute the warrant. The fact that he had it in his possession conferred upon him no authority whatever. The arrest, therefore, is to be treated as one made by a private citizen. Its legality would then depend upon showing that it was made under the circumstances set out in *Pen. Code 1895, § 900*.

4. There does not appear to have been any conversation between Coleman and Griffin—no demand for a show of the warrant, or statement of the authority under which the arrest was made. There was no reply to indicate whether it was at the instance of the bail, under the warrant for resisting legal process, because of a felony known to have been committed, or to prevent an escape therefor. We must assume, from the verdict, that the jury found that Coleman did not have authority to make the arrest. If so, the remaining questions must be treated on the idea that the law of arrest is out of the case, and that Coleman was guilty of an assault.

5. At an early day it was held that, if the supposed officer purposely kills the other party for not submitting himself to an illegal arrest, it will, generally speaking, be murder. *East's P. C. 312*; *Foster's Crown Law, 271*. This principle, however, must be subject to many exceptions. If the circumstances are such as to show that there

was no malice—if the person attempting such unauthorized arrest in good faith believes that he has the right to take the person sought to be detained, and, in the course of the struggle and in the heat engendered by the altercation, he takes the life of the person sought to be arrested—the modern cases seem to hold that he would only be guilty of manslaughter. But if the arrest was not only unauthorized, but was begun with the intent to kill, there would be malice. The killing at the end of a struggle which commenced with a felonious intent to take life would be murder. In the present case there was some evidence that Coleman may have intended to do what he did, and began the arrest, in the first instance, by drawing and presenting a deadly weapon; thereby putting Griffin, as a reasonable man, in fear of his life. If the jury found from the evidence that such was the fact, and that the shooting was but a continuation of an original murderous assault with a deadly weapon, and that this created on the part of Griffin the necessity to shoot in self-defense, Coleman could not justify himself in meeting the same with a like shot, since he brought the necessity upon himself. *Roach v. State*, 84 Ga. 85. Had the jury found such to be the fact, the verdict would necessarily have been that Coleman was guilty of murder. But the verdict in the present case was not for murder, but manslaughter; and there was evidence from which the jury could have found that Coleman did not begin the arrest by a show of any force which warranted Griffin in fearing that his life was in danger, but was only guilty of the offense of an assault, in telling Griffin to consider himself under arrest, while carrying him in the buggy.

6-9. On that theory, therefore, the transaction from inception to termination is to be governed by the law applicable to assault culminating in a homicide by the person who was the original assailant. Thus treating it, the unlawful arrest—the assault—would have justified Griffin in breaking away, resisting, and repelling force with force. But the force which Griffin could thus rightfully use could only be proportionate to that exerted by Coleman, and sufficient to avoid the detention. If Coleman said, "Consider yourself under arrest," and laid hold of Griffin with a view of making the arrest effective, it was a wrong, but not one for which he forfeited his life, either at the hand of the law or at the hand of Griffin. Such conduct did not put Griffin in bodily danger. It provoked an assault, but not a felony. It did not create a legal necessity to kill. In the eye of the law, liberty is very sacred, but so, also, is human life. If Griffin met an unlawful assault with force proportioned to the attack, he was in the right. As long as he remained in the right, Coleman could not justly shoot. But if Griffin resisted with disproportionate, and therefore unlawful,

violence—if, without being put in real or apparent danger of life or serious bodily harm, he fired upon Coleman for a mere assault—he became a wrongdoer, and Coleman became at once clothed with the right of self-defense against that which was not then lawful resistance, but an unlawful attack. For Coleman, under such circumstances, to fire and kill Griffin, would not be murder or manslaughter, but justifiable homicide. The decision in *State v. Campbell*, 107 N. C. 949, 12 S. E. 441 (5), is opposed to this view. We find, also, a number of cases in other jurisdictions which rule that one who provokes a difficulty without felonious purpose, and during its progress is compelled to take the life of the person whom he attacks, in order to save his own, cannot be entirely justified upon the grounds of self-defense, but will be guilty of manslaughter. *State v. Parker*, 106 Mo. 213, 17 S. W. 180. See other authorities to the same effect cited in *Clark's Criminal Law*, 183, 184. These decisions are based upon the wise and salutary principle, which is also recognized in this state, that the slayer must be faultless. *Haynes v. State*, 17 Ga. 465 (5). But while the direct question here involved has not been before this court in case of an unauthorized arrest, it has announced a principle which covers the point now under consideration. That principle is that being faultless is to be understood as meaning, not that the slayer did nothing to provoke the difficulty, but that "the provocation must not have been such as would, in law, be sufficient to justify the attack against which he was defending himself when the homicide was committed. Anything short of such provocation as this would not put the slayer in any degree in the wrong if it became necessary to kill in his own defense." *Butler v. State*, 92 Ga. 606, 19 S. E. 51; *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21; *Fussell v. State*, 94 Ga. 78, 19 S. E. 891; *Nixon v. State*, 101 Ga. 575, 28 S. E. 971. Those were cases in which opprobrious words might have justified a blow. They did not justify a deadly assault. The assailant was not faultless in that he provoked an attack. But he was faultless in that he did not provoke felony. The same principle applies here. The unlawful arrest justified a certain amount of resistance. But it did not justify shooting. Coleman had a right to defend himself against such wrongful counter attack. Compare *Crelighton v. Commonwealth*, 84 Ky. 103, 4 Am. St. Rep. 193. It is also to be noted, on this branch of the case, that the deadly weapon was instantly fired; that there was no opportunity afforded Coleman to discontinue the arrest, to withdraw, or to decline combat. Under the evidence, if Coleman began by a felonious assault, he was guilty of murder. If he resisted an unjustifiable deadly attack, he was not guilty of any offense. There was no proof of any middle ground; nothing to show a killing

in hot blood or passion, or because of a mere assault; and nothing in the record on which to base a charge of manslaughter.

We recognize the dilemma which frequently confronts the trial judge in this class of cases. If he improperly omits to charge on the subject of manslaughter, a new trial must be granted. Conversely, if he improperly includes that charge, a new trial will be granted. But such is the law. Considering the gravity of the issue, the error is one which has been repeatedly held to entitle the defendant to another hearing.

Judgment reversed. All the Justices concur.

(121 Ga. 687)

SHEDDEN v. STILES.

(Supreme Court of Georgia. Jan. 26, 1905.)

ACTION ON NOTE—BURDEN OF PROOF—INSTRUCTIONS—ANSWERS TO INTERROGATORIES—DELIVERY TO JURY.

1. Where the issue tried was whether the note sued on was executed for the plaintiff's accommodation, and there was direct and positive testimony submitted by both parties in support of their respective contentions, and the court instructed the jury that, as the defendant admitted the execution of the note, the burden rested upon him to prove his defense to the satisfaction of the jury, the mere failure to charge that the holder of a negotiable promissory note is presumed to be such bona fide and for value was not cause for a new trial.

2. Refusal to give an oral request to charge was not cause for a new trial, though made in response to an inquiry by the judge to the counsel, "If there was anything else, they desired charged."

3. There was no material error in admitting evidence.

4. Interrogatories, though read in evidence, should not be delivered to the jury. Where the court, over the objection of the party against whom the verdict was rendered, sent to the jury, after they had retired to deliberate as to their verdict, interrogatories which had been read in evidence, and which were calculated to influence the jury in favor of the prevailing party, a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by R. F. Shedden against W. H. Stiles. Verdict for defendant, and plaintiff brings error. Reversed.

Lumpkin, Boykin & Etheridge and J. M. Moon, for plaintiff in error. Thos. W. Miller & Son, for defendant in error.

FISH, P. J. R. F. Shedden sued W. H. Stiles on a promissory note signed by Stiles as maker, payable to his own order, and indorsed in blank by himself and George T. Hodgson. There was a verdict for defendant, and plaintiff's motion for a new trial having been overruled, he excepted.

1. The only defense filed to the action was that the note sued on was executed for the accommodation of the plaintiff. Complaint was made in the motion for a new trial that the court erred in failing to charge—though

not requested in writing so to do—that the holder of a negotiable promissory note is presumed to be such bona fide and for value. This was a correct principle of law, and applicable to the case, but we think the point was sufficiently covered by what the judge did charge. He instructed the jury that, as the defendant admitted the execution of the note, the burden rested upon him to prove his defense to their satisfaction. As above stated, the only defense was that the note was executed for plaintiff's accommodation. The evidence was undisputed that Stiles received no consideration for making and indorsing it, and that, as to him, it was an accommodation paper. When he indorsed and delivered it to Hodgson, however, it was a negotiable paper, payable to bearer; and, if Hodgson indorsed and delivered it to Shedden for a consideration, then Shedden could hold Stiles liable on it, even though Shedden knew at the time he took it that Stiles had received no consideration. Whether Stiles executed it for a consideration was immaterial. The vital issue in the case was whether Shedden paid Hodgson a consideration for the instrument. This point was hotly contested, both parties submitting direct and positive testimony in support of their respective contentions on the question. For defendant to prevail, it was absolutely necessary for him to show by a preponderance of the evidence that Shedden did not pay Hodgson a consideration for the paper. When the court instructed the jury that the burden rested on the defendant to prove his case to their satisfaction, it was equivalent, we think, to charging them that defendant must overcome, to their satisfaction, whatever case plaintiff sought to make, whether by way of presumption or by direct and positive evidence. The charge actually given was broader and more favorable to the plaintiff than that which he contends should have been given.

2. At the close of the judge's charge he asked counsel "if there was anything else they desired charged," and counsel for plaintiff, in reply, orally requested the court to charge that when the note was put in evidence the presumption was that it was a valid note, and that plaintiff was a bona fide holder of the same. The judge refused this request. Requests to charge should be in writing (Civ. Code 1895, § 5479), and there is no exception to the rule that a refusal to give an oral request to charge is not ground for a new trial.

3. Hodgson was permitted to testify that he requested Stiles to sign the note, and Stiles that he signed the note at Hodgson's request. This testimony was allowed over the objection of plaintiff that he was not present when the request was made, and did not know of the same. The objection was without merit, as Hodgson also testified that he asked Stiles to execute the note at the instance and request of the plaintiff. The

following question and answer in the interrogatories of Hodgson were read to the jury by defendant, over plaintiff's objection: "Q. When Mr. Shedden acquired possession of said note, did he or did he not know of the circumstances [under which] the note was signed by Mr. Stiles, and did he have full knowledge of all the facts relating to the signing of said note before it came into his possession? A. I think so." The objection was that the witness merely gave his opinion, and not facts. The witness testified positively that the note was executed for plaintiff's accommodation; that witness, at the instance of plaintiff, requested Stiles to sign the instrument; that neither witness nor Stiles received any consideration for the same; and that witness delivered it to plaintiff for use in his business. We are unable to understand what other circumstances and facts relating to the signing of the note, either by Stiles or the witness, the question referred to; and, as the testimony of the witness was positive as to these matters, allowing his opinion as to the same subjects, though it ought not to have been admitted, is not cause for a new trial. An extended answer of Hodgson to another interrogatory was read to the jury by defendant, over an objection by plaintiff that the answer was merely the witness' supposition. The objection was to the whole of the answer, some parts of which purported to state facts, and hence were clearly admissible over the objection made. The objection to the whole was therefore not well taken. *Bass Co. v. Granite City Co.*, 116 Ga. 178, 42 S. E. 415 (5).

4. Upon the trial the plaintiff testified orally in his own behalf. The defendant put in evidence the answers of the plaintiff to interrogatories which had been sued out for him, for the purpose of impeaching him. After the jury had retired to deliberate as to their verdict, the court, upon motion of the defendant and over the objection of the plaintiff, sent to the jury "the answers" to such interrogatories. This action of the court was assigned as error in the motion for a new trial. The practice as to whether interrogatories or depositions read upon the trial should be delivered to the jury when they retire to consider as to their verdict is not the same in the different states. In some jurisdictions it is held to be a matter largely within the discretion of the trial judge, in others it is held that they should go to the jury, and in still others that they should not, but it is generally the rule that depositions read in evidence should not go to the jury; and if they are calculated to influence the jury, and go to their room without the knowledge of the losing party, it has been held that the verdict should be set aside. 17 Am. & Eng. Enc. L. 1241, 1242. The reason given for not allowing them to be delivered to the jury is that the testimony which they contain, if read and re-read by the jury, would have an unfair advantage

over oral testimony of the other side, by speaking to the jury more than once. *Thomp. & M. Juries*, § 385 (1, 2); *Abbott's Trial Brief (Civil Jury Trials)*, 477, 478; *Thompson on Trials*, § 2578. Where all the evidence is in writing, it has been held that depositions read in evidence may be taken out by the jury on retiring to deliberate. *Id.* In so far as our information goes, it has ever been the practice in this state not to permit interrogatories to be delivered to the jury. In *Andrews v. Tinsley*, 19 Ga. 303, the jury, after having retired to consult as to their verdict, sent their bailiff to the clerk for the interrogatories of the plaintiff, which had been read in evidence before them. They desired to examine the interrogatories merely to refresh their memories as to certain dates, about which there was no controversy between the parties. This was held not to be cause for a new trial. In *Falvey v. Richmond*, 87 Ga. 99, 13 S. E. 261, interrogatories of the plaintiff were handed to the jury by plaintiff's counsel, and taken by them to their room. Plaintiff's counsel made an affidavit that he inadvertently gave the interrogatories to the jury, and that there was no attempt on his part to gain an unfair advantage thereby. It appeared from the affidavit of the foreman of the jury that the interrogatories were neither read nor examined by any of the jury, and that they did not even know that they had the interrogatories until after returning to the court room. It was held that "under these affidavits there was no error in the refusal of the court to grant a new trial on this ground." We think there is a clear intimation in these two decisions of this court that interrogatories should not be delivered to the jury. If a paper calculated to influence a jury in favor of the prevailing party goes to and is considered by them while deliberating as to their verdict, it is cause for a new trial. *Georgia Pacific Ry. Co. v. Dooley*, 86 Ga. 300, 12 S. E. 923, 12 L. R. A. 342, and cases cited. The answers to the interrogatories of the plaintiff sent to the jury by the court in the present case were calculated to influence them in favor of the defendant, in whose favor the verdict was rendered. We therefore think that a new trial should be granted on this ground.

Judgment reversed. All the Justices concur.

(121 Ga. 717)

O'DONNELL v. WING & SON.

(Supreme Court of Georgia. Jan. 27, 1903.)

BAILMENT — WHAT CONSTITUTES — TITLE OF GOODS — DESTRUCTION — ABSOLUTE SALE — ACTION FOR PRICE — DIRECTING VERDICT.

1. Where goods are shipped "on trial order," with a right to test the same for 20 days, and if, at the expiration of that time, they are unsatisfactory, the goods shipped shall be returned to the railroad, to be held at the shipper's disposal, or, if satisfactory, \$230 shall be paid

therefor, of which \$65 is to be cash and the balance in monthly payments, the same is a contract of bailment. The title remains in the bailor, and if, before notification of satisfaction, the property is destroyed during the 20 days, the loss will fall on the bailor as owner.

2. But if the bailee retains the property after the 20 days his retention will be equivalent to an expression of satisfaction. The sale becomes absolute, and the holder liable to an action for the purchase money.

3. Such satisfaction and completion of the sale may likewise result where a person in possession under a "trial order" treats the property as his own, as by a sale to a third person.

4. Where, therefore, it appears that in April, 1901, goods were shipped on such "a trial order," and, after being received, were sold in June, 1901, the purchaser acquired a title good as against the original owner.

5. There was no evidence as to the condition of the instrument at the time it was received by the defendant, and nothing to show what was then or subsequently a fair value for its use; and it was error to direct a verdict against the defendant for \$68 hire.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by Wing & Son against Fannie O'Donnell. Judgment for plaintiff, and defendant brings error. Reversed.

Laura L. Wing (doing business under the name of Wing & Son) brought an action against Mrs. O'Donnell for the recovery of a piano and \$4 a month rent. It appeared that the plaintiff sent to W. P. Jones at Bellwood, Fla., on April 1, 1901, a circular containing instructions: "How to order a piano on trial. Sign and return trial order. No advance payment is required. We pay all freight, and you will be under no more obligations to keep the piano than if you were examining it in our store or factory." On the same sheet Jones filled out blank order as follows: "Please ship one Wing Piano as described above, in your own name, with stool and scarf, to Grand Ridge, Fla., with freight prepaid, and send me an order to get it from the Railroad Agent for trial only. There is no agreement by me to purchase this piano; but I will allow it to remain in my home on trial for twenty days, and if it proves satisfactory I will pay you \$230.00, in the following manner: \$65.00 cash, and \$15.00 per month. If the piano does not prove satisfactory, I will have it boxed as received and return to the depot for your disposal. I am under no more obligations to keep this piano than if I were examining it in your warehouse. I am to be under no expense for freights coming or going. W. P. Jones. Instruct me when to ship you old instrument." The plaintiff's evidence tended to show that there was no other contract than that indicated above, and no agreement to accept any old instrument from Jones until after he had tested the piano, and it had proved satisfactory to him, and he had complied with the terms of the order by paying the cash payment. No old instrument was received from him. The piano was shipped in accordance with the contract. There was some excep-

tion to the testimony of the witness on the ground that as to a part his information was derived from the books. Mrs. O'Donnell testified that in June, 1901, she heard that there was a man in Bainbridge, where she lived, who desired to sell a piano cheap, and she then purchased it from Mr. Jones, paying him part cash and giving him her note for the balance. The witness for the plaintiff testified that the piano was worth \$230 at the time it was shipped, and, if kept in the same condition, would be of practically the same value at the time of answering the interrogatories. He had not seen the piano since shipment, and did not know what its condition was. The value of the piano for monthly hire or rent was about \$4 per month. The court directed a verdict for the plaintiff for the piano in question and for \$4 rent per month, the same amounting to \$68. The defendant made a motion for a new trial on the ground that the verdict was contrary to law and contrary to the evidence, and alleged error in the admission of testimony for the plaintiff stating that the title was in Wing & Son, and of answers which indicated that the witness testified from books rather than his own knowledge. The motion was overruled, and the defendant excepted.

T. S. Hawes, for plaintiff in error. A. L. Townsend, for defendant in error.

LAMAR, J. (after stating the foregoing facts). The piano was shipped to Jones on a "trial order." The case is not to be controlled by the question as whether the defendant paid full value, but by determining whether Jones, in June, 1901, had a title, and the consequent right to sell to Mrs. O'Donnell. On April 1, 1901, he ordered the plaintiff to ship the piano, agreeing to take it on trial for 20 days, and if it proved satisfactory, he would pay \$230, of which \$65 was to be cash and the balance in monthly payments. If the piano did not prove satisfactory, he agreed to have it boxed and returned to the depot, to be held at the plaintiff's disposal. This amounted to a bailment, and not a sale. But it is manifest that time was important in determining the status of each party. If during the 20 days, and before he had expressed his satisfaction, the instrument had been destroyed, the loss would have fallen upon the bailor as owner. But if, without otherwise expressing satisfaction, Jones had retained the instrument after 20 days (*Newburger v. Hoyt*, 86 Ga. 508, 12 S. E. 925), and it had thereafter been destroyed, the plaintiff would undoubtedly have been authorized to recover the purchase price of him. If the title was in him as owner to bear the loss (Civ. Code 1895, § 3543), it was in him for purposes of sale. The "trial order" did not provide for a mere option. The terms of the agreement were definite. Nothing more was needed to make the minds of the parties meet so as to complete the sale. By the expressed language of the order Jones

agreed to buy, if, after the 20-days trial, the piano was found to be satisfactory. That agreement was assented to by the plaintiff when she shipped the instrument. The question, therefore, of sale or no sale, depended upon satisfaction or dissatisfaction, to be determined within a given period. And by retaining the instrument beyond the time limited Jones, by his conduct, expressed such satisfaction as made the sale absolute. For a breach of the agreement to pay the cash and monthly balances due by reason of such satisfaction he became liable in an action to the plaintiff, who may yet maintain the same. *Corvalle v. Humphreys*, 16 East, 330 (1812).

In addition to retaining the piano, it appears that Jones sold it to the defendant. There are cases which hold that under shipments on trial order the fact that the article so received is sold to a third person is itself such an expression of satisfaction as to complete the sale. Title then passes from the seller to him who has obtained possession under a trial order with right to purchase on given terms if the property proves satisfactory. *Delamater v. Chapell*, 48 Md. 253. On the general subject of trial orders, see 2 *Benj. Sales* (Corbin's Ed.) § 911; 1 *Mechem on Sales*, 663 et seq. As to sales or return, see *Newburger v. Hoyt*, 86 Ga. 508, 12 S. E. 925; *Furst v. Commercial Bank*, 117 Ga. 472, 43 S. E. 728.

A witness for the plaintiff testified as to the value of the piano when it was shipped. He stated that he had not seen it between that date and the time of trial; that, if it was in the same condition as when it left the premises, it was worth \$280; and that it was worth "about \$4 for hire." There was no evidence whatever as to its condition at the time of delivery to the defendant, and no other evidence as to what would have been a reasonable hire for its use. The court should have sustained that ground of the motion for a new trial based on the direction of a verdict for the plaintiff for \$4 a month rent.

Judgment reversed. All the Justices concur.

(121 Ga. 722)

McCALL et al. v. WILKES et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

PLEADING—ANSWER—AMENDMENT—ACTION ON NOTE—SET-OFF—REJOINDER—WARRANTY.

1. A defendant who has filed his plea may, after the expiration of the time within which he is allowed to plead, set up by amendment any new defense without making an affidavit that the omission of such defense from his original answer was not intended for the purpose of delay, if in the discretion of the trial judge the circumstances of the case or the ends of justice require that such amendment be allowed. *Acts 1897, p. 35.*

2. Where, in answer to a suit on a note, the defendants seek to set off the value of certain timber on land conveyed to them by the plaintiff by a warranty deed, alleging that as to the

timber the warranty has failed, it is not a good rejoinder that the grantee had knowledge of an outstanding paramount title to the timber prior to the execution of the deed; nor is parol evidence admissible to show that it was not the intention of the parties that title to the timber should pass, the deed being in the usual form of a conveyance of land with a complete warranty of title. *Civ. Code 1895, § 3615.*

3. The defendants in their plea of set-off having averred that the timber on the land was worth only \$3 per acre, a verdict allowing \$3.25 per acre was contrary to law; but, the defendants having voluntarily written off the excess over the amount claimed by them, the verdict will not be set aside because of this excessive finding.

4. It appeared beyond dispute that the plaintiffs had made a conveyance of the timber to third persons prior to the date of the note given by the defendants for the value of the land including the timber. The jury found that the warranty of title had absolutely failed as to the timber, and that the defendants were entitled to set off its value. The lowest amount at which any of the witnesses estimated the value of the timber was in excess of the principal of the note sued on, and the jury would therefore not have been authorized, in striking a balance between the parties, to allow interest from the maturity of the note.

5. There was no error assigned requiring the grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Moultrie; *W. S. Humphreys*, Judge.

Action by J. G. McCall and others against J. J. Wilkes and others. From the judgment, plaintiffs bring error. Affirmed.

J. G. McCall, J. L. Watson, E. L. Bryan, W. C. McCall, and Z. D. Harrison, for plaintiffs in error. J. A. Wilkes and Shipp & Kline, for defendants in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(122 Ga. 45)

HORN v. PEACOCK.

(Supreme Court of Georgia. Jan. 30, 1905.)

PLEADING—EVASIVE ANSWER—CONTRADICTORY TESTIMONY.

1. Where a petition charges facts peculiarly within the knowledge of the defendant, and the answer is evasive, the averments of the petition will be taken as true.

2. If a plaintiff testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf.

3. Applying the rule stated in the note immediately preceding, the evidence was not of such a character as to authorize a finding in favor of the plaintiff for the full amount claimed.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; *D. M. Roberts*, Judge.

Action by L. M. Peacock against S. B. Horn. Judgment for plaintiff, and defendant brings error. Reversed.

J. P. Highsmith, for plaintiff in error. W. M. Clements, for defendant in error.

¶ 4. See *Interest*, vol. 29, Cent. Dig. §§ 23, 129.

COBB, J. The plaintiff bought guano, and had it shipped to the defendant, upon an agreement that the guano was to be sold to planters, notes taken payable in the fall, the notes to be collected, the purchase price of the guano to be paid, and the surplus to be divided equally between the plaintiff and the defendant. The defendant, in his answer, admitted the contract as claimed by the plaintiff, but averred that he did not know how much guano had been received by him, and asked that the plaintiff be held to strict proof as to the quantity shipped. He further alleged that he had remitted a sufficient amount to pay the purchase price of all the guano for which collections had been made, but that there were two notes uncollected, for which he denied he was liable to plaintiff until collection was made. The claim of the plaintiff was for the balance due on the purchase price of the entire shipment and his proportion of the profits on the sales. The jury returned a verdict in favor of the plaintiff, and the defendant excepts to the overruling of his motion for a new trial.

The burden was upon the plaintiff to show the contract, alleged, the guano shipped, the collection of the notes taken for the same by the defendant, and the failure to remit. The answer admitted the contract. As to the quantity of guano shipped the answer was evasive. The defendant knew, or should have known, how much guano he had received. As it was shipped directly from the manufacturer to him, and did not pass at all into the possession of the plaintiff, knowledge of the quantity shipped and received was more peculiarly within the knowledge of the defendant than it could have been within the knowledge of the plaintiff. In such a case the defendant will not be permitted to impose upon the plaintiff the burden of proving the quantity shipped by an answer evasive in its terms, and therefore the allegation in the petition as to the quantity shipped will be taken as true. Civ. Code 1895, § 5054; *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7 (3); *English v. Grant*, 102 Ga. 35 29 S. E. 157 (4). The only issue, therefore, in the case was whether the defendant had collected and failed to remit the amount sued for, or any part thereof. The plaintiff admitted that some of the notes had not been collected, and the amount of these uncollected notes is stated by the defendant in his testimony. Under this state of facts the plaintiff was clearly not entitled to recover the full amount sued for, which was due only in the event that all the notes taken for the guano had been collected by him. There was evidence authorizing a finding in favor of the plaintiff for some amount. It is difficult to determine, on account of the confused character of the evidence, exactly what this amount was; but the evidence did not authorize a finding for the full amount sued for. The evidence for the plaintiff is confused and unsatisfactory, and must be taken

most strongly against him. *Atlanta Ry. Co. v. Owens*, 119 Ga. 835, 47 S. E. 213. Taking into consideration the positive testimony of the defendant that at least two of the notes were uncollected, and the contradictory character of the testimony of the plaintiff, we do not think he has carried the burden which the law imposes upon him, and a new trial should have been granted.

Judgment reversed. All the Justices concur.

(121 Ga. 747)

GOULD v. SMALL.

(Supreme Court of Georgia. Jan. 28, 1905.)

ACTION ON NOTE—DIRECTING VERDICT.

1. This being a suit by the indorsee of a negotiable promissory note against one of the makers thereof, the defense being failure of consideration and knowledge of such failure by the plaintiff at the time he took the note; and the defendant having failed to carry the burden of showing that the consideration of the note had failed, it was not error for the court to direct a verdict for the plaintiff for the full amount sued for.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by A. B. Small against E. W. Gould. Judgment for plaintiff, and defendant brings error. Affirmed.

John R. L. Smith, for plaintiff in error.
Steed & Ryals, for defendant in error.

CANDLER, J. Roush and Gould executed to Thompson and Minchew their promissory note for \$500, due four months after date. The note was transferred to Small for value, and before maturity; and upon default in payment Small brought suit against Roush and Gould as makers and Thompson and Minchew as indorsers. Gould filed a separate answer, in which he pleaded failure of consideration, and averred that Small had notice of this defense when the note was negotiated. At the conclusion of the evidence the judge directed a verdict for the plaintiff for the full amount sued for, and Gould excepted.

The note sued on was given for part of the purchase price of certain timber situated on a tract of land known as the "Redd Minchew Place." This land lay partly in Bibb and partly in Twiggs county, but the evidence is undisputed that it constituted an entire tract. Roush and Gould went into possession, and began cutting the timber on the portion of the land in Bibb county. The land in Twiggs county lay adjacent to property owned by Small and others, and there was evidence tending to show that there was a dispute as to the boundary between the two pieces of land. An agent of the adjacent proprietors testified that he warned Gould and Roush not to cut any timber from a designated piece of land unless they could show that it was not part of the land owned

by his principals. Other witnesses testified to the same effect. A number of deeds were put in evidence by Gould for the purpose of proving that at the time of the execution of the contract for the sale of the timber there was outstanding a title to the land paramount to that of Thompson and Minchew. It was admitted, however, that they had never been ousted of possession, and that possession once shown will be presumed to have continued until the contrary is shown. *Coleman v. Rice*, 105 Ga. 164, 31 S. E. 424. Nor was there any effort to prove fraud on the part of Thompson and Minchew, or that they were insolvent; and under the ruling of this court in *Black v. Walker*, 98 Ga. 31, 28 S. E. 477, the fact that there was an outstanding title paramount to that of their vendors would not avail as a defense to an action on their notes for the purchase money unless there existed some additional ground, of the nature indicated, to authorize equitable interference with the carrying out of the contract as made. See, also, *Mallard v. Alfred*, 106 Ga. 503, 32 S. E. 588.

It was argued by counsel for the plaintiff in error that Gould was entitled to a verdict in the court below for the reason that Thompson and Minchew had no deed to the land on record, and that, therefore, if Gould should go on the land and cut the timber, he would be guilty of a misdemeanor under the act approved December 20, 1899 (Acts 1899, p. 59). His brief does not elaborate this point, but we understand the contention to be that, unless Thompson and Minchew had a recorded deed, Gould would have no right to cut the timber, and that therefore the contract would be contrary to public policy as requiring the commission of an unlawful act. A complete reply to this argument is that no such defense is set up in the plea filed. It does not appear that the defendants have ever done anything to test their right to cut the timber for the purchase price of which the note sued on was given. Certain it is that they cannot avoid liability on that note merely by reason of the fact that they heeded the warning of one who notified them to refrain from cutting the timber unless they could show their right to do so. The record clearly discloses that the plaintiff in error failed to carry the burden imposed upon him by law of showing that the consideration of the note had failed, and it was therefore not error for the court to direct a verdict for the plaintiff.

Judgment affirmed. All the Justices concur.

(121 Ga. 772)

BUCHANAN v. ELLISON.

(Supreme Court of Georgia. Jan. 28, 1905.)

NEW TRIAL—INSTRUCTIONS—REVIEW.

1. Although the sections of the Code referred to in the motion for a new trial may have been applicable to the case, it does not appear that the principles therein embodied were not other-

wise sufficiently submitted to the jury, and it is shown that there was no written request to give the sections in charge.

2. There being an express denial by the defendant of the notice and fraud alleged, the evidence supporting a verdict in his favor, and the finding having been approved by the presiding judge, this court will not interfere with his refusal to grant a new trial. *Freeman v. Mencken*, 42 S. E. 369, 115 Ga. 1020.

(Syllabus by the Court.)

Error from Superior Court, Talbot County; W. B. Butt, Judge.

Action by A. B. Buchanan against W. H. Ellison. Judgment for defendant. Plaintiff brings error. Affirmed.

J. J. Bull and A. G. Powell, for plaintiff in error. Persons & McGehee, for defendant in error.

LAMAR, J. Judgment affirmed. All the Justices concur.

(121 Ga. 663)

CITY ELECTRIC RY. CO. v. SMITH.

(Supreme Court of Georgia. Jan. 27, 1905.)

TRIAL—SEPARATION OF WITNESSES—STREET RAILROADS—INJURIES TO PASSENGER—EVIDENCE—NEW TRIAL—DAMAGES—OPINION EVIDENCE—CREDIBILITY OF WITNESSES.

1. "Where there is an order for the separation of witnesses, exceptions therefrom as to witnesses not parties to the case are discretionary with the court." *Central Railroad Co. v. Phillips*, 17 S. E. 952, 91 Ga. 523.

2. Plaintiff testified that he had ridden on defendant's cars six or seven times daily for several years; that he knew their usual motions and movements; that the jerk which it was claimed caused his injury "was an unusual jerk, in that it was very severe. It was a sudden jerk. Witness means by 'severe jerk' that it jerked him with such force that when he caught hold of the railing on the rear end of the car it jerked his hold loose. It was with such force that witness could not hold on to the bar." Held, that permitting the witness to testify that it "was an unusual jerk" was not cause for a new trial. *Civ. Code 1895, § 5285.*

3. Where in an action for personal injuries one of the items of the damages claimed was the decreased capacity of the plaintiff to labor and earn money, and the petition alleged that at the time the injuries were received plaintiff was capable of earning and was receiving \$100 per month, evidence that, but for the injuries, he could earn \$150 per month, was admissible, not as a basis for a recovery at that rate, but as tending to show that plaintiff was capable of earning the amount alleged in the petition. See *Southern Bell Tel. Co. v. Lynch*, 20 S. E. 500, 95 Ga. 529 (2). Where the defendant objected to the admission of such evidence on the ground that "plaintiff was limited by his declaration to a capacity of \$100 per month," its admission, without an instruction by the court properly limiting its consideration by the jury, was not cause for a new trial, when it appeared from the amount of the verdict, considered in connection with the undisputed evidence in the case, that the defendant was not hurt by the failure to give such instruction.

4. In such a case it was competent for the plaintiff, after giving his reasons therefor, to testify as to what, in his opinion, his services would be worth but for his injuries. *Civ. Code 1895, § 5285.*

5. Refusing to allow a question to be propounded in a particular form to a witness, even if erroneous, is not cause for a new trial, when it appears that in response to other questions

by the same party all that the witness knew on the subject was fully brought out. *Elliott v. Banks*, 42 S. E. 218, 115 Ga. 926.

6. Where the plaintiff testified that when riding on one of the electric cars of the defendant company he was thrown therefrom by a sudden jerk of the car, it was not error to allow a witness to testify, over defendant's objection, that the effect of suddenly turning on too much electricity to such a car would be to cause it to start too quickly; the objection being that there was no evidence in the case that any electricity was turned on.

7. Even if the court were in error in authorizing the plaintiff to submit evidence on a given subject and to a certain extent, if he introduced no such evidence the error was harmless.

8. Where, in an action against an electric railway company for personal injuries to one of its passengers, alleged to have been caused by a sudden and severe jerk of the car upon which such passenger was riding, a witness for the defendant testified that he had made certain tests with its cars to ascertain whether a jerking motion could be imparted to a moving car by suddenly turning on more electricity, and gave the details as to the character, extent, and result of such tests, upon which he gave an opinion upon the subject in favor of the defendant's contention, which opinion was contrary to one which he, during the same trial, had given when testifying in behalf of the plaintiff, the refusal of the court to permit him to testify that he had ample authority from the defendant company to make thorough tests was not, after a verdict in favor of the plaintiff, cause for sustaining the defendant's motion for a new trial.

9. The requests to charge as to the credibility of witnesses were, in so far as they were legal, covered by the instructions given.

10. There was evidence to authorize the verdict, and the court did not abuse its discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by W. H. Smith against the City Electric Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Denny & Harris, for plaintiff in error. Dean & Dean and Halsted Smith, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 686)

ANDERSON v. HILTON & DODGE LUMBER CO.

(Supreme Court of Georgia. Jan. 27, 1905.)

ACTION ON CONTRACT—PLEADINGS—SPECULATIVE DAMAGES—PROFITS—FAILURE TO LOAN MONEY.

1. Where proceedings are brought to enforce rights arising under a contract required to be in writing, failure to allege in the pleadings that such contract was in writing cannot be taken advantage of by demurrer. The silence raises no presumption that the contract exists only in parol.

2. An allegation that the plaintiff sold to the defendant standing timber to be sawed into lumber, and that after the defendant had moved and located his mill for the purpose of cutting the timber the plaintiff stopped and prohibited the defendant from cutting the timber, whereby he was compelled to shut down his mill and lose the profits, was not demurrable on the ground that the damages were remote or speculative.

3. The profits sued for were not those which were dependent on some other business or enterprise entered into because of the contract, but the defendant was asserting a right for damages occasioned by his being prevented from making the profits which would have been the immediate fruit of the very contract by which the plaintiff granted the right to the defendant to enter upon the land, operate a mill, and sell the lumber. Civ. Code 1895, § 3798.

4. Profits being net earnings after the payment of all expenses, the defendant was not entitled to a recovery of the profits as damages, and likewise for the expense of moving and removing his mill.

5. The allegations in the plea were not sufficient to state a cause of action for damages because of the plaintiff's failure to comply with the promise to lend money to the defendant.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by the Hilton & Dodge Lumber Company against H. K. Anderson. Judgment for plaintiff, and defendant brings error. Reversed.

The Hilton & Dodge Lumber Company foreclosed a mortgage dated August 14, 1896, on personal property in the manner provided in Civ. Code 1895, § 2753. The mortgagor, Anderson, defended by the counter affidavit allowed by Civ. Code 1895, § 2756. There were several pleas, some of which were stricken, and after the case was remanded (110 Ga. 263, 34 S. E. 365) the affidavit was so amended as to charge that on August 14, 1896, the Hilton & Dodge Lumber Company sold to Anderson all the pine timber suitable for sawmill purposes on 28 lots of land in Laurens and Montgomery counties at 50 cents per thousand for all timber averaging 400 feet and 75 cents per thousand for all lumber containing over 400 feet, agreeing at the same time to buy from the defendant the lumber sawed therefrom at \$9.20 per thousand feet; that the Hilton & Dodge Lumber Company also agreed to advance him certain sums of money with which to enable defendant to locate his sawmill on the property for the purpose of squaring the timber, said loan to be secured by an additional mortgage on the property previously conveyed; that the defendant agreed to, and did in pursuance of the contract, remove his sawmill about 14 miles to a point convenient to the timber sold; that the plaintiff knew, at the time of making the contract, that it would be necessary to make such removal and incur the expense incident thereto; that in February, 1897, the lumber company prohibited the defendant from cutting or sawing the timber; that this expense was a complete loss to the defendant, and the amount thereof he prays may be recouped or set off as against the plaintiff's claim; that defendant cut a small number of trees, and delivered them to Hall & Johnson to square the logs for market, and thereupon the plaintiff notified Hall & Johnson not to square the timber, or else that plaintiff would hold them responsible, and thereupon the said Hall & Johnson refused to square the

logs, to defendant's damage; that shortly thereafter the plaintiff stopped and prohibited the defendant from cutting the timber on the 28 lots, to his damage, and by reason thereof defendant had to shut down his mill, and lost the profits which he otherwise would have made. He also sues for the expense of moving his mill to the timber, and for expenses for subsequently being obliged to move it away by reason of the conduct of the plaintiff. He states how much timber was on the land, and that he could have cut the same had he been allowed to do so by the plaintiff, and that he lost the profits of the business between February 1, 1897, and July 1, 1897. The mortgage shows on its face that it was given to secure not only the amount indicated, but such future advances as might be made. The defendant, by his affidavit, alleged that the plaintiff had agreed to advance him additional sums to operate his business, but failed so to do, and refused to pay checks drawn by him on it, to his damage. The court refused to allow the amendment. The defendant excepted. The original affidavit of illegality was filed in May, 1897. The demurrer filed at the January term, 1899, was sustained, and this judgment reversed. 110 Ga. 263, 34 S. E. 365. There was an additional amendment in July, 1898, to the effect that the defendant had been enjoined by one McLendon from cutting the timber; that he was delayed thereby for 60 days, and finally permanently enjoined; that thereby he lost the timber which the plaintiff had sold him, to his damage \$1,800. The last amendment was filed on July 25, 1904. The affidavit of illegality and amendment were demurred to on 22 grounds. The bill of exceptions recites that the court refused the amendment "because it set up a contract for timber growing on said land, and did not allege that the contract was in writing, and because the damages sought to be set off in said amendment against the debt of the plaintiff were too remote and speculative to be so set off." The court thereupon sustained the demurrer to the original affidavit and amendment, and entered judgment for the plaintiff. The defendant excepts to this ruling, contending, among other things, that the court could not consider the special grounds of demurrer to the affidavit and the amendment, which had been of file in court for several terms.

T. L. Griner and James K. Hines, for plaintiff in error. Dessau, Harris & Harris and De Lacy & Bishop, for defendant in error.

LAMAR, J. (after stating the foregoing facts). The objections raised by the special demurrer could have been cured by amendment. The parties have argued only the controlling question. It would be unprofitable to consider each of the many special grounds of the demurrer. We shall therefore consider only the points which the bill

of exceptions indicates were involved in the decision by the trial judge. *Moss v. Fortson*, 99 Ga. 496, 27 S. E. 745.

1. A party is not obliged to set out in his pleadings the evidence on which he relies. The failure to allege that a contract is in writing raises no presumption that it exists only in parol. It is now well settled in this state that, where proceedings are brought to enforce rights arising under agreements required to be in writing, the failure to allege that the contract was in writing cannot be taken advantage of by demurrer. *Taliaferro v. Smiley*, 112 Ga. 62 (3), 66, 37 S. E. 106; *Draper v. Macon Company*, 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 136.

2, 3. The plaintiff agreed to sell certain timber to the defendant at a certain price. It also agreed to buy from him lumber cut therefrom at a certain price. The damages arising from the breach of the contract to sell or the breach of the contract to buy were recoverable, and the measure of damages in such cases is clearly defined. But treating the counter affidavit as pleading seeking to set up a cause of action for the damages resulting from the plaintiff's refusal to permit the defendant to operate the mill and cut the timber sold for that purpose, it was not demurrable. Anderson was not suing to recover profits which were dependent on some other enterprise entered into because he happened to have this contract. He sued for the profits which would have been the immediate result of his operating a mill which the plaintiff had agreed he might operate when it stipulated that he should cut the trees and saw them into lumber for purposes of sale. He was suing for damages in contemplation of the parties when the contract was made. Civ. Code 1895, § 3798; *Stewart v. Lanier Co.*, 75 Ga. 582; *Waycross Co. v. Offerman Co.*, 114 Ga. 731, 40 S. E. 738; *Kenny v. Collier*, 79 Ga. 744, 8 S. E. 58.

4. Of course, the defendant is not entitled to recover for the profits and also the expenses in conducting the business. Moving the mill to the land or removing the mill from the land were not expenses incurred in carrying out a contract between two parties, such as those included in Civ. Code 1895, § 3806. Nor are they expenses to which a party was put by reason of a tort referred to in Civ. Code 1895, § 3908. But the expenses of moving and removing the mill were a necessary part of the cost of conducting defendant's business, and by the expenditure of which he expected to make the profit for which he sued. They are no more recoverable than would be the expenses of paying his employees while the mill was actually in operation.

5. The mortgage did provide that the property thereby conveyed should be security for any advances thereafter made to the defendant by the plaintiff. It is alleged that an agreement to lend was violated, and that

the defendant was damaged by the company's failure to advance money as agreed. But the defendant does not state enough to warrant a recovery on the ground that there had been damage to his credit by failure to pay the check. Nor does he allege enough to entitle him to recover for a breach of the agreement to lend. There have been cases in which such suits have been maintained, but they are extremely rare, and, in view of the nature of money, must be. One dollar in legal tender is worth no more than another. The price of money is the principal and the legal or contract rate of interest. Hence the circumstances must be peculiar in which a person is entitled to damages because of a failure to lend as promised. No injury will flow from such a breach if the same amount can be borrowed from another on the same terms. If there is a mere contract to lend, and no date is named for the maturity of the loan, repayment is due immediately. Damages for failure to receive that which would have to be at once returned would be nothing, though the circumstances might be such as to change this rule if the lender knew that the money was intended for some purpose which precluded the idea of immediate repayment. But it is evident that the nature of the transaction is such as to afford no room for the implications which so often supply the omitted terms in many other contracts. There must be something definite. The contract must be supported by a consideration. It must be mutual. *Swindell v. Bank*, 121 Ga. —, 49 S. E. 673. And it must be made to appear that the borrower had been unable to obtain a like sum upon like terms. It would further be necessary to show definitely and distinctly that the damage (other than that arising from having to pay a higher rate of interest) was in contemplation of the intending lender at the time he made the agreement to lend. The counter affidavit in the present case did not state a cause of action for the alleged breach of the contract to lend money or make advances. *Blue v. Capitol Bank*, 145 Ind. 518, 43 N. E. 655; *Goodon v. Moses*, 99 Ala. 230, 13 South. 765; *McGee v. Wineholt* (Wash.) 63 Pac. 571; *Kelly v. Fahrney*, 97 Fed. 176, 33 C. C. A. 103; *Equitable Mortg. Co. v. Thorn* (Tex. Civ. App.) 28 S. W. 276 (2, 3); *Lowe v. Turpin* (Ind. Sup.) 44 N. E. 26, 47 N. E. 150, 37 L. R. A. 233.

Judgment reversed. All the Justices concur.

(123 Ga. 11)

CENTRAL OF GEORGIA RY. CO. v. CHICAGO PORTRAIT CO.

(Supreme Court of Georgia. Jan. 30, 1905.)

ACTION ON CONTRACT—PETITION—CARRIERS—CONVERSION OF FREIGHT—AGREED VALUATION—DAMAGES—ATTORNEY'S FEES.

1. Where a petition can be construed either as a suit in contract or as an action for a

breach of duty arising out of the contract, the latter construction will be adopted.

2. The shipment by a common carrier of non-perishable merchandise from the point of destination to another point on the line of its railway, for the purpose of sale as unclaimed freight, within less than six months from the time such goods arrive at destination, is a conversion of the same in the county where the point of destination is located.

3. In an action of tort against a common carrier for the conversion of goods consigned to the plaintiff the carrier cannot take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage.

4. In an action of the character above indicated the expenses of the plaintiff's agent, incurred while waiting for the delivery of the freight upon the statement of the agent of the carrier that the same had not arrived, when in fact it was then in his possession, is too remote to be the basis of a recovery against the carrier.

5. The allegations of the petition were not sufficient to authorize the recovery of attorney's fees.

6. The evidence authorized a verdict for the actual value of the goods converted, and the judgment is affirmed upon condition that all other sums be written off.

(Syllabus by the Court.)

Error from City Court of Albany; R. Hobbs, Judge.

Action by the Chicago Portrait Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

The Chicago Portrait Company brought suit against the Central of Georgia Railway Company, alleging that it delivered to the railway company in Chicago five boxes of nonperishable merchandise, to be transported by the defendant and its connecting carriers to Albany, Ga.; that the merchandise was delivered to the defendant company, and by it transported to its destination; that it reached Albany in good order; and that the defendant converted the same by causing it to be shipped to Savannah, Ga., as unclaimed freight, and there sold at public outcry, within less than six months after the same had arrived at Albany. The defendant filed special demurrers to the petition, a plea to the jurisdiction, and an answer. The trial resulted in a verdict for the plaintiff, and the defendant assigns error upon the judgments overruling its demurrers, plea to the jurisdiction, and motion for a new trial.

Wooten & Hofmayer, for plaintiff in error. S. J. Jones and Mayson, Hill & McGill, for defendant in error.

COBB, J. 1. We think the petition can be properly construed as seeking to recover for a tort committed in converting the goods. But even if the language of the petition is equivocal, any doubt as to its meaning is to be resolved by construing it as an action for a tort, rather than as an action for a breach of the contract of transportation. It has been said that in cases where the plaintiff has a right to elect to sue either upon a con-

tract or for a tort arising out of a breach of duty under the contract, the petition, if equivocal in its terms, will be construed as claiming damages for the tort. *Alken v. Southern Railway Co.*, 118 Ga. 120, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.

2. The suit was brought in the city court of Albany. The goods were sold in Savannah. The plea to the jurisdiction set up that the suit was improperly brought in Dougherty county, but should have been brought in Chatham county, where the sale took place; it being claimed that there was no conversion of the goods until the sale took place. The sale was undoubtedly a conversion; but we think the conversion was complete when the agent at Albany shipped the goods to Savannah as unclaimed freight, for the purpose of sale, within less than six months after they had arrived at destination. See Civ. Code 1895, § 2303. The plaintiff might have sued in Savannah, but it certainly had a right to sue in Albany.

3. It was contended that the contract of transportation was an Illinois contract, and was therefore to be governed by the laws of that state, and that under such laws a common carrier has a right to make a special contract, upon a sufficient consideration, limiting its liability for negligence and fixing the amount to be recovered in the event of a loss; and that under the contract made in this case with the initial carrier in Illinois, if the plaintiff was entitled to recover at all, it was entitled to recover only \$5 for every 100 pounds of freight. We do not find it necessary to determine in this case whether the contention as to the law of Illinois is correct, or whether, if correct, that law is applicable to the contract of carriage referred to in the petition. This suit is not brought for a breach of the contract of carriage. The wrong complained of is a conversion of the plaintiff's goods after the contract of carriage was completed. As was well said by Mr. Justice Lamar in *Georgia Southern & Florida Railway Company v. Johnson*, 121 Ga. —, 48 S. E. 808: "In an action of trover or damages for conversion the tortfeasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

4. The plaintiff claimed as a part of its damages the expenses of its agent while he was waiting at Albany for the goods to arrive, after four of the boxes had reached there, and the agent had informed him that the other would soon come, when in fact it had actually arrived at that time. We do not think damages of this character could be properly recovered. They do not flow directly from the wrongful act, and are too remote to be the basis of a recovery. The court therefore erred in not striking upon demur-

rer that portion of the petition which claimed these damages.

5. In the ninth paragraph of the petition appears the following allegation: "Petitioner insists that, as it has made every effort for the past year and a half to get a settlement of this claim out of said railway without success, and said company's persistent refusal to settle or pay the same entitles petitioner to recover from said company its reasonable attorney's fees incurred in bringing and prosecuting this suit, which it shows is the sum of one hundred dollars." The averments just quoted were specially demurred to on the ground that they did not set out any legal reason why the defendant should be subjected to a claim for attorney's fees. We think this demurrer was well taken. Attorney's fees are not generally allowed a litigant, but the Code declares that they may be allowed if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. Civ. Code 1895, § 3796. There was no allegation that the defendant had acted in bad faith, or had been stubbornly litigious, nor was it in terms alleged that it had caused the plaintiff unnecessary trouble and expense. The averment was, in effect, merely that the defendant had so acted as to compel the plaintiff to bring a suit to recover the amount due it. This is not sufficient to tax the defendant with attorney's fees. *Pferdmenges v. Butler*, 117 Ga. 400, 43 S. E. 695; *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 45 S. E. 426.

6. While there are other assignments of error, none of them are of such a character as to require an extended discussion, and any error that may have been committed would not be sufficient of itself to require a reversal of the judgment. The evidence fully authorized a judgment in favor of the plaintiff for the sum of \$138.60 as the value of the articles lost; and, as this exact amount was sued for, and no interest was claimed in the petition, the recovery should have been limited to this sum. *Ga. R. Co. v. Crawley*, 87 Ga. 192, 13 S. E. 508. If the plaintiff will write off from the verdict and judgment the attorney's fees found and all damages except \$138.60, the judgment will be affirmed; otherwise a judgment of reversal will be entered.

Judgment affirmed on condition. All the Justices concur.

(121 Ga. 816)

HARRISON v. MAY.

(Supreme Court of Georgia. Jan. 28, 1905.)

CERTIORARI—FILING ANSWER—DISMISSAL.

1. This case is controlled by the decision of this court in the case of *Sutton v. State*, 48 S. E. 342, 120 Ga. 865.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between W. G. Harrison and S. G. May. From the judgment, Harrison brings error. Reversed.

R. A. Hendricks, for plaintiff in error.
Buie & Knight, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concur.

(121 Ga. 822)

GEORGIA SOUTHERN & F. RY. CO. v. JONES (two cases).

(Supreme Court of Georgia. Jan. 28, 1905.)

RAILROADS—INJURY TO STOCK—DILIGENCE REQUIRED.

1. A railroad company is liable for any damage done to persons, stock, or other property by the running of its trains, unless the company shall make it appear that its agents exercised all ordinary and reasonable care and diligence; but a charge that, "where stock is upon the track or in danger of being killed, ordinary diligence and reasonable care would require the railroad company to do all that they could to slow up or stop their train, rather than to kill the stock," is erroneous. The definition given of ordinary care imposed extraordinary diligence on the company. *W. & A. R. R. v. King*, 70 Ga. 261.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Actions by J. B. Jones against the Georgia Southern & Florida Railway Company. Judgments for plaintiff, and defendant brings error. Reversed.

R. C. Jordan, Crauford & Walker, and John I. Hall, for plaintiff in error. W. E. Thomas, for defendant in error.

EVANS, J. Judgment in each case reversed. All the Justices concur.

(121 Ga. 26)

MOULTRIE LUMBER CO. v. DRIVER LUMBER CO.

(Supreme Court of Georgia. Jan. 30, 1905.)

HEARSAY EVIDENCE—DIRECTING VERDICT.

1. Hearsay evidence has no probative value.

2. A. sells to B. cross-ties subject to inspection and rejection. A report by C. to B., which is forwarded to A., showing inspection and rejections, is merely hearsay.

3. The answer not admitting a prima facie case for the plaintiff, and material allegations in the petition not being supported by competent evidence, it was error to direct a verdict in favor of the plaintiff.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Action by the Driver Lumber Company against the Moultrie Lumber Company. Judgment for plaintiff. Defendant brings error. Reversed.

The Driver Lumber Company brought suit against the Moultrie Lumber Company, alleging that the defendant had accepted an order from the plaintiff for switch ties, on con-

dition that the defendant would guaranty quantity, quality, and count; that under the terms of the order the ties were to be shipped to Brunswick, and there inspected, and the defendant was "to stand the inspection and bear the loss of such culls and rejections as might be made"; that the ties were shipped, and the plaintiff paid to the defendant the full amount demanded; and that thereafter, when the ties were inspected, a number were rejected, and these rejections rendered the defendant liable to plaintiff in a stated sum. The defendant answered, admitting that ties had been shipped, and that the full amount of the bill had been paid, but averred that it was unable, from want of sufficient information, to either admit or deny the allegation in reference to the inspection and rejection. The defendant further pleaded that according to the terms of the order, as well to the general custom of the business in which the parties were engaged, the defendant was entitled to notice of rejections within a reasonable time, and that plaintiff had failed to report the rejections for four months, although often requested to make such report. The court directed a verdict for the plaintiff, and error is assigned upon this ruling.

W. F. Way, Bryan & Watson, and Z. D. Harrison, for plaintiff in error. Shipp & Kline, for defendant in error.

COBB, J. The answer of the defendant did not admit a prima facie case, and therefore the burden was upon the plaintiff to establish by proof such material allegations of the petition as were not expressly admitted in the answer. The order and the payment of the full amount claimed by the defendant as due for the shipment of cross-ties were admitted, but the answer did not admit that rejections had been made, or that the amount represented by rejections was the sum alleged in the petition. It was a necessary part of the plaintiff's case to prove that these rejections had been made as alleged. The only evidence offered to establish this was a report made by the Bainbridge Lumber Company to the plaintiff, which had been forwarded to the defendant, showing that rejections had been made as alleged in the petition. As against the defendant, this report was merely hearsay, and it is now settled in this state that hearsay evidence has no probative value. *Equitable Mortgage Co. v. Watson*, 119 Ga. 280, 283, 46 S. E. 440, and citations. The plaintiff having failed to make out a prima facie case by competent evidence, it was error to direct a verdict in its favor.

As the case is to be again tried, it is necessary to allude to the special plea of the defendant. As the order did not, on its face, provide for reports of inspection, to be made within a reasonable time, the defendant can take nothing under that averment in its plea to the effect that such was the contract. If

upon another trial it should appear by competent evidence that there was a custom of the business in which the parties were engaged that, in orders of the character here involved rejections should be reported within a reasonable time, and that such custom was so universal in its application that a presumption would arise that both parties contracted in the light of it, then the defendant would be entitled to have the issue as to whether the reports in this case had been made within a reasonable time submitted to the jury. There was some evidence in reference to such a custom, but we will not now determine whether it was sufficient to establish a custom of the character above referred to. But, even in the absence of such a custom, the sale would be governed by principles similar to those applicable in cases where goods are delivered "on sale or return," and a failure, for an unreasonable time, to notify the seller that the articles delivered do not comply with the contract, would authorize the seller to treat the sale as complete; and certainly this would be the case if, after the lapse of a reasonable time, no notice of rejections was made, and the seller, treating the sale as complete, had paid out money or otherwise acted so that rejections then made would work to him harm or prejudice. See *Benjamin on Sales* (7th Ed.) § 597; 1 *Mechem on Sales*, §§ 875, 876.

Judgment reversed. All the Justices concur.

(122 Ga. 38)

ASHLEY v. HUTCHINSON et al.

(Supreme Court of Georgia. Jan. 30, 1905.)

APPEAL—REVIEW.

1. There was no error in any of the rulings of which complaint was made, and the evidence was sufficient to authorize the verdict.
(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between C. R. Ashley and M. W. Hutchinson and others. From the judgment, Ashley brings error. Affirmed.

R. A. Hendricks, for plaintiff in error. Alexander & Gary, for defendants in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(122 Ga. 4)

WARREN v. POWELL.

(Supreme Court of Georgia. Jan. 30, 1905.)

TRESPASS—PETITION—ALLEGATION AS TO TIME.

1. There must be a time averred in the writ, showing when every material or traversable fact transpires. The demurrer attacking the petition on the ground that no time was stated should have been sustained.
(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by J. B. Powell against S. J. Warren. Judgment for plaintiff. Defendant brings error. Reversed.

A. H. Russell, W. M. Harrell, and A. G. Powell, for plaintiff in error. J. H. Gilpin and T. S. Hawes, for defendant in error.

LAMAR, J. The suit was for damages for trespass for cutting timber. The petition set forth a cause of action. But the special demurrer on the ground that the date of the trespass was not alleged should have been sustained, and the case dismissed, unless the defect were cured. It is true, as contended by the plaintiff, that the statute of limitations is a defense which may be taken advantage of by plea. But where it appears on the face of the petition that the cause of action is barred, the defendant may take advantage thereof by demurrer; the better practice being for the demurrer itself to set forth in terms this special objection. *Coney v. Horne*, 93 Ga. 725, 20 S. E. 213. The rules of pleading have been adopted partly with a view of saving both the parties and the public the trouble and expense of an unnecessary trial. A defendant is not bound to avail himself of the benefit of the statute of limitations. But if he intends to do so, it would be a useless consumption of time to enter upon the hearing and introduce evidence to establish the existence of a cause of action which the plaintiff admitted to be barred. If by a special demurrer the latter attacks the sufficiency of the petition on the ground that no date is alleged, he is entitled to an order requiring the plaintiff to make such an averment, not only to enable him to know the time of the transaction referred to, and to prepare his evidence accordingly, but also that he may thereafter demur if it should appear that the cause of action was barred, and thus avoid a useless hearing. That time is usually material and necessary to be averred appears from the ruling in *Bond v. Central Bank*, 2 Ga. 100, where the court said: "It is certainly true that the writ must aver a time when every material or traversable fact transpired. It must allege all the circumstances necessary for the support of the action, * * * and the time and place, with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal defense." *Andrews v. Thayer*, 40 Conn. 156, is directly in point. The action there was in trespass. The only time laid in the declaration was the statement "that heretofore the defendant took and carried away the personal property" described. There was a special demurrer that it did not appear in the declaration when the trespass was committed. The court held that the demurrer was properly sustained. In the present case the defendant, in due time and form, made the objection. The defect was not cured by amendment. The demurrer was overruled.

and the defendant forced to answer such defective petition. Under the rule laid down in *Western Union Telegraph Company v. Griffith*, 111 Ga. 565, 36 S. E. 859, a new trial necessarily results.

Judgment reversed. All the Justices concur.

(121 Ga. 737)

YOUNG v. FAIN, Jailer.

(Supreme Court of Georgia. Jan. 28, 1905.)

HABEAS CORPUS—REVIEW—EVIDENCE.

1. Where, in a peace-warrant proceeding, one has been committed to jail in default of a bond requiring him to keep the peace, a writ of habeas corpus cannot bring into review alleged irregularities or errors of procedure in the trial before the committal court, or questions as to the sufficiency of the evidence upon which the applicant in the writ was committed.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Application by J. A. Young for a writ of habeas corpus to J. J. Fain, jailer. From an order discharging the petition, relator brings error. Affirmed.

W. R. Hammond, for plaintiff in error. O. D. Hill, Sol. Gen., and Howard & Thompson, for defendant in error.

FISH, P. J. A peace-warrant proceeding was instituted by Fannie May Young against Mrs. Julia A. Young before J. G. Bloodworth, notary public and ex officio justice of the peace of Fulton county, which resulted in the magistrate passing an order requiring that the defendant therein should give bond in the sum of \$200 to keep the peace, and that in default thereof she should be committed to the common jail of the county until discharged by due process of law. Mrs. Young refused to give the required bond, and was, in compliance with the order of the magistrate, confined in the jail. For the purpose of securing her discharge, she applied to Judge Reid, of the city court of Atlanta, and obtained the issuance of the writ of habeas corpus, directed to the jailer of the county. Upon the hearing of the writ, the judge denied the relief prayed for, and remanded the applicant to the jail in accordance with the order of the justice of the peace. Thereupon she sued out a writ of error, and brought the case to this court.

In the bill of exceptions, error is assigned upon the refusal of Judge Reid to permit the applicant to introduce in evidence before him the brief of the evidence heard by the magistrate upon the trial of the peace-warrant proceeding, certified to by him as being correct, and filed by him in the office of the solicitor general of the circuit, and upon the refusal of Judge Reid to even read this paper, or in any wise to consider it in the case. Error is also assigned upon his refusal to hear certain evidence, the purport of which was stated to him by counsel for the applicant, and

also set forth in the petition for the writ, which it was alleged, in the petition for the writ, the magistrate, by an erroneous ruling, prevented the defendant in the peace-warrant proceeding from introducing upon the hearing before him. The rulings complained of in the bill of exceptions were based upon the position taken by Judge Reid, that, in the hearing of the writ of habeas corpus, he could not go behind the judgment of the magistrate, either for the purpose of correcting any error which he may have made in his rulings during the trial of the peace-warrant case, or for the purpose of ascertaining and determining from the evidence which the magistrate heard and reported whether or not there was probable cause for requiring Mrs. Young to give the bond to keep the peace. If the judge was right in so holding, then it necessarily follows that the rulings complained of were not erroneous. In our opinion, the question is settled in favor of the position taken by the judge by Pen. Code 1895, § 1224, the first paragraph of which completely covers a case like this. That section and paragraph provide that "no person shall be discharged upon the hearing of a writ of habeas corpus in the following cases, to wit: (1) Where he is imprisoned under lawful process, issued from a court of competent jurisdiction, unless in cases where bail is allowed and proper bail is tendered." The process under which the plaintiff in error was committed to the jail of Fulton county was just such process as the law authorizes and provides for in cases of the character of the one with which the magistrate was dealing when he issued it, and hence was lawful process, if he had jurisdiction to issue such process. It is equally clear that it was issued from a court of competent jurisdiction. "A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description." *Cooley's Con. Lim.* (7th Ed.) 575. Jurisdiction to issue peace warrants, and to hear and determine the cases arising thereunder, is expressly conferred upon justices of the peace by the statutes of this state. Pen. Code 1895, §§ 1235, 1238. The plaintiff in error was, to use the language of her petition in the present case, "temporarily sojourning in the county of Fulton and city of Atlanta" when the warrant against her was issued; and the fact that she was then in such county and duly served was sufficient, so far as the jurisdiction of the person was concerned. The jurisdiction of the magistrate, then, was competent. His jurisdiction in the peace-warrant proceeding, to hear the evidence submitted, and to determine therefrom whether there was probable cause for requiring that the defendant should give a bond to keep the peace, or be committed to the county jail until discharged therefrom in the manner provided by law, cannot be made dependent upon the question whether there was

sufficient evidence before him of such probable cause, for this would be to argue in a circle, and to make his jurisdiction to decide upon the sufficiency of the evidence for this purpose dependent upon the sufficiency of the evidence.

The cases in other jurisdictions which the counsel for the plaintiff in error cites in support of his contention that the habeas corpus court could "review the evidence introduced before the magistrate on the peace warrant proceedings, and determine therefrom whether there was any reasonable or probable cause for the detention of the petitioner in the habeas corpus proceeding," are not in point here. Still less applicable are the cases which he cites in support of his contention that, "In addition to examining the evidence produced before the magistrate on the commitment trial, the court issuing the writ of habeas corpus may hear additional evidence in furtherance of the ends of justice." The prohibitory language, addressed to courts hearing writs of habeas corpus, which we have quoted from section 1235 of the Penal Code of 1895, clearly shows the rule in this state to be that lawful process, issued by a court of competent jurisdiction, is a bar to any investigation of the merits of the case behind such process, whether such investigation be confined strictly to the evidence before the court issuing the process, or be given a broader range, and include evidence newly introduced before the habeas corpus tribunal. It necessarily follows from this statute that in this state the rule announced by the Supreme Court of Connecticut in *In re Bion*, 59 Conn. 372, 20 Atl. 662, 11 L. R. A. 694, prevails. There it was held: "A writ of habeas corpus cannot operate to bring in review mere irregularities or errors of procedure, or questions as to the sufficiency of evidence, in the case upon which the applicant was committed." In that case, like this, the applicant sought by the writ of habeas corpus to secure his release from the county jail, where he was under commitment for noncompliance with an order of a justice of the peace requiring him to give bond to keep the peace. In the opinion, Loomis, J., well said: "Where one is committed to jail pursuant to a judgment valid on its face, by a court having jurisdiction, and by virtue of legal process valid on its face, the attack on the judgment under a writ of habeas corpus must necessarily be collateral, and subject to the rules restricting collateral attacks, and, if so, the validity and present force of the process are the only subjects for investigation under such a writ in such a case." A similar ruling was made in *Ex parte Perdue*, 58 Ark. 285, 24 S. W. 423, where it was held: "On certiorari to review the action of the circuit court in refusing to discharge a prisoner on habeas corpus, where it appears that the prisoner is held under a regular commitment by a magistrate in a cause wherein he had jurisdiction, the sufficiency of the evidence

upon which the commitment was made will not be inquired into." Chief Justice Bann, in delivering the opinion, cited *State v. Neel*, 48 Ark. 289, 8 S. W. 633, where it was held: "If the person restrained of his liberty is in custody under process, nothing will be inquired into, by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued."

See, also, in this connection, the observations of Mr. Justice Candler as to the function of the writ of habeas corpus in *Stephens v. Henderson*, 120 Ga. 218, 220, 47 S. E. 498; *Ex parte Granice*, 51 Cal. 375; *Turner v. Conkey*, 132 Ind. 248, 31 N. E. 777, 17 L. R. A. 509, 32 Am. St. Rep. 251; *In re Eldred*, 46 Wis. 531, 1 N. W. 175; 15 Am. & Eng. Enc. L. 172, 175, 176.

It follows that the judgment of the court below must be affirmed. All the Justices concur.

(121 Ga. 685)

WILLIAMS v. SEWELL et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

ANIMALS—RUNNING AT LARGE—VIOLATION OF ORDINANCE—WARRANT OF ARREST—ALTERNATIVE SENTENCE—FINE—ENFORCEMENT—MALICIOUS ARREST—FALSE IMPRISONMENT—JUDGMENT FOR COSTS.

1. An animal tied to a stake in a public street for the purpose of permitting it to graze upon the herbage therein is an obstruction of such street, and is at large, within the meaning of ordinances authorizing the removal of obstructions from the public streets, and requiring the marshal of the town to take up live stock running at large and confine them in a pound. It is immaterial whether the portion of the street thus occupied by the animal is in actual use by the public at the time, if it is subject to be used as a highway.

2. A municipal charter which imposes upon the mayor the duty of seeing that the ordinances of the town are faithfully executed, and confers upon him jurisdiction to try all persons charged with violating such ordinances, authorizes the mayor to issue a warrant for the arrest for trial of one charged with the violation of an ordinance; and this is true notwithstanding the charter does not in express terms authorize the mayor to issue a warrant for such purpose.

3. A municipal court authorized by the charter to impose two or more kinds of punishment for a violation of the municipal ordinances may impose an alternative sentence (see Pol. Code 1895, § 712; *Hathcock v. State*, 13 S. E. 959, 88 Ga. 91, 99; *Papworth v. Fitzgerald*, 32 S. E. 863, 106 Ga. 382), but has no power, in the absence of express legislative authority, to impose a fine, and enforce its collection by labor upon the public streets (*Brieswick v. Brunswick*, 51 Ga. 639, 21 Am. St. Rep. 240 [1]; *Carr v. Conyers*, 10 S. E. 630, 84 Ga. 287, 20 Am. St. Rep. 337 [2]).

4. A judgment of a municipal court imposing a sentence that the accused pay a fine in a given amount, "and, in default of the payment of the same within ten days," that the accused work at hard labor on the streets of the municipality, is, under the rulings in the cases last above cited, not a judgment imposing an alternative sentence, but is a judgment imposing a fine, with a provision that its payment shall be enforced by labor on the public streets.

5. A judgment of the character above indicated, so far as it authorized the enforcement of the payment of the fine by labor on the streets, is void, when there is no express legislative authority conferred upon the municipality to enforce the payment of a fine by labor upon the public streets, and an arrest under such a judgment is unlawful.

6. Such a judgment is in the nature of a warrant for the arrest of the accused, and an officer who makes an arrest thereunder will not be liable either for malicious arrest or false imprisonment if he acts in good faith in attempting to execute the judgment. Civ. Code 1895, § 3852; *Berger v. Saul*, 30 S. E. 326, 113 Ga. 869, 871; *Page v. Citizens' Banking Co.*, 36 S. E. 418, 111 Ga. 86, 51 L. R. A. 463, 78 Am. St. Rep. 144.

7. A judgment for costs, in which no amount is stated, is not void. *McLendon v. Frost*, 59 Ga. 350.

8. There was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by Lizzie Williams against H. H. Sewell and others. Judgment for defendants. Plaintiff brings error. Affirmed.

R. D. Jackson, James Beall, and Griffith & Weatherly, for plaintiff in error. W. F. Brown, for defendants in error.

COBB, J. The action was for trespass in taking and carrying away personal property, for assault and battery, malicious arrest, and false imprisonment. The defendants were the mayor and marshal of the town of Temple, and two others who were called to the assistance of the marshal. The charter of the town of Temple will be found in the Acts of 1901, p. 650 et seq. The legal principles controlling the case are set forth in the headnotes. The evidence demanded a finding that the defendants acted in good faith and without malice, and authorized a finding in their favor on all other issues. There was no error of such a character as to require a reversal of the judgment.

Judgment affirmed. All the Justices concur.

(122 Ga. 45)

BALDWIN FERTILIZER CO. v. McALLISTER.

(Supreme Court of Georgia. Jan. 30, 1905.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

1. The evidence being sufficient to support the verdict, this court will not interfere with the discretion of the trial judge in overruling a motion for new trial based solely upon the grounds that the verdict was contrary to law and the evidence, and without evidence to support it.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; E. J. Reagan, Judge.

Action between the Baldwin Fertilizer Company and M. L. McAllister. From an order denying a new trial, the company brings error. Affirmed.

W. L. Grice & Sons and W. M. Clements, for plaintiff in error. J. H. Martin, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 769)

HELMS et al. v. MARSHALL.

(Supreme Court of Georgia. Jan. 28, 1905.)

JUDGMENT—REVIVAL—COLLATERAL ATTACK.

1. A judgment rendered against an administrator, purporting to revive a judgment which was dormant, but which, so far as the record discloses, was barred, there being no entry on the execution within 10 years after its issuance, is not void, and cannot be collaterally attacked by the heirs at law of the decedent in the trial of a claim interposed by them to the levy of an execution issued on the revived judgment.

(Syllabus by the Court.)

Error from Superior Court, Talbot County; W. B. Butt, Judge.

Claim case between F. J. Marshall, administrator, and Fannie Helms and others. From the judgment, Helms and others bring error. Affirmed.

J. J. Bull, for plaintiffs in error. Persons & McGehee, for defendant in error.

COBB, J. This was a claim case, in which Marshall, administrator, was the plaintiff in execution, the administrators of George and Caroline Boswell, respectively, were the defendants in execution, and the claimants were the heirs at law of George and Caroline Boswell. It was admitted that the Boswells were in possession at the dates of the death of each. From the evidence introduced in behalf of the claimants, it appears that judgment was rendered against George Boswell in 1873 in favor of the plaintiff's intestate. This judgment became dormant, and was duly revived in 1888, on a scire facias in favor of Marshall, administrator, against Caroline Boswell, as executrix of George Boswell. Execution upon the revived judgment was issued October 8, 1888, and there were no other entries on the docket. In 1902, more than 10 years from the date that the execution was issued, a proceeding to revive the revived judgment of 1888 was instituted against the legal representatives of both George and Caroline Boswell, and a judgment of revival was rendered against both after proper service. Why the legal representative of Caroline Boswell was made a party, does not appear. The court, over objection of claimants, ruled out all of the evidence introduced by them, on the ground that, being the heirs of George and Caroline Boswell, they could not attack the judgment that had been rendered against the administrators of the Boswells. A verdict was then rendered, finding the property subject, and claimants excepted; assigning error only upon the exclusion of the evidence above referred to.

It appears from the bill of exceptions only by inference that the purpose of the testimony introduced by the claimants was to show that the judgment rendered in 1902 reviving the judgment of 1888 was void, because the judgment sought to be revived was barred by the statute of limitations, and this is the contention of counsel for the plaintiffs in error in his brief. The judgment of 1888, so far as the record discloses, was barred in 1902, when the proceeding to revive it was instituted. Civ. Code 1895, § 3761. A scire facias to revive a dormant judgment is in the nature of a suit, and the defendant is bound to plead all matters of defense that he has, just as he would in an ordinary suit, or else he will be, after the judgment, concluded as to any defense which could have been made the subject-matter of a plea. *Lewis v. Allen*, 68 Ga. 400. When a legal representative is sued upon a debt of the decedent, it is not his duty to plead the statute of limitations, unless the bar attached during the lifetime of the decedent. Civ. Code 1895, § 3433. If, however, the bar attached during the lifetime of the decedent, it is his duty to interpose the defense of the statute. But if he allows judgment to be rendered against him in either case, both he and the heirs of the estate, who are his privies, are bound by the judgment, and cannot thereafter set up that the claim was barred. The heirs, however, are not precluded by the judgment from holding the administrator responsible as for a devastavit in case it be shown that the claim was not a just claim, or that the bar of the statute attached during the lifetime of the decedent. See Civ. Code 1895, § 3433. A dormant judgment is a debt of record, and the rules above referred to apply to a proceeding instituted thereon, whether it be an ordinary suit on the judgment, or a scire facias to revive the same. A judgment reviving a dormant judgment on scire facias instituted for that purpose is an adjudication between the parties and their privies that the judgment was a dormant judgment at the time the proceeding to revive the same was instituted, and they will not be heard subsequently to aver that the judgment was not dormant at the time the judgment of revival was rendered, or that at that time it was barred by the statute of limitations. *Foster v. Reid*, 57 Ga. 609; *Dunn v. Brogden*, 68 Ga. 63. It does not appear that the judgment of 1873 became either dormant or barred during the lifetime of George Boswell, and the judgment of 1888, of course, did not become barred during his life, as that judgment was rendered against his legal representative. So far as the judgment of 1902 was a judgment against the legal representative of George Boswell, it was a valid judgment between the parties and their privies, and was not subject to the attack which was sought to be made on it in the present case. Caroline Boswell was not a

party to the judgment of 1873. She was a party to the judgment of 1888 at the time it was rendered, only in her representative capacity as executrix of George Boswell. If she became a party to that judgment in her individual capacity, it was by reason of something that transpired after the judgment was rendered. She may have been a surety on a supersedeas or stay bond, and have thus become bound by the judgment; and, if so, a proceeding to revive the judgment of 1888 would be properly instituted against her. As her legal representative was a party to the scire facias and made no defense, the presumption, after the judgment of revival, would be that she had become in some lawful way bound by the judgment sought to be revived; and a judgment of revival entered against her legal representative would be binding upon him and her heirs, whether the judgment sought to be revived became barred during her lifetime or not. In no view of the case as it appears in the record was the judgment of 1902 void. If it had been shown that this judgment was fraudulent or collusive, a different question would have been presented. No reason for reversing the judgment has been shown.

Judgment affirmed. All the Justices concur.

(121 Ga. 329)

SALTER v. CITY OF COLUMBUS.

(Supreme Court of Georgia. Jan. 30, 1905.)

MUNICIPAL CORPORATIONS—BUSINESS TAX—SOLICITING AGENT.

1. Where a municipal ordinance provides that each person engaged in any business "hereinbelow specified" shall register, pay a license tax, and take out a license, and makes it a penal offense for any person, or agent of any persons, whose duty it is to register and obtain a license, to transact or offer to transact either of the kinds of business specified, and where the business specified "below" is that of persons "dealing in spirituous, vinous or malt liquors," a person charged under these ordinances with "doing business without license" cannot be lawfully convicted on proof that he, as agent of another, solicited orders for malt liquor, and, after the delivery of such liquor by other agents of the principal, collected for his principal the purchase price. Such person was merely a soliciting and collecting agent, and, even if embraced within the ordinances, was not guilty, as charged, of "doing business" himself.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; R. B. Russell, Judge.

R. L. Salter was convicted of doing business in the city of Columbus without payment of license tax, and brings error. Reversed.

Henry C. Cameron and Hatcher & Carson, for plaintiff in error. T. T. Miller, for defendant in error.

SIMMONS, C. J. In the mayor's court of the city of Columbus, Ga., Salter was charged with "doing business in said city with-

out first paying the license tax required." He was summoned to appear to answer concerning a charge of "doing business without license." Upon the trial he was convicted of "doing business without license." He took the case by certiorari to the superior court, where the decision was again adverse to him. He excepted.

The case was tried upon an agreed statement of facts, from which it appeared that Salter was merely an agent for the F. W. Cook Brewing Company, a corporation of Indiana. This company has a cold storage place and place of doing business in Girard, Ala., immediately across the Chattahoochee river from Columbus, Ga.; the river being there spanned by a bridge. The brewing company ships large quantities of beer to Girard, and there stores it. Salter resides in Columbus, and solicits orders from the retail dealers in liquors in that city; the orders being sometimes solicited at the places of business of such retail dealers, and sometimes telephoned by such dealers to the brewing company's place at Girard. Such orders are then filled from the Girard cold storage place by the brewing company delivering the beer to the retail dealers in Columbus. Delivery is made by wagons owned and operated by the brewing company; the beer being taken in such wagons, in the original packages, from Girard to the retail dealers' places in Columbus. Delivery by the brewing company is a part of the contract of purchase of the beer. After the delivery of the beer to the purchasers, Salter collects from them the purchase price. Neither Salter nor the brewing company, nor any person representing them, has taken out or obtained any license from the city of Columbus to sell or deal in any kind of liquors. Salter is engaged in no business other than that here described, and has no office or place of business in Columbus, but has his office and place of business in Girard, at the place of business of the brewing company, at which place he remains the greater part of his time. The ordinance under which Salter was convicted is as follows: "It is further ordained by the authority aforesaid, that each person, firm or corporation engaged in any business, trade, profession or occupation hereinbelow specified, shall register under oath [etc.] his, her or their business, trade or occupations, as hereinbelow specified, and shall pay the license tax prescribed by the 15th day of February, 1904, and take out a license for said business, trade, profession or occupation. * * * And if any person, firm or corporation or agent of any persons, firms or corporations whose duty it is to register and obtain a license, shall transact or offer to transact in said city, either of the kinds of business, trades or occupations in this section specified, without having first registered and obtained said license, * * * he, she or they or such agent, shall on conviction before the recorder, be punished by a fine," etc.

"Below" appeared an ordinance imposing a license tax upon "every person or firm dealing in spirituous, vinous or malt liquors within the corporate limits of the city of Columbus, whether as a wholesale or retail dealer."

Salter, the present plaintiff in error, was not, within the meaning of these ordinances, a person "dealing" in liquors. He merely acted as the soliciting and collecting agent of his principal, the brewing company. The "dealing" in malt liquors was done by the principal, acting through Salter and the agents who effected the delivery of the goods ordered and sold. It is not necessary to decide whether the ordinance embraced Salter as an agent of an unlicensed dealer. Conceding that it did so, still this was not the charge made against Salter in the present case. He was himself charged with "doing business without a license." This cannot be held to mean a charge that he was acting as agent for a dealer who should have registered and taken out a license, but had failed to do so. The charge contains no intimation that Salter was merely soliciting business for an unlicensed principal. It is a charge against Salter that he was himself doing the business dealt with in the ordinances, and that he was doing so without having paid the tax required of him, and without having taken out the prescribed license. On this charge he was not guilty. Even if he was guilty of a violation of the ordinances, he was not guilty of having violated them in the manner charged, and his conviction was erroneous. For this reason, the certiorari should have been sustained.

Judgment reversed. All the Justices concur.

(121 Ga. 385)

HUDSON v. LAMAR, TAYLOR & RILEY DRUG CO.

(Supreme Court of Georgia. Jan. 30, 1905.)

ACTION AT LAW—WAIVER OF HOMESTEAD—RELIEF IN EQUITY.

1. This case is controlled by the ruling in *Bell v. Dawson Grocery Company*, 48 S. E. 150, 120 Ga. 628, wherein it was held that pending the bankruptcy proceedings the holder of a note containing a waiver of homestead has no remedy at law, but must enforce his rights arising from the waiver in a court of equity.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by the Lamar, Taylor & Riley Drug Company against J. R. Hudson. Judgment for plaintiff, and defendant brings error. Reversed.

Lamar, Taylor & Riley Drug Company brought suit in the city court of Americus against J. R. Hudson on a promissory note for \$1,630, dated December 20, 1902, due on demand, with provision for the payment of attorney's fees, and waiving for himself and family any and all homestead or exemption rights he may have by virtue

of the Constitution and laws of the state of Georgia or the United States. The defendant pleaded that the note was given in settlement of an account long past due, and not for a consideration given at the time it was signed, and that the homestead waiver was without consideration, and void. For further plea he set up that the plaintiff ought not to have and recover of the defendant, because on January 7, 1903, plaintiff and two others instituted proceedings to have the defendant adjudged an involuntary bankrupt; that on January 21, 1903, defendant was duly adjudged a bankrupt; that in February, 1903, at a meeting of the creditors, the plaintiff proved its debt in the bankrupt court, and on March 19, 1903, filed before the referee its objections to the homestead assigned to the defendant by the trustee in bankruptcy, and on May —, 1903, the plaintiff filed a petition in the district court, and obtained an allowance of \$135 as attorney's fees for filing the proceedings in bankruptcy. There was a demurrer to the plea, and an agreed statement of facts, from which it appeared that the note was given for merchandise purchased of the plaintiff by the defendant; that at a meeting of the creditors it was agreed that the stock and assets should be sold, and the claim of the plaintiffs under its homestead waiver, the lien of a mortgage creditor, should be divested from the goods and attached to the proceeds; that the stock was sold for \$1,400, and the sale was confirmed April 8, 1903; that on February 25, 1903, the trustee filed his report setting apart as exempt the property described in the bankrupt's claim for exemption; that the plaintiff objected to the report as against its debt because of the waiver of homestead in the note; that the question raised by the objections is still undetermined in the bankrupt court; that on December 18, 1903, the bankrupt filed his petition for discharge, whereupon the plaintiff filed objections to the discharge on the ground that it held the note in which the homestead had been waived, stating that it had entered a suit in the city court of Americus upon such note for the purpose of subjecting the exemption; and that the plaintiff had given the notice required by law to entitle it to recover attorney's fees. The case was submitted to the court without the intervention of a jury, and a judgment was entered for the plaintiff for principal, interest, and attorney's fees, to which the defendant excepted because the judgment was contrary to law, because the plaintiff was not entitled to a judgment for more than the value of the homestead, nor to a judgment for attorney's fees, nor to a general judgment against the defendant; because the right of the plaintiff to enforce a waiver note was an equitable right, of which the city court of Americus had no jurisdiction; because, in any event, the plaintiff could only be entitled to a judgment in rem against the exempt property;

because the homestead waiver was without a present consideration given at the time that the note was signed, when the defendant was insolvent and in contemplation of bankruptcy, and so known to the plaintiff, by reason whereof the waiver was a preference within the meaning of the bankrupt act, and therefore void.

E. A. Hawkins, for plaintiff in error. Lane & Park, for defendant in error.

LAMAR, J. Judgment reversed. All the Justices concur.

(122 Ga. 43)

TERRY v. KEIM et al.

(Supreme Court of Georgia. Jan. 30, 1905.)

SPECIFIC PERFORMANCE—TENDER OF PRICE.

1. Before equity will decree specific performance of a contract for the sale of land, there must be an absolute and unconditional tender of the purchase price. An offer to pay the purchase price on delivery of a properly executed deed is not an unconditional tender.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; E. J. Reagan, Judge.

Action by J. J. Terry against M. C. Keim and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John W. Haygood, Eldridge Cutts, and B. B. Cheney, for plaintiff in error. E. W. Ryman, for defendants in error.

EVANS, J. Terry brought suit against John Fry and Louis and M. C. Keim to compel the specific performance of a contract of purchase of certain land. The defendant Fry was a nonresident, and service was not made upon him, and at the trial the plaintiff abandoned his case as to him. The plaintiff submitted evidence tending to establish the following facts: John Fry, a resident of Charlottesville, Ind., was the owner of the premises described in the declaration, and contracted to sell them to plaintiff for \$150. The contract was made by correspondence, the beginning of which was a letter from Terry to Fry offering to buy the land for \$150. Fry accepted this offer, and instructed Terry to send check to a certain bank, and that as soon as he (Fry) found out the draft was in the bank he would send a deed in proper form. Fry then sent a deed with draft for purchase money attached to the First National Bank of Fitzgerald. Plaintiff declined to pay the draft because the deed was attested by only one witness, and wrote Fry to have the deed executed before two witnesses, and to return it, and he would pay the draft. Fry declined to do this, and afterwards sold the land to M. C. Keim. At the time of Keim's purchase, he had knowledge of plaintiff's contract of sale. The property was vacant, and the plaintiff took possession of it. He has ever been willing to pay the purchase money on receipt of prop-

erly executed deed. On the trial of the case, after the plaintiff had submitted his evidence, he tendered the full amount of the purchase money to the defendant Keim. On motion of the defendant the court granted a nonsuit, and the bill of exceptions assigns error on the judgment of nonsuit.

The court held that the tender of the purchase money was conditional, in that it was coupled with a demand for a deed executed before two witnesses; that, to entitle the plaintiff to specific performance of the contract of sale, it was necessary for him to show, prior to the institution of the suit, an unconditional and absolute tender of the purchase money. In thus holding the trial judge followed the cases wherein this precise question has been adjudicated by this court. In *Cothran v. Scanlan*, 34 Ga. 555, it was held that a bill for the specific performance of a contract for the purchase of land was demurrable where there was no allegation of an unconditional and absolute tender of the purchase price. In that case the allegation of tender was that it was "upon condition that said Cothran and Black would then and there make titles," etc. This case has been cited and the principle therein announced has been approved in *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560, and again in *Elder v. Johnson*, 115 Ga. 692, 42 S. E. 51, and *Morris v. Insurance Co.*, 116 Ga. 53, 42 S. E. 474. The principle of law impelling the court to grant the nonsuit is clearly defined in the cases cited, and the judgment of nonsuit was right.

Judgment affirmed. All the Justices concur.

(121 Ga. 301)

GEORGIA, F. & A. RY. CO. v. SIZER & CO.

(Supreme Court of Georgia. Jan. 28, 1905.)

CERTIORARI—TRAVERSE TO ANSWER—VERIFICATION.

1. Where a certiorari has been sued out, taking a case from an inferior judiciary to the superior court, and a traverse is filed to the answer by the plaintiff in certiorari, such traverse may be verified by his attorney at law.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

The Georgia, Florida & Alabama Railway Company levied a distress warrant on property claimed by Sizer & Co. Judgment for claimant. Certiorari dismissed, and plaintiff in certiorari brings error. Reversed.

Donalson & Donalson, for plaintiff in error. T. S. Hawes, for defendant in error.

SIMMONS, C. J. It appears from the record that certain lumber was levied upon by virtue of a distress warrant in favor of a railroad company and was claimed by Sizer & Co. The case was tried in the city court of Bainbridge, and the property found not

subject. Thereupon the railroad company applied for and obtained a writ of certiorari from the superior court. The judge of the city court answered the certiorari, and upon the coming in of his answer a traverse thereto was filed by the plaintiff in certiorari. This traverse was verified by the railroad company's attorney at law who had participated in the trial in the city court. The defendant in certiorari moved to dismiss the traverse upon the ground that it was not verified by the affidavit of the party. The judge of the superior court granted this motion, and the plaintiff in certiorari excepted.

Section 4651 of the Civil Code of 1895 declares that the plaintiff or defendant in certiorari may traverse the truth of the answer, which traverse must be in writing "and verified by affidavit." It will be observed that this section does not prescribe who shall verify the traverse. The broad construction would seem to authorize any one to do so who knew the facts. We know by experience that in many cases tried in the courts one or the other of the parties is not present, and the party himself would in such case be unable to verify the traverse. He could know the facts only upon the information of others. Our Code provides that any act authorized or required to be done under the Code by any person in the prosecution of his legal remedies may be done by his agents, and for this purpose the agent is authorized to make an affidavit or execute a bond although his agency be created by parol. Civ. Code 1895, § 3035. Section 4638 expressly authorizes the attorney at law of a party to make the affidavit required in suing out the certiorari. Having this authority, and the section which requires a traverse to be verified not prescribing by whom the affidavit shall be made, we think it clear, taking all these sections together, that the attorney who tried the case may verify the traverse. There is good reason for believing that the attorney who is expressly authorized to sue out and verify the petition for the writ of certiorari has also authority to prosecute the proceeding, where necessary to his client's interests, by verifying the traverse to the answer. In the present case the attorney who verified the traverse had participated in the trial in the city court. It will be presumed that he knew as much of the facts proved on the trial as did any other person, as it was his duty to attend to them, and to comment on them to the court and jury. He was probably better informed as to these facts than any one else upon his side of the case. If the verification of the traverse had to be made by the party himself, it would, as before remarked, often have to be done upon the information of others. For these reasons we think that the court erred in dismissing the traverse. Let the traverse be tried, and, when the record is made up by the allowance or disallowance of the traverse by the jury, the judge below

will then pass upon the merits of the case, and exercise the discretion vested in him in such cases.

Judgment reversed. All the Justices concur.

(122 Ga. 1)

**ATLANTIC & B. RY. CO. v. MAYOR, ETC.,
OF CITY OF MONTEZUMA.**

(Supreme Court of Georgia. Jan. 30, 1905.)

**RAILROADS—USE OF STREET—ORDINANCE—
VALIDITY.**

1. Where, by virtue of Civ. Code 1895, § 2167, par. 5, and a contract with the city, the plaintiff had a right to construct and maintain a railroad track through Cherry street, in Montezuma, this would not authorize the company to use the street for drilling, switching or transferring cars.

2. The chancellor did not err in refusing to enjoin the city from enforcing an ordinance limiting the speed of trains and requiring a flagman to precede the trains in the street, and prohibiting the company from stopping, drilling, or in any manner shifting or transferring cars between indicated points on the street.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by the Atlantic & Birmingham Railway Company against the mayor and council of Montezuma. Judgment for defendant, and plaintiff brings error. Affirmed.

On April 7, 1902, in consideration of the mutual benefits arising to each party, it was agreed that the mayor and council of Montezuma would secure for the Atlantic & Birmingham Railroad Company a right of way from the line of Macon county to Flint river, "including right of way to and through Cherry St. in Montezuma, Ga., and would hold the railroad company harmless from any damages arising from the operation of said road through Cherry St. which might be claimed by the owners of the property adjacent thereto by reason of the use of this street for this purpose having been allowed by the city council." The city also provided for the right of way for the location of a "Y" on lands outside of the city, the "Y" to be used for turning locomotives and trains, and donated a right of way 1,200 feet in length running west of Dooly street towards the Flint river. The railroad company, on its part, agreed to begin and prosecute to a finish the building of its road from Cordele to and through Montezuma. By its petition the railroad company alleged that in pursuance of this contract it had constructed its line of railway through Cherry street to the aforesaid tract of land, upon which it erected its depot, and has continued to maintain and operate its road to said point as its terminus; that especially in the handling of freight cars at said point where connection is made with the Central of Georgia Railway, it is necessary to switch and drill its trains upon Cherry street, and in shifting and transferring cars it is compelled to use

the part of Cherry street between the east side of Spalding street and the old Rosser storehouse in Montezuma; that, notwithstanding it has endeavored only to use Cherry street for these purposes in a reasonable manner, and so to limit the use as not to interfere with the interests of the defendant or of the public, and although no damage has resulted to the defendant or the public, the city council, on March 25, 1902, passed an ordinance prohibiting engines going through Cherry street at a greater rate than three miles an hour, and also requiring a flagman to go ahead of the train, "and no train or engine will be permitted to stop, drill, or in any manner shift or transfer cars between the east side of Spalding street and the old Rosser warehouse, except to prevent accident, under penalty of being punished as provided in section 13 of the charter"; that the city council has caused this ordinance to be enforced by arresting engineers, and preventing switching, drilling, shifting, and transferring cars between the points designated, so as to seriously interfere with the plaintiff's business as a common carrier, and it threatens so to enforce said ordinance as to prohibit the plaintiff from the use of that portion of Cherry street, to its irreparable damage, and to the annulment of the rights and privileges granted by the aforesaid contract. Whereupon it prayed for an injunction. The city demurred and answered, claiming that when the contract was made the plaintiff specially agreed that Cherry street should only be used by trains coming and going on schedule trips, and did not include any right to switch or to drill; that the city of Montezuma is built in a narrow space between Flint river and Beaver creek; that, while Cherry street is the busiest portion of the town, with many of the chief houses of the place on each side, it is the narrowest street in the city, and at the point indicated by the ordinance four different streets and three public ways converge into said street; that the plaintiff has shut up and practically excluded the public from all access to the town west of Rosser street, and so obstructed Cherry street as to make it impassable beyond that point; that during the time of switching and transferring cars, which is almost continuous, the travel and business of the town is absolutely paralyzed and stopped; that the noise of the engines is deafening; and that it is unreasonable for the company to make a side track and a switchyard of Cherry street; and that the ordinance was passed and is being enforced in the discharge of the city's duty to the public. There was evidence pro and con. On the return of the rule to show cause after hearing affidavits and argument on the demurrer, the court refused, in vacation, to pass upon several issues raised, holding that, irrespective of the verbal agreement, the municipal authorities had the authority to prohibit by ordinance the use of the street for the purposes com-

plained of in the petition, and thereupon refused the interlocutory injunction prayed for. To this order the plaintiff excepted.

J. L. Sweat and J. M. Du Pree, for plaintiff in error. Greer & Felton, for defendant in error.

LAMAR, J. There is a "marked difference between the lawful and unlawful use of railroad property." *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 690, 34 S. E. 852, 47 L. R. A. 755. Both the contract and Civ. Code 1895, § 2167, par. 5, permitting the longitudinal use of the street, must be construed to authorize only lawful use, and not the creation or maintenance of a nuisance thereon. Streets and highways are intended primarily for the purposes of travel and transportation. When a railroad company is authorized to lay its track thereon, there is a conclusive presumption that the use thereunder must be for similar purposes. A private citizen would not be authorized, even in front of his own premises, to obstruct a street, or to use it as a place of storage, or for any purpose which would interfere with the rights of the balance of the public. The railroad company stands upon the same footing. While permitted to use the street or the highway for transportation, it must adjust itself to the rights of the public in the same way that the public must adjust itself to the rights of the company. The railroad company cannot unreasonably obstruct the street, or interfere with travel. It cannot use the street as a depot, or a place for loading or unloading cars. And it has been repeatedly held that a railroad company cannot use the street as a yard, or for switching or drilling purposes. The court did not err in refusing the injunction. *W. & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320 (3); *Kavanagh v. R. Co.*, 78 Ga. 803, 4 S. E. 113; 27 Am. & Eng. Enc. Law (2d Ed.) 179 (12).

Judgment affirmed. All the Justices concur.

(121 Ga. 778)

TRAMMELL v. SWIFT FERTILIZER WORKS.

(Supreme Court of Georgia. Jan. 28, 1905.)

NOTES—SURETYSHIP.

1. If the fact of suretyship does not appear on the face of a note, it may be proved by parol, and the relative position of the makers' names is immaterial, if one is surety of the other. A charge to this effect is not erroneous because the court failed to add that, as a presumption of fact, the first name was that of the principal.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1964.]

2. The law controlling the issues made by the pleadings was fairly charged by the court, the evidence fully warranted the verdict, and no reason is shown for disturbing the judgment denying a new trial.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by the Swift Fertilizer Works, for the use of Carter & Patterson, against H. N. Bailey and D. O. Trammell. Judgment for plaintiff, and Trammell brings error. Affirmed.

B. F. Harrell and G. Y. Harrell, for plaintiff in error. E. T. Hickey and J. T. Harrison, for defendant in error.

EVANS, J. The Swift Fertilizer Works, for the use of Carter & Patterson, brought suit against H. N. Bailey and D. O. Trammell to recover an amount alleged to be due on a promissory note, a copy of which was attached to the petition. The note contained a promise to pay the Swift Fertilizer Works \$162.75, and recited that: "The payment of this note is secured by a Lien to the extent of said advance on all the crops which may be grown or cultivated on said farm or plantation during the year 1901, wherever said crops, parts or part of them are to be found." It was signed by H. N. Bailey and D. O. Trammell as makers, and by J. E. Ware as a witness. There is nothing in the note indicating other than that the makers were liable as joint principals. Bailey filed no defense. Trammell pleaded that he signed the note as surety, and that he had given notice to the plaintiff to sue the principal, H. N. Bailey, which notice was disregarded by the plaintiff, and for that reason he was discharged from liability. At the trial no evidence was introduced to sustain this plea, but his plea was amended by alleging that the note which he signed as surety embraced a mortgage upon the crops of his principal, Bailey; that the payee had failed to have the instrument recorded, or to make any effort to collect the note out of Bailey or the mortgaged property; that defendant's risk as surety had thus been increased, and he was no longer liable on the note. During the progress of the trial no question was raised as to the sufficiency of the mortgage clause in the instrument sued upon. The plaintiff contended that Bailey was the tenant of Trammell; that the consideration of the note was a quantity of fertilizer which had been sold to Trammell, as landlord; and that credit had been extended on the faith of his signing the note as principal. The defendant Trammell introduced testimony tending to show that Bailey was his tenant, and had made sufficient crops to pay off the note, but that the plaintiff had made no effort to collect the same; that he had signed the note only as surety; and that the payee had not recorded the instrument, or taken any steps to enforce the mortgage lien on Bailey's crops. The jury found for the plaintiff the full amount of the note. Trammell made a motion for a new trial, which was overruled, and he excepted.

1. The main issue in the case was whether Trammell was a surety or a joint principal. Upon this issue the evidence was conflicting. The court fully submitted the issue to the jury; charging them, in substance, that, where the fact of suretyship does not appear on the face of a note, it may be proved by parol, and the relative positions of the makers' names is immaterial, if one really signed as surety for the other. Not only did the judge charge this principle of law in the abstract, but he also applied it to the facts developed by the evidence. Exception is taken to the charge on the ground that it was argumentative, and deprived the defendant of the evidentiary value of the relative location of the names on the note, he having signed last. Where two persons sign a note, apparently as joint principals, and there is nothing in the note to indicate that one was surety for the other, the presumption of law is that both are liable as joint principals. This is not, of course, a conclusive presumption, but may be rebutted by parol. Civ. Code 1895, § 2984. It is immaterial in what order the names may appear on the note, if, in point of fact, one of the makers is liable only as surety. No presumption of law or of fact can arise, in a case where both sign apparently as joint principals, that the person who signed last was surety only. The burden was on the defendant Trammell to overcome by proof the presumption that, as indicated by the note itself, both he and Bailey signed the note as a principal, and the charge of the court was as favorable to Trammell as he had any right to expect.

2. There is nothing in the note confining the operation of the lien therein referred to, or indicating a purpose to limit it to the property of one only of the makers. No question was made before the court as to the validity of the lien. The case was tried as though the instrument was a note and mortgage. One of the contentions of the plaintiff was that the lien was as much upon the property of Trammell as it was upon the property of Bailey. The court submitted this contention to the jury, and instructed them that, if the lien was intended to cover Trammell's crops, he would not be released because of the failure of the payee to place the note upon record; but, on the other hand, if the mortgage was upon the crop of Bailey only, it was the duty of the payee to place the instrument on record, and, if the payee failed to do so, and the jury should find that Trammell signed as surety, such failure would operate to release him. Of this charge Trammell has no just cause of complaint. The issue as to whether or not he signed as surety was fully and fairly submitted to the jury, and the jury were instructed that, if the lien was intended to cover Bailey's crops only, a failure to record the mortgage would release Trammell as surety, if he signed the note in that capacity. The jury found

against Trammell on this issue, and the evidence fully warranted their finding.

In one of his exceptions, the plaintiff in error complains that the court, in its charge, submitted to the jury the question whether or not the clause in the note sued on, relating to a lien on crops of the makers, amounted to a mortgage. In a note the judge certifies that he did not submit that question to the jury, but only called on them to determine whether the mortgage operated on the crops of Bailey, or on the crops of Trammell as well. This being true, we cannot undertake to deal with the exception taken; the statement of fact on which it was based not being certified.

Judgment affirmed. All the Justices concur.

(121 Ga. 814)

THOMPSON v. BROWN.

(Supreme Court of Georgia. Jan. 28, 1905.)

HUSBAND AND WIFE—CONTRACTS OF WIFE—LIABILITY OF HUSBAND.

1. Where a wife makes a contract in her own name for the improvement of her husband's house, the husband is not liable therefor when it does not appear that the wife was his authorized agent, or that he knew that the work was being done on his property, or that he adopted the contract as his own. *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 142, 143.]

2. The wife having acted on her behalf, and not as the agent of her husband, he cannot be held bound, as principal by ratification, merely because he has paid for part of the work. Civ. Code 1895, § 2897; 1 Am. & Eng. Enc. Law (2d Ed.) 1188; *Blount v. Dugger*, 41 S. E. 270, 115 Ga. 109.

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by J. H. Brown against H. E. Thompson. Judgment for plaintiff. Defendant brings error. Reversed.

Theo Titus, for plaintiff in error. S. A. Roddenberry and Roscoe Leeke, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(121 Ga. 741)

SEALE v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

SUNDAY—RUNNING FREIGHT TRAINS—EVIDENCE—INSTRUCTIONS—INDICTMENT.

1. On the trial of one indicted for a violation of Pen. Code 1895, § 420, prohibiting the running of freight trains on the Sabbath day, it is not error to admit evidence of any violation of the law prior to the finding of the indictment, and within the statute of limitations.

2. The word "destination," as used in the second exception to section 420 of the Penal Code of 1895, means the point at which the train finally stops, and not the point at which it crosses the state line.

3. Where, on the trial of the superintendent of transportation of a railroad company for a violation of the Code section referred to in the preceding headnotes, it appears that the accused knew of and was responsible for a schedule of the railroad company, the compliance with which necessitated a violation of the law, it is not error of which he can complain that the court charged the jury that he might justify himself by proving that the employees of the company acted in direct violation of his orders and rules, but that "mere general orders and rules would not be a justification under the statute."

4. Nor, in such a case, is it error to refuse to charge (especially in the absence of a written request) that the accused could not be found guilty if it appeared that he did not know that the train had been run in violation of law, if such was the fact, until after it was so run.

5. An indictment for a violation of Pen. Code 1895, § 420, need not allege that the train for the running of which the accused is charged to be responsible was not within any of the statutory exceptions to that section. Allegations to that effect are mere surplusage, and need not be proven to warrant the conviction of the accused. *Jackson v. State*, 15 S. E. 905, 88 Ga. 787, approved and reaffirmed.

6. Upon a review of the case of *Jackson v. State*, 15 S. E. 905, 88 Ga. 787, the same is reaffirmed.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

J. N. Seale was convicted of a violation of the Sunday law, and brings error. Affirmed.

John J. Strickland, for plaintiff in error.
W. A. Charters, Sol. Gen., for the State.

CANDLER, J. The accused was superintendent of transportation of the Southern Railway Company; and the indictment charges that on the 14th day of June, 1903, which was Sunday, he caused a freight train of that company to be run in the county of Habersham, "the said freight train being then and there drawn and pulled by an engine numbered 289; the said freight train not having one or more cars loaded with live stock and delayed beyond the schedule time, and said freight train not running over said road on Saturday night on a schedule fixing its time of arrival at destination according to said schedule by which it started not later than eight o'clock Sunday morning; and said freight train not being a special fruit, melon or vegetable train, the cars of which contained no other freight except perishable fruits, melons, vegetables, fresh fish, oysters, fresh meats, live stock and other perishable goods of a like nature; and the said freight train not being a train on a road having its terminal in another state and not running over 30 miles in the state of Georgia." It was undisputed that the train for running which the accused was indicted left Atlanta on Saturday night, the schedule time of its departure being 11:40 p. m.; that it was bound for Greenville, S. C., at which point it was due to arrive, under its schedule, at 10:50 a. m. Sunday. It was due to reach Toccoa, in Habersham county, at 5:55 a. m. Sunday, but on the occasion under investigation it arrived at

that point behind time. Whether its arrival in Toccoa was before or after 8 o'clock Sunday morning is a question as to which the evidence is in conflict, but, under the view we take of the case, this point is immaterial. Upon arriving at Toccoa the train was put on a side track, and was not moved again until after 12 o'clock Sunday night. The accused was found guilty. He moved for a new trial, which was refused, and he excepted.

1. Error is assigned upon the admission by the court below of evidence to the effect that the railroad company of which the accused was superintendent of transportation had run other trains on Sunday in Habersham county during the year 1903. The objection made to this evidence at the time it was offered was that it "would have the tendency to prejudice the jury against the defendant in the case on trial." We are clear that this was not a good objection, and that for no reason urged on the trial in the court below should the evidence have been excluded. It is well settled as a general principle that, in the trial of indictments for violations of Sunday laws, "the proof of any Sunday, before the finding of the bill and within the statute of limitations, is sufficient." *Whart. Cr. Ev.* (9th Ed.) § 106, and authorities there cited. It was not denied that the accused had been superintendent of transportation of the Southern Railway Company during the year 1903, and no objection was made that the evidence admitted referred as well to the period of the year after the indictment was found as before. In the able brief of counsel for the accused it is urged that, as the indictment specified the number of the engine which drew the train, the state was confined to proof as to that particular engine, and that evidence as to other offenses in which that engine was not concerned was inadmissible. No such point, however, appears to have been made on the trial in the court below, and hence it will not be considered here.

2. It is contended by counsel for the accused that the word "destination," as used in Pen. Code 1895, § 420 (2), which provides that the prohibition of the statute shall not extend to "a freight-train running over a road on Saturday night, if the time of its arrival at destination according to the schedule by which it started on the trip, be not later than eight o'clock Sunday morning," means the state line, and not the ultimate stopping place of the train; and the motion for a new trial complains of certain charges of the court at variance with this view. It is urged with considerable plausibility that it could not have been the intention of the Legislature to undertake to deal with the operation of a train after it had passed beyond the state's borders; that the statute is only applicable to trains in Georgia; and that, when a train has passed the Georgia line, it has reached its "destination," so far as the Georgia law is concerned. A brief examination of the history of the present legislation against Sunday

freight trains in this state will, however, suffice to show that this argument is without substantial foundation. The first enactment on the subject was in 1850, when the prohibition against running freight trains on the Sabbath day was made absolute. Subsequently an exception was made in order to permit trains loaded with live stock, which should not have reached their destination before the beginning of Sunday, to run on to a stock pen where the animals could be fed and watered, but beyond that they could not be run on Sunday. Acts 1873, p. 63. The exception now under consideration was enacted into a statute on February 28, 1874 (Acts 1874, p. 97), and recited, as a preamble, that, "under the existing laws of this state, many freight-trains have to lie over during the Sabbath day at wayside stations, remote from the families and the churches of employees." It was therefore enacted that "it shall and may be lawful for all freight-trains on the different railroads in this state, running over said roads on Saturday night, to run through to destination: provided, that the time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than 8 o'clock on Sunday morning." We have, then, clearly expressed, the reason of the law—to enable employees of the railroad company to reach their homes in time to spend Sunday with their families and attend religious services. Bearing in mind this evident object of the law, we hold that "destination" means destination, not the state line—the place where abide the families, where are located the churches, of the railroad employees.

3. The court charged that the accused might justify himself by proving that the employees of the railroad company acted in direct violation of his orders and rules, but that "mere general orders and rules would not be a justification under the statute." The portion of the charge which we have quoted is assigned as error. In the view that we take of the law under which the accused was tried, and of the admitted facts, this charge was harmless, even if erroneous. The schedule of the train placed it at its destination after 8 o'clock on Sunday morning, and hence it could not, under the law, move a wheel in Georgia after 12 o'clock Saturday night, unless it came within one of the exceptions of the statute. This schedule was well known to the accused—indeed, he was responsible for it. Therefore, regardless of whether the train reached Toccoa at 7:45, as claimed by the accused, or at 9, as claimed by the prosecutor, the train had been running in violation of law every moment after 12 o'clock; and it was not claimed that its running and operation after that time were in violation of the orders of the accused.

4. The only remaining ground of the amendment to the motion for a new trial complains that the court failed to charge that the accused could not be found guilty if it ap-

peared that he did not know that the train had been run in violation of law, if such was the fact, until after it was so run. It does not appear that any written request was made to give this charge; but, independently of that fact, as we have already shown, it was undenied that the accused knew of the existence of the schedule, which in itself called for the illegal operation of the train after midnight on Saturday night, and consequently he was not entitled to the benefit of such a charge as the one under consideration.

5. The sole question remaining for decision is whether or not the verdict was contrary to the evidence, and without evidence to support it, in that the state failed to show, as was alleged in the indictment, that the train in question was not within any one of the exceptions to the prohibitory statute. It is contended by counsel for the accused that it was essential to the validity of the indictment that it allege that the train did not come within any of these exceptions, and consequently that it was necessary to the conviction of the accused that the allegations be supported by proof. In the case of *Herring v. State*, 114 Ga. 96, 39 S. E. 866, Mr. Justice Little, in an exhaustive and elaborate opinion, has dealt fully with the question as to when it is necessary to allege and prove that one accused of crime is not one of a class excepted by law from the operation of the penal statute; and in the course of the opinion (page 101, 114 Ga., page 863, 39 S. E.) he quotes with approval from Wharton on Criminal Practice & Procedure, § 241, where it is declared that the test is practically this: "Is it the scope of the statute to create a general offense, or an offense limited to a particular class of persons or conditions? In other words, is it intended to impose the stamp of criminality on an entire class of actions, or upon only such actions of that class as are committed by particular persons or in a particular way? In the latter case the defendant must be declared to be within the class; in the former case this is not necessary." Judge Little adds: "This reasoning seems to be sound, affording a practical and reasonable conclusion, namely: If, by the words of a statute, particular acts done are declared to be a crime for which punishment is provided, the offense created is general and applicable to all; and an indictment which sets out the offense in the language of the statute is sufficient, notwithstanding there may be matters found in the body of the statute elsewhere which provide that a given class of persons, or persons with certain qualifications, shall not be convicted of that offense, or that certain existing conditions may be a justification for doing the act set out in the statute. In such a case the offense is a complete one as it stands stated, and it is not necessary, in framing the indictment, to negative the conditions under which the force of the statute may be

avoided. These are matters of plea and defense to a general statutory crime." As we have already seen, the act of 1850 prohibited in the broadest terms the running of freight trains in Georgia on Sunday. This act then became a general statutory crime, and the subsequent enactments on the subject merely excepted from the operation of the statute particular classes of trains, or trains run under particular conditions. Applying the principle ruled in the Herring Case to the facts of the case at bar, we are clear that it was not necessary for the indictment to allege that the train was not within the exceptions to the statute; that these allegations, when made, were mere surplusage; and that the failure to support them by proof did not render the conviction of the accused unlawful. See, also, the case of *Kitchens v. State*, 116 Ga. 847, 43 S. E. 256, where the Herring Case was followed and approved. *Tigner v. State*, 119 Ga. 114, 45 S. E. 1001; 1 Bish. New Crim. Proc. § 640.

6. Upon a review of the decision of this court in the case of *Jackson v. State*, 88 Ga. 787, 15 S. E. 905, we reaffirm the same.

Judgment affirmed. All the Justices concur.

(121 Ga. 836)

OLIVER v. HENDERSON et al.

(Supreme Court of Georgia. Jan. 30, 1905.)

WILL—DESCRIPTION OF PROPERTY—PAROL EVIDENCE.

1. A testator devised to A. a part of his property, described as "lot of land (78) in the Second District of Dooly county." Testator did not own lot 78, but did own 68, in the district named. It did not appear whether he owned other lots in that district. The testator said during his lifetime that he intended to give lot 68 to A., and often referred to it as the property of A. Held, that a petition alleging these facts, and praying that the averments as to the intention of the testator might be shown by parol evidence, was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by Henry Oliver against D. L. Henderson, guardian, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Henry Oliver, in his will, gave to his wife a life estate in all of his property, the language of the will descriptive of the property being as follows: "All my property, both personalty and realty." To the heirs of his son I. O. Oliver the testator bequeathed "the said personalty and realty" after the death of his wife, except that Henry Oliver, Jr., was to have "lot of land (78) in the Second District of Dooly county more than the rest of the heirs of the said I. O. Oliver." Henry Oliver, Jr., filed a petition alleging that the life tenant was dead; that the testator never at any time in his life owned lot 78 in the Second District of Dooly county; that he

did own at the time of his death lot 68 in that county and district, "and other lands adjoining"; that he intended to devise to plaintiff lot 68, and the insertion of lot "78" was a mistake; that the testator often told plaintiff that he intended to give him lot 68; that the testator was illiterate, and told the scrivener who wrote the will that he wanted to give plaintiff lot 68, and the scrivener by mistake or oversight wrote "78" instead. The plaintiff prayed originally for a reformation of the will, but by amendment struck this prayer, and prayed for a recovery of lot 68 from the possession of the defendant, and that he be allowed to show by parol evidence the facts set forth in relation to the mistake in writing lot 78 in the will instead of lot 68. The court dismissed the petition on demurrer, and the plaintiff excepted.

C. L. De Vaughn, J. A. Hickson, M. P. Hall, and W. F. George, for plaintiff in error. Whipple & McKenzie, J. W. Haygood, and Crum & Jones, for defendants in error.

COBB, J. The testator gave to his wife a life estate in all of his property. He then undertook to dispose of the remainder interest therein, giving to the heirs of I. O. Oliver the fee in all of the property, one of such heirs being given, in addition to an equal share, a lot of land which is described as "lot of land (78) in the Second District of Dooly county." It appears that the testator did not own lot 78. The description "lot 78" is therefore false, and, under the maxim, "*Falsa demonstratio non nocet*," may be rejected, provided after so doing there is a sufficient description left to identify the property intended to be devised. Thus the "*Zachariah Emerson Place*," described in a deed as being in lot 125 of a given district, may be shown by parol to be located in some other lot. *Johnson v. McKay*, 119 Ga. 196, 45 S. E. 992. And so a description in a will of "the land contained in eighty-one, west side of the old run of Flat creek," may be shown by parol to refer to a lot of another number, the latter lot answering the true description "west side of the old run of Flat creek." *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451. See, also, *Tyler v. Justice*, 120 Ga. 879, 48 S. E. 328; *Doe v. Roe*, 1 Wend. 541; *Whitcomb v. Rodman*, 156 Ill. 116, 40 N. E. 553, 28 L. R. A. 149, 47 Am. St. Rep. 181; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493; cases in note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 289. Likewise ambiguities in a will, both latent and patent, may be explained by parol. Civ. Code 1895, § 3325. A latent ambiguity, says Lord Bacon, is "that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity." See 1 *Jaria. Wills* (Am. Notes) top page 743. This definition was ap-

plied in *Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164, where it was held that a grant to "Berry Stephens, an orphan," might be shown by parol evidence to have been intended to be a grant to the orphan of Berry Stephens, there being such a person in life, and there being no person answering the first description.

But, while parol evidence is admissible to raise a latent ambiguity in a description, and then explain it, in every case the intention of the maker of the instrument must be gathered from the instrument itself, read in the light of the parol evidence. Of course, it is not permissible to create a devise or bequest by parol, but the parol evidence must show what the testator's real intention was from the language used. Thus language which is susceptible of two meanings must have been intended to mean only one, and the question to be decided in each case is, which of the two meanings did the testator intend should be given it? If this double meaning is apparent on the face of the instrument, then the ambiguity is a patent one. If the language is apparently not of double meaning, but is shown to be so only by the aid of collateral or extrinsic facts, the ambiguity is latent. While the general rule is that only latent ambiguities are explainable by parol evidence, under our Code either a patent or a latent ambiguity may be so explained. Civ. Code 1895, § 3325. But equity has no jurisdiction to reform a will. *Willis v. Jenkins*, 30 Ga. 167; *Bingel v. Volz* (Ill.) 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64. Wills must be taken to mean just what the language, considered in the light of the circumstances and the situation of the testator, was intended by him to mean. Parol evidence is not admissible to show that the testator meant one thing when he said another. See *Smith v. Usher*, 108 Ga. 233, 33 S. E. 876. This rule seems to be without exception, and those decisions which appear to depart from it will generally be found to be only erroneous applications of the rule.

There are many decisions dealing with questions similar to that raised by the present record. In *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289, a will described property as the "northeast quarter of the southwest quarter" of a section of land. It was held that parol evidence was not admissible to show that the "northeast quarter of the southeast quarter" was intended, even though it appeared that the testator owned no such land as that described, and no other land than that which it was claimed he intended to devise. In the opinion it was said: "There is no mistake here upon the face of the will which is here subject to investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit

parol evidence to show that, although the testator described with perfect accuracy one parcel of land, he meant another. The bare statement of the appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence." To the same effect are *Bingel v. Volz* (Ill.) 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Ehrman v. Hoskins*, 67 Miss. 192, 6 South. 776, 19 Am. St. Rep. 297; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757. See, also, in this connection, *Venable v. Burton*, 118 Ga. 156, 45 S. E. 29. There are, however, decisions which are not in all respects in accord with those just cited. Some of them will be found, upon a close inspection of their facts, to be distinguishable, while others are wholly irreconcilable with the cases just above referred to. All of them purport to be based upon the intention of the testator as expressed in the will, when the language of the will is considered in the light of the parol evidence. The case of *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 29 L. Ed. 860, is a leading one. There a testator devised a lot, "together with the improvements thereon erected," but erroneously stated the number of a lot which had no improvements. It was held that parol evidence might be introduced to show that the testator had another lot which had improvements on it, and that this lot would be held to be the land intended to be devised. So, where a testator owned only three city lots in a certain block, and undertook to devise these three lots, but erroneously gave the number of one of them, describing them all as being in the specified block, it was held that the three lots owned by the testator in that block would pass, notwithstanding the erroneous description. See *Seebrock v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488. A similar conclusion was reached in *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370. See, also, *Zirkle v. Leonard* (Kan. Sup.) 60 Pac. 318; *Priest v. Lackey*, 140 Ind. 399, 39 N. E. 54; *Stewart v. Stewart* (Iowa) 65 N. W. 976. In every one of the cases where the parol evidence was admitted there was some general description, other than the false description, sufficient to identify the property intended to pass. In every one of the cases it distinctly appeared that in the district or block or other area mentioned the testator owned no other property than that which it was claimed he intended to devise, and that he did not own property answering to the description claimed to be false.

In the present case it is distinctly alleged that the testator did not own lot 78 in the Second District of Dooly county. But, to have made the evidence admissible, it should have been alleged also that the testator owned only one lot in the Second District of Dooly county, which lot was No. 68. If this had been alleged, the court might well have

said, as against the demurrer, that, inasmuch as it is manifest that the testator intended to devise a lot in the Second District of Dooly county, he must have intended lot 68 to pass, because that was the only lot in that district and county which he owned. But the petition not only fails to allege that lot 68 was the only lot owned by the testator in that district and county, but it avers that he owned lot 68 in the Second District of Dooly county "and other lands adjoining." This is an ambiguous averment. The adjoining lands may or may not lie in the Second District of Dooly county. Probably, under the rule requiring pleadings to be construed most strongly against the pleader, the averment should be taken to mean that the adjoining lands do lie in that district and county. But, in any event, it was incumbent on the plaintiff to allege distinctly that they did not. There is nothing in the will to indicate that the testator intended lot 68 in the Second District of Dooly county to pass, rather than some other lot in that district and county, if he owned such other lots. He may have owned 88 or 54, and, if so, how can the courts say that he meant 68, rather than 88 or 54? There is no legal method by which the intention of the testator can be ascertained. The court did not err in sustaining the demurrer.

Judgment affirmed. All the Justices concur.

(122 Ga. 5)

FLINT RIVER LUMBER CO. v. SMITH et al.

(Supreme Court of Georgia. Jan. 30, 1905.)

POWER OF ATTORNEY—RECORDING—EVIDENCE.

1. A power of attorney, executed in the same manner as deeds subject to registry are required to be executed, may be recorded at any time after its execution, although no conveyance has been executed in pursuance of the power; and, upon the registry of a conveyance executed under the prior recorded power of attorney, the latter becomes a part of the registered conveyance, and admissible in evidence under the same rules and regulations as the conveyance would be.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by the Flint River Lumber Company against George O. Smith and others. Judgment for defendants, and plaintiff brings error. Reversed.

The Flint River Lumber Company sued the Smith Lumber Company and George O. Smith to recover a described tract of land, for injunction, and damages for trespasses committed on the land. One of the links in the plaintiff's chain of title was a deed from James U. Horne to Maston O'Neal, dated October 23, 1883, and recorded on December 7, 1883, in Book AA, p. 153, in Decatur county. This deed was executed by M. A. Bell under a power of attorney from James U.

Horne, which power of attorney was executed in 1882, and recorded on April 14, 1883, in Book Z, p. 464, in Decatur county. The defendants objected to the introduction in evidence of the deed and power of attorney on the ground that they were not recorded "along together," and that their record was illegal. The court sustained the objection, and the plaintiff excepted.

Donalson & Donalson, for plaintiff in error. A. H. Russell and T. S. Hawes, for defendants in error.

COBB, J. Powers of attorney are not mentioned in the registry laws of this state. The law which imposes the duties of a registration officer upon the clerk of the superior court requires him to keep "books for recording all deeds, mortgages and other liens, and bills of sale separately." Unless the power of attorney is considered a part of the instrument executed under its authority, there is nothing in our law which would make its registry constructive notice. In *Tenant v. Blacker*, 27 Ga. 418, it was held that powers of attorney may be recorded under the same rules as the deeds made under them, and, when thus recorded, may be read in evidence in the same way as registered deeds. Judge Benning, in the opinion, stated that the practice of recording powers of attorney, "along with the deeds made under them," and admitting them in evidence, without further proof, "along with their deeds," was a practice of so long standing that the court did not feel prepared to disturb it. In *Anderson v. Dugas*, 29 Ga. 440, it was held that, when a deed executed under a power of attorney is duly recorded, the record of it is constructive notice, though the power of attorney be not recorded. Judge Stephens, in the opinion, says: "We do not think that the recording of the power of attorney was necessary to make the record of the deed serve as notice. The power of attorney is a muniment of title, and may therefore be properly recorded along with the deed." See, in this connection, *Jackson v. Neely*, 10 Johns. 374. In *Graham v. Campbell*, 56 Ga. 258, it was ruled that the existence of a power of attorney which was "recorded with the conveyance" could be shown by a copy from the records. In *Dodge v. American Freehold Land Mortg. Co.*, 109 Ga. 396, 34 S. E. 673, Mr. Chief Justice Simmons says: "This power of attorney, under our law, must be recorded with the deed made by the attorney in fact." There are a number of cases where reference is made to the recording of powers of attorney, and the expressions "along with the deed," or "with the conveyance," or similar expressions, have been used; but in none of the cases cited, nor in any other case, so far as we have been able to ascertain, is there a distinct ruling declaring what is the meaning of such expressions. Do they mean that the power of attorney must be recorded at the same time,

in the same book, and in physical connection with the deed executed under it? Or do they mean that the power of attorney must be recorded at the same place that deeds are recorded; that is, in a particular book in the office of the registrar of deeds, without reference to whether the deed executed under it is recorded in the same book, or in immediate connection with the power? In Maryland there was a statute which declared that a power of attorney to sell real estate should be "recorded with the deed" executed under the power. In *Rosenthal v. Ruffin*, 60 Md. 324, it was held that the power of attorney might be recorded either at or before the recording of the deed; that the statute did not require it to be recorded eo instante with the deed, the term "with the deed" meaning "upon the proper records of the city or county where the deed is recorded." In that case the power of attorney was recorded before the deed was executed thereunder. In *Mix v. Hotchkiss*, 14 Conn. 32, Church, J., said that the power of attorney "was recorded with the deed," although it did not appear upon the same page or leaf of the book of records as the deed, but at a distance of 80 pages from it, and was recorded after the record of the deed. There was, however, no distinct ruling by the court on this question, as the case was decided on another point. The power of attorney is for some important purposes an essential part of the deed, and is complete in itself; and we see no good reason why a power of attorney executed in the same manner that a deed subject to registry would be executed might not be entered upon the record immediately upon its execution, and that, whenever a conveyance subsequently made under the authority of the power of attorney is thereafter duly recorded, the power of attorney and the deed should not be considered as recorded with each other, both being found upon the records where those interested are bound to go to obtain information in reference to muniments of title. The order in which the deed and the power are recorded is immaterial. Of course, the naked power of attorney, although recorded, would not be constructive notice until the deed executed thereunder is also placed upon record; but, whenever both are recorded, the power of attorney, as a part thereof, will become notice from that date. The deed showed upon its face that it was executed under a power of attorney, and this would be sufficient to put a purchaser upon inquiry as to the existence and genuineness of the power of attorney, and would naturally lead to a search of the records, to ascertain whether the same had been recorded, although, as held in *Anderson v. Dugas*, supra, and in the New York case cited above, the record of the power of attorney was not essential to make the deed constructive notice of the conveyance.

Judgment reversed. All the Justices concur.

(122 Ga. 29)

PONDER v. QUITMAN GINNERY.

(Supreme Court of Georgia. Jan. 30, 1903.)

APPEAL—RECORD—BILL OF EXCEPTIONS—DEMURRER—NUISANCE—ACTION FOR DAMAGES.

1. An amendment offered to a petition, but disallowed by the trial judge, becomes no part of the record, and consequently cannot be considered by this court unless set forth in the bill of exceptions or annexed thereto as an exhibit and duly authenticated.

2. When a petition is demurred to on both general and special grounds, and dismissed upon the former only, this court cannot, upon a bill of exceptions sued out by the plaintiff, in which he assigns error upon the ruling adverse to him, undertake to pass upon the sufficiency of the special grounds of demurrer.

3. The employment, by the owner of a ginning plant, of machinery which separates dust and sand from cotton and expels the particles of dust and sand into the air in large volumes, causing the same to be blown into the dwelling house of an adjacent proprietor, to his great discomfort and injury, in an invasion of his property rights, for which an action for damages will lie.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by F. V. Ponder against the Quitman Ginnery. Judgment for defendant, and plaintiff brings error. Reversed.

J. W. Edmondson, for plaintiff in error.
Bennet & Bennet, for defendant in error.

EVANS, J. The plaintiff in error filed a petition in which she named the Quitman Ginnery as defendant, and wherein she set forth the following complaint: Plaintiff is the owner of a dwelling house in the town of Quitman of the value of \$8,000. The defendant, a corporation, has erected and is now operating an extensive ginning plant just across a narrow street from her dwelling, which plant is run continuously for about five months of each year, and has been in operation for the past five years. The gins installed in this plant have flues attached for the purpose of taking the dust and dirt out of the cotton as it passes through the gins, and this dust and dirt is continuously being blown into her residence, greatly to the hurt, vexation, and injury of plaintiff, causing her to do a great amount of extra work in sweeping and dusting and trying to keep her house clean and in order, and endangering her in the sum of \$50 per year. By reason of the blowing of the dust, dirt, and lint from defendant's plant into her dwelling house the health of herself and family has been very much impaired, her husband having been unable to perform scarcely any labor for several months in consequence thereof. Being poor, and advanced in years, she is dependent in a great measure upon his labor for a support. In order to get away from such a nuisance, she has offered to sell or rent her place and move away to the country; but, owing to the proximity of defendant's plant, she can neither get a pur-

chaser nor tenant. Because of the noise and confusion made by the running of the machinery in said plant she is unable to get as much sleep and rest as is necessary for the enjoyment of good health, the machinery often being run far into the night, and being always started before day in the morning. By reason of detriment to her health and the mental worry so caused she has been damaged in the sum of \$50 per year, and because of the impairment of her husband's health she has suffered damages to the amount of \$100. Her furniture, bedding, window curtains, and wearing apparel have been injured by the dust, dirt, and lint blown into her house from the defendant's plant, entailing upon her a loss of \$100. In consequence of the erection, operation, and maintenance of the nuisance aforesaid in such close proximity to the residence of plaintiff her house and lot have become almost, if not totally, valueless, to her injury and damage in the sum of \$2,500. Waste cotton seed are allowed to accumulate under and around said plant and there rot, the stench from which is almost unbearable, and contributes largely to her damages, which in the aggregate amount to \$3,000.

At the hearing of the case, the plaintiff asked leave of the court to amend her petition in certain particulars, but the defendant objected to the allowance of the proposed amendment, and the court declined to allow the same. The defendant then pressed a demurrer, which it had filed to the plaintiff's petition, which demurrer embraced both general and special grounds. Without undertaking to pass upon any of the special grounds of the demurrer, the court granted an order sustaining it generally, and dismissed the plaintiff's action. To both of the adverse rulings above mentioned she excepted. The proposed amendment to the petition is not set out in her bill of exceptions, nor annexed thereto as an exhibit, but appears in the transcript of the record sent up to this court, having been improperly incorporated therein by the clerk of the trial court.

1. 2. The question of practice dealt with in the first headnote has heretofore been definitely settled by this court. *Moore v. Town of Guyton*, 110 Ga. 330, 35 S. E. 339; *Taylor v. McLaughlin*, 120 Ga. 703, 48 S. E. 203, and cases cited. The ruling announced in the second headnote is in accord with the decision rendered in *Linder v. Whitehead*, 116 Ga. 206, 42 S. E. 358.

3. The action is one for damages accruing from the erection and maintenance of a private nuisance. The tortious act complained of is the operation of a ginnery situated in close proximity to the plaintiff's premises in such a manner as to seriously interfere with her enjoyment thereof as a home. "A nuisance is anything that worketh hurt, inconvenience, or damage, to another; and the fact that the act done may otherwise be law-

ful, does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinarily reasonable man." Civ. Code 1895, § 3861. The plaintiff has a natural right to the enjoyment of the unpolluted air; and if the defendant corporation, by contaminating the air with dust, dirt, and lint, thrown into the air by artificial means, and blown into her dwelling, to her hurt and discomfort, has interfered with her enjoyment of the premises, the defendant must respond to her in damages. *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390; *Farley v. Gate City Gas Light Co.*, 105 Ga. 331, 31 S. E. 193. With respect to this alleged unlawful interference with her rights of property, at least, the petition set forth a cause of action. The defendant may have been engaged in an occupation which could be lawfully conducted, but it had no right to so conduct its business as to inflict injury to owners of adjacent property. The employment of machinery which separates dust and sand from cotton by means of a blast which drives the particles of dust and sand into the air, and causes them to be blown into the plaintiff's dwelling, is an invasion of her right to enjoy her home in its natural state under ordinary surroundings. Nothing decided in *Austin v. Augusta Terminal Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, is in conflict with what is here held, as in that case the acts complained of did not amount to a nuisance.

As the demurrer was sustained generally, we have confined our inquiry to the question whether or not the petition set forth a cause of action. As the court below held it did not, the plaintiff was cut off from curing by way of amendment such defects in her pleading (if any) as were subject to special demurrer. When the case "comes up for another hearing, the court below may yet do what it has not heretofore done, viz., pass upon the special grounds of the demurrer." *Linder v. Whitehead*, 116 Ga. 210, 42 S. E. 358.

Judgment reversed. All the Justices concur.

(122 Ga. 28)

FAULKNER v. SNEAD.

(Supreme Court of Georgia. Jan. 30, 1905.)

CERTIORARI—GRANT OF NEW TRIAL—REVIEW—JURY—CHALLENGES.

1. Even where there have been two verdicts in a justice's court in favor of the plaintiff, this court will not interfere with a second grant of a new trial on certiorari where it appears that there were errors which in a close case may have been injurious to the losing party. *Texas v. R. & Banking Co.*, 5 S. E. 114, 79 Ga. 330; *Turner v. R. Co.*, 6 S. E. 690, 81 Ga. 336.

2. Even though the defendant were ignorant of the fact that the names of two jurors did not appear upon the jury list, he cannot take

advantage thereof after verdict. *Jordan v. State*, 48 S. E. 679, 119 Ga. 443 (5).

3. It was error to overrule the challenge to the juror whose name did not appear upon the regular jury list. *Mitchell v. Bradberry*, 78 Ga. 15.

4. It appearing that the defendant was forced to strike the incompetent juror thus put upon him, the answer of the justice as to the juror's being finally "accepted" may well have been construed by the judge of the superior court to relate to the other talesmen who seem to have been selected from the list of voters, and who actually served on the jury, and as to whom there was an assignment of error in the petition for certiorari, though the assignment did not itself show cause for the grant of a new trial.

5. Statements of fact contained in the brief of counsel and the attached affidavit of the justice, explaining what he meant by his answer, cannot be considered in reviewing the order of the judge of the superior court in sustaining the certiorari and in directing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; *R. G. Mitchell, Judge.*

Action by Z. Faulkner against W. M. Snead. From a judgment on certiorari setting aside a judgment for plaintiff, he brings error. Affirmed.

R. A. Hendricks, for plaintiff in error.
Bule & Knight, for defendant in error.

LAMAR, J. Judgment affirmed. All the Justices concur.

(122 Ga. 18)

AVERBACK v. SPIVEY.

(Supreme Court of Georgia. Jan. 30, 1903.)

JUDGMENT—GARNISHMENT—ANSWER—DEFAULT.

1. While the act establishing the city court of Moultrie (Acts 1901, p. 143, § 35) provides for appearance and trial terms, and declares that in cases in which there is no plea or defense filed on the call of the appearance docket a judgment may be rendered by the court at said appearance term, yet section 19 (page 141) enacts "that the garnishment proceeding in the city court shall be conformable to the laws on the subject applicable in the superior court."

2. In the superior court, under Civ. Code 1895, §§ 4551, 4709, the garnishee in all cases has until the first day of the second term after the service of the summons of garnishment in which to answer.

3. Where, therefore, a garnishee failed to answer at the term of such city court to which he had been summoned, a judgment by default should not have been entered, and the judge, on a motion filed on the first day of the succeeding term, properly set the judgment aside and allowed the garnishee to answer.

4. The garnishee was not in default for failing to answer while the motion was under consideration by the judge. The answer filed immediately upon the grant of the order vacating the previous judgment was not too late.

(Syllabus by the Court.)

Error from City Court of Moultrie; *W. A. Covington, Judge.*

Action by M. J. Averback against J. F. Spivey. Judgment for defendant, and plaintiff brings error. Affirmed.

T. W. Mattox, for plaintiff in error. J. D. McKenzie, for defendant in error.

LAMAR, J. In this case a garnishment was sued out on a judgment as provided in Civ. Code 1895, § 4705. By the last clause of section 4709 proceedings subsequent to the affidavit and summons "shall be the same as prescribed in cases of attachments." By Civ. Code 1895, § 4551, the answer in all cases is in time if made on the first day of the second term of the superior court after service of the summons. *Sanders v. Miller*, 60 Ga. 554; *Jarrell v. Guann*, 105 Ga. 141, 31 S. E. 149; *Atlanta Journal v. Brunswick Pub. Co.*, 111 Ga. 722, 36 S. E. 929. Under these decisions and sections of the Code the garnishee therefore had until the first day of the February term, 1903, in which to answer, and the default judgment entered during the November term, 1902, was void (*Liverpool v. Savannah Grocery Company*, 97 Ga. 747, 25 S. E. 828), unless the act establishing the city court of Moultrie has modified the general law contained in the Code. Section 35 of that act (Acts 1901, p. 143) provides for an appearance and a trial term, and declares that "in all cases in which there is no plea or defense filed on the call of the appearance docket * * * a judgment may be rendered by the court at said appearance term." Section 15 provides that the laws governing pleading and practice in the superior court shall be applicable to said court unless otherwise provided in the act; section 18, that all laws upon the subject of attachments and garnishments in the superior court shall apply to said city court so far as the nature of said city court will admit. By section 19 it is further enacted "that the garnishment proceedings in the city court shall be conformable to the laws on the subject applicable in the superior court." It is claimed that under this statute a failure of the garnishee to answer on or before the call of the appearance docket at the first term after service of the summons authorizes a judgment against him. There is language in the act which might admit of such a construction. But considering the nature of the garnishment proceeding, and the relation of the garnishee to the case, and giving full effect to the provision of section 19, which expressly declares that the "garnishment proceedings in the city court shall be conformable to the laws on the subject applicable to the superior court," it appears that, whatever might be the rule as to other classes of cases or in other city courts (*Dodson Supply Co. v. Harris*, 114 Ga. 963, 41 S. E. 54; *Matthews v. Bishop*, 106 Ga. 564, 32 S. E. 631), the General Assembly intended here to give to the garnishee all of the rights which he had under the Code. Among these was the privilege to have the case continued until the first day of the second term, where there had been a failure to answer at the first term. Having promptly made application for this privilege, the garnishee could not be prejudiced by reason of the failure to answer during the time the ap-

plication was under consideration by the court. The judge did not err in vacating this judgment. This conclusion renders it unnecessary to consider whether the sickness of a member of the garnishee's family constituted such providential cause or excusable neglect as would authorize the court in a proper proceeding to set aside the judgment. See *Phillips v. Taber*, 83 Ga. 566, 10 S. E. 270 (4); *Leaming v. McMillan*, 59 Ark. 162, 26 S. W. 820.

Judgment affirmed. All the Justices concur.

(122 Ga. 23)

CASSELS et al. v. FINN.

(Supreme Court of Georgia. Jan. 30, 1905.)

TRUSTEE EX MALEFICIO.

1. The failure to perform an oral promise, made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that he will dispose of her estate as she desires, cannot make the heir at law, in case of an intestacy, a trustee *ex maleficio* as to the property inherited by him, in the absence of actual fraud (Syllabus by the Court.)

Error from Superior Court, Thomas County; E. J. Reagan, Judge.

Action by O. S. Cassels and others against L. E. Finn. Judgment for defendant, and plaintiffs bring error. Affirmed.

In 1875 John L. Finn married Miss Susie Smith, and they lived together as man and wife until she died on July 25, 1894. At the time of her death she was seised and possessed of a separate estate, which in part consisted of certain lands acquired by inheritance from her father. She had for some time previously been in bad health, and for about six weeks prior to her death had been confined to her bed, but she was at the time of sound and disposing mind and memory. On the night of June 17, 1894, Mrs. Finn repeatedly, in the presence of Mrs. Cora S. Cassels, her sister, and another, expressed a desire to make a will providing for the payment of certain small legacies, disposing of one-half of the residue of her property to Mrs. Cassels and her children, and providing that her husband should have a life estate in the other half, charged with the expense of educating one of the sons of Mrs. Cassels, with remainder over to this son. Mrs. Cassels, in order to quiet her sister and enable her to rest during the night, prevailed upon Mrs. Finn to postpone the making of a will until the following morning, when she could send for some one to come and see her and prepare the necessary papers. The next morning Mrs. Finn sent for her husband, and told him what disposition she wished to make of her property, and upon his assurance that he would carry out her wishes in the matter, she abandoned her intention of making a will. During the period of her illness he frequently requested Mrs. Cassels

not to encourage his wife to make a will, saying he would treat Mrs. Cassels right touching the distribution of his wife's estate. Upon his wife's death, he, as her sole heir at law, took possession of her estate. In 1896 Finn intermarried with Mrs. Lillian E. Winn, and in January, 1898, died, leaving her as his sole heir at law. He died without carrying out, save in minor particulars, the wishes of his former wife respecting the division to be made of her separate estate. After the death of Finn, his second wife, Mrs. Lillian E. Finn, took possession of and assumed control over all of the property of which he died seised, including much of the property inherited from his former wife. The present action was brought against Mrs. Lillian E. Finn by Mrs. Cassels and her children to compel an accounting, and to recover of the defendant all of the property in her possession which had formed a part of the separate estate of Mrs. Susie S. Finn at the time of her death. The theory on which the petition was framed was that, inasmuch as Finn's former wife had been induced by his fraudulent conduct to abandon her intention of executing a will, and as he had thus been enabled to acquire her estate by inheritance, the property belonging thereto became impressed with an implied or constructive trust in favor of the plaintiffs, and that Finn held the same merely in the capacity of a trustee for them. Upon a demurrer to the petition interposed by the defendant, the court below held that no cause of action was set forth in the petition, and the action was accordingly dismissed. To this ruling the plaintiffs except.

Denmark, Ashley & Smith and S. A. Roddenberry, for plaintiffs in error. W. M. Hammond and Fondreu Mitchell, for defendant in error.

EVANS, J. (after stating the facts). Unless the allegations of the petition respecting the conduct of the husband of the defendant relating to the intestacy of Mrs. Susie Finn will imply a trust which can be established by parol proof, the demurrer was rightfully sustained. Express trusts must be created or declared in writing. Civ. Code 1895, § 3153. Hence the parol promise alleged to have been made by John Finn to his first wife cannot be upheld as an express trust. But if, from the nature of the transaction, it be manifest that it was the intention of Mrs. Susie Finn to make a will devising her property to plaintiffs, as alleged in the petition, and she was prevented from so doing by the fraud of her husband, whereby upon her decease he became vested with the absolute title to all her property as heir at law, equity will imply a trust. Civ. Code 1895, § 3159. "There is no law which requires a fraudulent undertaking to be manifested by writing. Those who use premises, which

they make deceitfully, for the purpose of accomplishing fraudulent designs, are generally careful not to furnish written evidence of their turpitude. Such promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts; but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust." *Brown v. Doane*, 86 Ga. 38, 12 S. E. 179, 11 L. R. A. 381. The learned judge who delivered the opinion in that case quoted approvingly from 2 Pom. Eq. Jur. § 1656: "In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal; otherwise the statute of frauds would be virtually abrogated. There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." There is a great difference between the breach of a promise made with no intention of performing it and the breach of a promise not fraudulent of itself. In discussing this distinction, Lumpkin, J., in *Robson v. Harwell*, 6 Ga. 615, said: "The rule I am contending for is not only the rule of the books, but it is the dictate of sound reason. Let the doctrine be once established that a failure to comply with a parol promise made contemporaneous with a deed is *ipso facto* a fraud, and can be proved, and the promise decreed to be performed in equity on the ground of fraud, and you do what the Master of Rolls in *Portmore v. Morris* [2 Bro. C. C. 219] refused to do—demolish one of the foremost rules of law."

Do the allegations of the petition show any fraudulent conduct on the part of John Finn? It is charged that Mrs. Susie Finn sent for her husband, and "repeated to him several times what disposition she wanted made of her property"; it being the same described in the petition. "Thereupon the said John L. Finn said to his wife, 'I promise and swear to do everything just as you wish and as you have stated.' His wife then replied to him, 'John Finn, your word is as good as a will.' The said Mrs. Susie S. Finn then, relying on his promise, and believing that he would in good faith carry out her wishes, decided not to have a will prepared." This conversation is said to have occurred on June 18, 1894, and Mrs. Finn died on the 25th of July following. The petition further states that for some time after her death her husband seemed disposed to carry out and perform in good faith his promise to his deceased wife, even going so far as to make remittances to Mrs. Cassels of moneys received by him in part from the collection of rents and from the sale of a vacant lot in Thomasville, and repeatedly assuring Mrs. Cassels of his intention to carry out every

pledge made to his deceased wife. John Finn, up to the time of his death, also paid the school expenses of Alexander Cassels. According to the petition, Finn never denied his parol promise to his deceased wife, but died without executing it. No act of mala fides is alleged, and, so far as we can learn from the petition, it was Finn's intention to perform his promise. His promise to his wife does not appear to have been made with contemporaneous fraudulent intent. The failure to perform a verbal promise, made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that he will dispose of her estate as she desires, cannot make the heir at law, in case of an intestacy, a trustee *ex maleficio* as to the property inherited by him, in the absence of actual fraud. There is a line of authorities, both English and American, holding that, if a testator be induced to make a devise by the promise of the devisee that it shall be applied to the benefit of another, a trust is thereby created which may be established by parol evidence. *Oldham v. Litchfield*, 2 Vern. 506; *Thynn v. Thynn*, 1 Vern. 296; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Williams v. Fitch*, 18 N. Y. 548; *Church v. Ruland*, 64 Pa. 432; *Gilpatrick v. Glidden* (Me.) 18 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245. The reasoning of this line of decisions is strongly put by Gibson, C. J., in *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52: "It is contended that parol evidence of a trust is contrary to our statute of wills, which corresponds, as far as regards the point in dispute, with the British statute of frauds. Undoubtedly every part of a will must be in writing, and a naked declaration of trust in respect of land devised is void. The trust insisted on here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise." So, in the case of *Dixon v. Olmius*, 1 Cox, Ch. 414, the will of Lord Waltham had been revoked by suffering a fine and recovery, and Lord Waltham desired to republish it, but was fraudulently prevented by acts of fraud and violence of Mr. Olmius, the husband of the testator's daughter, who was tenant in tail, and entitled to the estate in case the recovery was defeated. Lord Thurlow held that the tenant in tail could not take advantage of her husband's fraud, and that the estate would be treated as if the will had been republished. The case of *Beddilan v. Seaton*, 3 Wall. Jr. 279, 3 Fed. Cas. 38, differentiates between a transaction whereby the absolute title is acquired by will by means of a fraudulent promise, and one whereby the title is acquir-

ed by inheritance by means of a fraud practiced by the heir at law to prevent his ancestor from making a will otherwise disposing of his estate. The facts of this case are very similar to those of the case at bar, and the distinction sought to be pointed out is that in case of the procurer of the title by will by fraudulent promise of the devisee a trust arises, which adheres to the land thus fraudulently obtained, whereas, when the title is cast upon the heir by the law, such a trust cannot be implied, for in the latter case the promise would be a mere parol contract, and not a trust descending with the land. In principle I am unable to perceive any rational distinction between the two classes of cases. In each the title is procured by means of fraud, and it is the fraud which creates the trust, and not the particular manner by which the result is accomplished.

Pervading all the cases cited the dominant note is fraud, and not the mere breach of a parol promise. The Illinois Supreme Court clearly brings out this distinction in *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, wherein it is ruled: "If A. voluntarily conveys lands to B., the latter having taken no measures to procure the conveyance, but accepting it and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interfered, and advised A. not to convey directly to C., but to convey to him, promising, if A. would do so he, B., would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A." To the same effect, see *Fischbeck v. Gross*, 112 Ill. 208. Before one can become a trustee ex maleficio, he must obtain another's property from him by fraud.

We have endeavored to demonstrate that the plaintiffs' cause of action is dependent upon the determination of the conduct of the defendant's husband as fraudulent. That it was not fraudulent is clear from the allegations of the petition. His parol promise appears to have been made in good faith, and the breach thereof was occasioned by his death before fulfillment. Mrs. Susie Finn lived five weeks after her husband made the promise. During this period the husband is not charged to have done any act to prevent the execution of a will. His wife simply relied on a promise not binding in law, but only in conscience. The failure to perform such verbal promise was not per se fraudulent; and, as no act of fraud is alleged to have been committed by John Finn whereby he became the owner of the property upon the decease of his wife, he was not a trustee ex maleficio. The demurrer was properly sustained.

Judgment affirmed. All the Justices concur.

(22 Ga. 39)

THOMPSON v. AMERICAN MORTG. CO. OF SCOTLAND, Limited.

(Supreme Court of Georgia. Jan. 30, 1905.)

JUDGMENT—AMENDMENT.

1. Where a petition was filed and process issued against A., and the return of the sheriff shows that he served "the defendant," and where, in entire conformity to the pleadings, judgment by default was entered against A., such judgment cannot, on the ground that its rendition against A. was the result of a clerical error, be so amended as to make it a valid judgment against B.; there being apparent on the face of the record no evidence of any clerical error or inadvertence. This is so, though B. admits that he was the party who owed the debt sued for, and should have been made the defendant in the suit, and informally consents that the judgment be so amended as to apply against him.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; B. D. Evans, Judge.

Claim case between the American Mortgage Company of Scotland, Limited, and A. J. Thompson. Judgment for the company, and the claimant brings error. Affirmed.

A. C. Pate and J. H. Martin, for plaintiff in error. W. E. Simmons and W. L. Grice & Sons, for defendant in error.

CANDLER, J. On March 26, 1884, Caroline Coley conveyed to J. K. O. Sherwood the land which is the subject-matter of the present controversy, to secure a loan of \$800, and took from Sherwood a bond to reconvey upon payment of the loan. On the same day Sherwood conveyed the land to the American Mortgage Company of Scotland, Limited, subject to Mrs. Coley's rights under her bond to reconvey, and also indorsed to it Mrs. Coley's note, to secure which the deed was made. The deed from Caroline Coley to Sherwood and that from Sherwood to the mortgage company were both duly recorded April 26, 1884. On November 19, 1890, a judgment was rendered against Lancaster, as administrator of Caroline Coley, in favor of the mortgage company, upon the note to secure which the deed was given, and execution issued thereon November 20, 1890. A deed from the mortgage company to Lancaster, as administrator for the purpose of levy and sale, was duly filed in the office of the clerk of the superior court; the execution was levied on the land on April 28, 1891; and on May 2, 1891, a claim was interposed by the plaintiff in error. At the February term, 1904, of Pulaski superior court, the issue thus made came on for a hearing, and was by agreement tried by the judge without a jury. An agreed statement of facts was submitted, which embraced what has already been set out; and, in addition, it appeared that in 1880 Nettle Westcott brought suit against Mrs. Mary Coley in the county court of Pulaski county. Process issued against Mary Coley, and the return of service thereon was as follows: "Served a copy of this summons on the de-

fendant by leaving at her house. Sept. 11, '80. W. D. Martin, Deputy-sheriff." On January 24, 1881, judgment was rendered in this suit against Mary Coley, and on April 11, 1881, execution thereon issued against her. On January 28, 1884, the judge of the county court of Pulaski county passed an order, of which the following is an exact copy: "Pulaski County Court, January term, 1884. It appearing to the court in the case of Mrs. Nettie Westcott vs. Caroline Coley, upon which a judgment was rendered at the January term, 1881, of said court, has been by a clerical error entered up against Mrs. Mary Coley; and it further appearing that the pleading and all the papers show that said suit was against said Caroline Coley, who had due and legal service perfected upon her, and with no defense filed, that judgment was rendered properly. Ordered, that the minutes of the court be amended 'nunc pro tunc' so as to speak the truth in said case, and that being so amended a *fi. fa. do* issue against said Mrs. Caroline Coley. Ordered also that the clerk of this court place the same on record. This January 28th, 1884. H. H. Whitfield, J. P. C. C." In accordance with this order, on September 3, 1884, an execution issued from the county court of Pulaski county in favor of Mrs. Nettie Westcott against Mrs. Caroline Coley, and on September 29, 1884, this execution was levied on the land in controversy. On December 29, 1884, a deed to the land was made by the sheriff of Pulaski county to John Pusser; on February 26, 1886, Pusser sought to convey it to Mrs. Mary T. Mims; and on January 17, 1884, Mary T. Mims made a deed to the land to A. J. Thompson & Co. All these deeds, it was agreed, covered the land in dispute. Mrs. C. W. Mims testified that her given name was Mary; that she was a daughter of Mrs. Caroline Coley; that she knew the land levied on, and was familiar with the circumstances under which her mother conveyed it to Sherwood; that her mother was in possession of it at the time the conveyance was made, had been for some 15 or 16 years prior to that time, and continued so for 2 or 3 years afterwards; that her mother was served in a suit brought in the county court by Mrs. Nettie Westcott; that she remembered that her mother was served twice with Westcott papers, but that she read over none of the papers that were served on her mother, and did not know what was in them. It was agreed that C. W. Mims, the husband of Mary T. Mims, would testify that Caroline Coley got a summons left at her house by the deputy sheriff, and that she and said Mims came to Hawkinsville to confer with an attorney about the Westcott suit. She came once after a judgment had been rendered against Mrs. Mary Coley, and agreed with Judge Kibbee that there was a mistake in the name of the defendant, that she (Mrs. Caroline Coley) owed the debt, and that the judg-

ment rendered in the suit against Mrs. Mary Coley might be corrected so as to be against her. So far as known, however, she did not go to the courthouse, and did not see the judge of the court about it. It was also agreed that Mims would testify that Caroline Coley died November 15, 1887; that Mary T. Mims was in possession at the time she made the deed to Thompson & Co.; that Thompson & Co. went into possession January 1, 1888, and have remained in possession since that time. To the original petition of Mrs. Westcott in the suit referred to was attached an itemized account against "Mrs. Coley." On the evidence and the agreed facts above stated, the judge of the superior court found the property subject. Thompson, surviving partner, excepted.

In the argument, both here and in the court below, it was agreed by counsel that the sole question for determination was as to the legality of the order amending the judgment against Mary Coley so as to make it a judgment against Caroline Coley. Civ. Code 1895, § 4047 (6), empowers a court "to amend and control its process and orders, so as to make them conformable to law and justice, and to amend its own records, so as to make them conform to the truth." The order in this case by which it was sought to amend the judgment against Mary Coley so as to make it a valid judgment against Caroline Coley recited that the judgment as originally rendered was the result of a clerical mistake. It further recited "that the pleadings and all the papers show that said suit was against said Caroline Coley." The facts as disclosed by the record show that this amendatory judgment did not itself speak the truth. The petition was against Mary Coley, the process was against Mary Coley, and the return of the sheriff showed that the defendant was served. If the declaration and process had been against Caroline Coley, and the judgment against Mary, then the error would have been amendable, if made in the proper manner. Or, if the suit had been against Caroline, and the process and judgment against Mary, the error could have been cured by amendment. But the declaration, process, and judgment were all against Mary Coley, and execution issued against Mary Coley. There could have been no clerical error or inadvertence on the part of any officer of court. Everything done, both by the clerk and the sheriff, was in conformity to the plaintiff's pleadings, and the judgment rendered was also in conformity thereto. The subsequent order of the court did not seek to amend anything except the judgment rendered, and its effect was to destroy the conformity between the judgment and the pleadings and process. In other words, taking the record as now presented to us, we have a petition and process against Mary Coley, service on the defendant named, and a judgment against Caroline Coley. There is no question that a judgment may be

amended, even after execution has issued thereon; but it is clear that the amendment must harmonize with the pleadings, and unless it does so, it will be void—especially as to third persons whose rights are affected thereby. Caroline Coley was not a party to the suit, and was nowhere named in the petition, nor even in the bill of particulars. While it appears that she consented to the amendment of the judgment, we know of no law which will authorize a party who has not been sued to come into court in an entirely informal manner and substitute himself as the defendant in a judgment against a party who has been sued. To hold such an amendment good as against the rights of the plaintiff in execution in the present case would be to open wide the door to unlimited possibilities of fraud.

It follows from what has been said that the sheriff's deed to Pusser, and the subsequent deeds under which the claimant relied, conveyed no title, and that the court below properly found the property subject.

Judgment affirmed. All the Justices concur, except EVANS, J., disqualified.

(121 Ga. 772)

CENTRAL OF GEORGIA RY. CO. v. CASTELLOW.

(Supreme Court of Georgia. Jan. 28, 1905.)

APPEAL—NEW TRIAL—INSTRUCTIONS.

1. The requests to charge, so far as legal and pertinent, were in substance covered by the general charge. The evidence was sufficient to raise a presumption of negligence against the company, and a finding that the presumption had not been rebutted was authorized. The discretion of the trial judge in refusing to grant a new trial will not be interfered with.

(Syllabus by the Court.)

Error from Superior Court, Quitman County; H. C. Sheffield, Judge.

Action by J. J. Castellow against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. D. Kiddoo, for plaintiff in error. A. M. Raines and M. J. Yeomans, for defendant in error.

COBB, J. Judgment affirmed. All the Justices concur.

(122 Ga. 15)

E. SWINDELL & CO. v. SADDLER.

(Supreme Court of Georgia. Jan. 30, 1905.)

INJUNCTION—CUTTING TIMBER—PETITION—SALE.

1. Where a plaintiff seeks to enjoin the cutting of timber under Civ. Code 1895, § 4927, and the abstract attached to his petition shows that he has not the perfect paper title prescribed by that section, he may amend by alleging that the defendant is insolvent, and that the damages threatened will be irreparable.

2. Where, in such an action, it appears that the plaintiff has signed an unambiguous contract for the sale of the timber in dispute, and no effort is made to reform the instrument on

the ground that it does not speak the real agreement between the parties, it is error to grant the injunction prayed.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by Moses Saddler against E. Swindell & Co. Judgment for plaintiff. Defendants bring error. Reversed.

Saddler sought to enjoin Swindell & Co. from cutting timber on a tract of land alleged to be his property. He did not allege that the defendants were insolvent, or that the damages would be irreparable, but apparently relied upon the perfect paper title prescribed by Civ. Code 1895, § 4927, as the basis of an action to enjoin the cutting of timber. The abstract of title attached to his petition was, in so far as the purposes of this suit are concerned, defective, in that parol evidence was necessary to show that one of the grantors therein named was the heir at law of his predecessor in title. See *Powell v. Brinson*, 120 Ga. 36, and cases cited on page 38, 47 S. E. 499, 500. A temporary injunction was granted, and the defendants filed a motion in the nature of a demurrer to the petition, praying that this injunction be dissolved. Two amendments to the petition were then allowed over the objection of the defendants. In one of these amendments it was alleged that the defendants do not claim title to the timber in dispute, "except under and through a certain receipt, which plaintiff gave defendants for the sum of ten dollars, which was part payment of a contract price of thirty dollars, which said defendants were to give plaintiff for certain trees of a certain character" on the land involved in this suit; that the plaintiff did not read the paper so signed by him, for the reason that he could not read, but relied entirely upon the statement of the defendants' agent with whom the transaction was had as to its contents; that the agreement between the parties was that only the "big yellow-hearted trees" were to be sold, the rail timber being expressly excepted from its operation; that the defendants went upon the land and proceeded to cut all the timber of every description—"in fact, more timber than the agreement called for"; and that the defendants are hopelessly insolvent and unable to respond in damages. In the other amendment it was alleged that the damage to the plaintiff would be irreparable. The defendants filed answers to the petition and to the amendments. They admitted that they claimed the timber under a contract with the plaintiff, but denied that that contract embraced only the timber of a certain character on the land. They also denied all the material portions of the petition and the amendments. Attached to the answer as an exhibit was a copy of the contract in question, which was as follows: "Feb. 21st, 1899. State of Georgia, County of Decatur. Received of E. Swindell & Co. the sum of \$10.00 dollars, the same being part of the

purchase-money for the timber on lot of land No. 305, the east side, 110 acres timber in the 16th district of said county, and also for the right to construct and build upon the said lands, at any time, tram-roads, rail-roads and wagon-roads, and such other devices as they may see fit. The deed to the said timber and said privileges to be delivered as soon as the title to said land can be examined and perfected, and the balance of said purchase-money to be paid when the deed is so made and delivered by Moses Saddler to the said E. Swindell & Co., as follows: Balance \$20.00 to be paid at the commencement of cutting timber. In the event no deed is made I agree to refund the said part of the purchase money so paid by the said — on demand; it being understood and agreed that it is optional with the said E. Swindell & Co. to accept the said title to the said property and pay the purchase-money therefor." This writing was signed by Saddler by his mark, and was attested by two witnesses—one a justice of the peace; and it was in evidence on the hearing, and its execution admitted by the plaintiff. The court granted an order enjoining the defendants as prayed until the final hearing. The defendants except to this order, the allowance of the amendments to the petition over their objection, and the refusal of the court to dissolve the injunction as prayed.

Albert H. Russell and Townsend & Dickenson, for plaintiffs in error. W. D. Sheffield, for defendant in error.

CANDLER, J. (after stating the foregoing facts). 1. Under the liberal law now of force in this state in regard to the allowance of amendments, and the liberal construction of that law by this court, we are not prepared to hold that the amendments to the petition which were allowed over the objection of the defendants set up a new and distinct cause of action. "Relatively to the law of pleading, a cause of action is some particular right of the plaintiff against the defendant, together with some definite violation of that right." *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318 (4). In the present case the particular right declared on by the plaintiff was the right to the unmolested possession and enjoyment of the timber on his land, and the definite violation of that right the cutting of the timber by the defendants. It is true that the original petition sought relief under a particular act of the General Assembly, on the theory that the plaintiff had a perfect paper title to the land on which the timber was located, while the amendments sought relief on the ground that the defendants were insolvent, and that the damages sustained or about to be sustained would be irreparable. This, however, was a matter which went to the form of the assertion of the plaintiff's right, rather than to the substance of the right itself. No new

cause of action was set up by the amendments, and their allowance was not error.

2. We are clear, however, that, upon the face of the pleadings as they appear in the record, the plaintiff is not entitled to the relief sought. It was not denied that the plaintiff signed a contract for the sale of the timber, the cutting of which he now seeks to enjoin. On its face this paper stipulates for the sale of all the timber on the plaintiff's land. If it does not speak the true agreement between the parties, it must be reformed before equity will interfere to restrain the apparent rights of the defendants thereunder. A case directly in point is *Perkins Lumber Co. v. Wilkinson*, 117 Ga. 394, 43 S. E. 696; and further discussion is unnecessary, other than to say that, under the decision in the case cited, the grant of an injunction was clearly error.

Judgment reversed. All the Justices concur.

(121 Ga. 601)

BAKER v. STATE.

(Supreme Court of Georgia. Jan. 28, 1905.)

CRIMINAL LAW—EVIDENCE—REVIEW ON APPEAL.

1. The evidence and the legitimate inferences which the jury could draw therefrom were sufficient to sustain the charge made in the accusation. See *Turner v. State*, 57 Ga. 107.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

William Baker was convicted of crime, and brings error. Affirmed.

Glawson & Fowler, for plaintiff in error. Wm. Bennson, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 758)

MILLER et al. v. BUTLER.

(Supreme Court of Georgia. Jan. 28, 1905.)

TRUSTEE—ACTIONS BY AND AGAINST — PARTIES—RIGHTS OF BENEFICIARIES—DEMURRER—ADMISSIONS—FRAUD—MISJOINDER OF PARTIES.

1. It being the duty and within the power of the trustee to defend the estate committed to his care, he may institute or defend actions relating thereto without joining the cestuis que trust as parties, and in the absence of fraud they are bound by the judgment rendered therein.

2. If the cestuis que trust suffer loss by reason of the conduct of the trustee, the remedy is not to undo what has lawfully been done, but to proceed against the trustee, whose solvency and capacity was passed upon by the settlor in appointing him to represent the estate when it became necessary to deal with third persons.

3. While a demurrer admits facts properly pleaded, it does not admit a fraud charged, except as the facts establish or constitute fraud.

4. The petition in the present case stated no facts constituting fraud, nor did the subsequent breach of the contract under which the decree was taken amount to fraud which would relate

back and vitiate a decree which was otherwise free therefrom.

5. The right of the plaintiffs to unite in a suit grew out of the unity of their interest under the trust deed.

6. The trustee and beneficiaries thereunder were not the promisees in the express contract sued on, and therefore had no right to maintain an action thereon in their own names.

7. The parties sued in one capacity under the trust deed. But the right to recover for the breach of the express contract was only in two of the parties, and in a capacity different from that in which they sued.

8. The causes of action and prayers for relief were dissimilar and antagonistic.

9. If, by virtue of the interest created by the trust deed, the beneficiaries have any cause of action against the defendant alone, or against the defendant and the trustee, or the right to recover from the defendant an amount equal to the consideration alleged to have been given for the consent verdict, the same must be asserted in a separate and distinct suit.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Suit by Willis Miller and H. W. Miller against H. C. Butler. Judgment for defendant, and plaintiffs bring error. Affirmed.

Willis Miller, for the benefit of himself, and also for the benefit of his daughter-in-law and grandchildren, conveyed certain land to his son H. W. Miller, trustee. There was no power to sell conferred upon the trustee. The land described in the trust deed was claimed by Butler under a sheriff's deed. He was also prosecuting a suit against Willis Miller on a debt antedating the trust deed, with a view of enforcing the judgment entered thereon. Thereupon Willis Miller and H. W. Miller, trustee, filed a bill against Butler to enjoin this common-law suit, and to remove the cloud on the title created by the sheriff's deed held by Butler. He answered, attacking the trust deed on several grounds—among others, that it was void because Willis Miller, the grantor, had therein reserved a benefit to himself. Pending the suit, Willis Miller died, and his administrator was made a party plaintiff. In May, 1895, a verdict was rendered in favor of the defendant, establishing the validity of his title to the land, and also entering a decree in his favor for \$2,590. Several years thereafter (March, 1900) H. W. Miller as trustee, and the cestuis que trust under the trust deed above recited, brought an equitable petition against Butler, alleging that the verdict above referred to had been taken by consent under an agreement by which Butler undertook to levy the execution to be issued thereunder on certain land belonging to Willis Miller; agreeing also that at the sale he would buy in such land, and convey the same by absolute deed to H. W. Miller and his wife. The petition alleged that within the last few months he, on demand, had failed to carry out this agreement. It was claimed that the children were not parties to the original suit. There was a prayer that Butler should be forced to carry out his agreement as to H. W. Miller and Mary Miller. It was charged that Butler

had failed to carry out the agreement, and that such was fraudulent conduct, and it was prayed that the decree should be set aside for fraud. Butler demurred, and subsequently the petition was amended, by which the complainants prayed that, if they were not entitled to specific performance of the contract made by Butler, they be awarded damages for its breach. The court sustained the demurrer, and the trustee and beneficiaries under the trust deed excepted.

D. J. Gaffney and W. O. Wright, for plaintiffs in error. F. M. Longley, for defendant in error.

LAMAR, J. (after stating the foregoing facts). Where the title to property is put in one person for the benefit of others, the latter take cum onere. The skill, ability, and solvency of the trustee operate to their advantage. But as to acts within the scope of his express or implied powers, they must suffer the consequences when they ultimately prove detrimental to the beneficiaries. The remedy in such a case is not to undo what has lawfully been done, but to proceed against the trustee (*Clark v. Flannery*, 99 Ga. 239, 25 S. E. 312), whose personal and financial fitness were passed upon by the grantor when giving the land. The very instrument which created the estate put forward the trustee as the person who was to represent those interested therein when it became necessary to deal with third persons. On this principle, cestuis que trust are bound by his nonaction for a time long enough for him to be barred by the statute (*Civ. Code* 1895, § 3773); they are bound by his loss of a loan made in good faith to a person then solvent (*Walker v. Walker*, 42 Ga. 135); by his receipt of funds which other prudent men then took as currency (*Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389); by a compromise honestly and in good faith made by him (*Maynard v. Cleveland*, 76 Ga. 53 [6]). They are likewise bound by the results of suits instituted or defended by him for the benefit of the estate. *Gunn v. James*, 120 Ga. 482, 48 S. E. 148. And this is so even if the judgment is rendered by default. *Sanders v. Houston*, 107 Ga. 59, 32 S. E. 610 (4). See *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347 (6, 7), where the minor was held bound by the conduct of the mother, to whom a year's support for herself and child had been set apart.

In proceedings by a trustee to get a benefit personal to himself, or to secure the right to exercise a power not granted by the trust deed or not implied by law, the cestuis que trust must be made parties. *Meyer v. Butt*, 44 Ga. 468; *Snelling v. American Freehold Co.*, 107 Ga. 854, 33 S. E. 634, 73 Am. St. Rep. 160. But it required neither express power in the deed, nor an order from the chancellor, to authorize or require the trustee to defend and preserve the estate committed to his care. That was a prime duty imposed

by his appointment. *Schley v. Lyon*, 6 Ga. 535; *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639. The beneficiaries under this deed were therefore not necessary parties to the suit brought by the trustee to preserve the corpus as against the claim asserted by Butler. In the absence of fraud or collusion, they were bound by the decree that the title of Butler was superior to that created for them by the deed of settlement. *Sanders v. Houston Co.*, 107 Ga. 55, 56, 32 S. E. 610; *Snelling v. American Freehold Co.*, 107 Ga. 854, 33 S. E. 634, 73 Am. St. Rep. 160; *Knorr v. Raymond*, 73 Ga. 750 (10a); *Smith v. Cook*, 71 Ga. 705.

But the plaintiff in error contends that, even if the decree in the former suit would ordinarily have bound them, it has no such effect here, because of the allegation in the bill that it was the result of fraud on the part of Butler. Where litigation is pending, and by the fraud of one party the other is prevented from making his defense, or induced to withdraw his plea, appeal, or motion for a new trial, or where by reason of fraud a judgment apparently conclusive is rendered, relief therefrom may be had by appropriate proceedings. *Everett v. Tabor*, 119 Ga. 130, 46 S. E. 72. If a consent judgment is taken under an agreement that it is to be used only in a particular way after a certain time, or only against designated property, the party will be held to his contract, and equity will enjoin against another or different use being made of the judgment. *Markham v. Angier*, 57 Ga. 43. But it will be noticed that in these classes of cases the judgment was either originally void because fraudulently obtained, or its enforcement was enjoined because it was being used contrary to the terms of the very agreement on which it had been entered. In the present case the contract calls for exactly the form of decree which was taken, as well as for the exact use which was to be made under it. There is no allegation that, at the time of making the contract, Butler fraudulently intended not to pay the price for the decree operating as a quasi conveyance to the land already held by him under the sheriff's deed. There is therefore nothing even within the analogy of the principle of Civ. Code 1895, § 3531.

In pleadings, epithets and hard words are not sufficient to make out a case of fraud when relief is asked because of its existence. While a demurrer admits facts properly pleaded, it "does not admit a fraud charged, except as the facts establish or constitute a fraud. A merely pro forma statement will not do. The facts must be stated, that the court may judge whether they amount to fraud or not." *Bellamy v. Woodson*, 4 Ga. 175, 48 Am. Dec. 221; *Schaifer v. Bacon*, 88 Ga. 135; *Kilgo v. Castleberry*, 38

Ga. 512, 95 Am. Dec. 406 (3); *Powell v. Parker*, 38 Ga. 644 (1). Fraud is subtle, and slight circumstances may be sufficient to establish its existence. But the pleadings should at least indicate some of the slight circumstances intended to be proved. Some issuable and specific fact should be stated so as to put the defendant on notice, even if it be only a charge that he fraudulently intended, while insolvent, not to pay. In the present case there is an utter absence of such allegation, and the only fact relied on to constitute fraud in 1895, when the judgment was taken, is Butler's failure, on demand, in 1900, to comply with the former promise. But while a subsequent breach of a contract affords ground for relief, it does not constitute fraud infecting and vitiating the validity of the original agreement. This is particularly so in the present case, where the very contract required that the execution under the decree now attacked for fraud was to be levied on certain land, which was thereupon to be bought in by Butler, and the property should then be conveyed by him by absolute deed to H. W. Miller and his wife. The original petition therefore set out no cause of action based upon the allegations of fraud.

Nor did the amendment save the case. It may be that, as indicated in the speaking demurrer, the land passing under the trust deed is now in the hands of bona fide purchasers; that either for this reason, or because the plaintiffs apprehending that the deed from Willis Miller to H. W. Miller, trustee, might be successfully attacked by Butler, they ask, in the alternative, for damages for the breach of the contract under which the consent verdict was taken. The amendment does not attack the contract as void because the consideration moved to H. W. Miller instead of to H. W. Miller, trustee. Instead of treating it as void, the amendment treats the contract as valid. But if so, the cause of action thereon was not in the *cestui que trust*. They were not promisees. *Hawkins v. Central R. Co.*, 119 Ga. 159, 46 S. E. 82. The right to enforce the contract was not in the trustee or the beneficiaries, but in H. W. Miller and wife. The demurrer to the petition as amended was therefore properly sustained. If a part of the plaintiffs have one cause of action, and the rest another, they must assert the same in separate suits. If all or a part of the beneficiaries have a cause of action against Butler alone, or against Butler and the trustee, they must institute a different form of action.

Whatever may be the rights of the parties in another suit, there was no error in sustaining the demurrer to the present proceeding, and the judgment is affirmed. All the Justices concur.

(121 Ga. 753)

JOHNSON v. McKAY.

(Supreme Court of Georgia. Jan. 28, 1906.)

LIS PENDENS—DESCRIPTION OF PROPERTY—PAROL EVIDENCE—RES JUDICATA—FRAUD—NEW TRIAL.

In March, 1895, A. filed a petition to recover from B. a tract of 1,143 acres of land (described by naming coterminous owners), alleging that the same descended to her as the sole heir of her husband, who was the brother of the defendant B., but that said land was then held and claimed by B. under an improper construction of a contract made in 1856, relating to the division of land between her husband, his mother, and B. In April, 1895, B. filed his answer, admitting possession, and claiming title by virtue of such contract, the terms of his father's will, and the death of his brother without children. Pending the suit, the plaintiff A., in October, 1895, mortgaged to J. two tracts which went to form a part of the 1,143 acres. Thereafter a decree was entered that the land referred to in the petition, described by reference to then coterminous owners, was the property of B. *Held:*

1. That the description of the property as set out in the pleadings was sufficient to operate as *lis pendens*.

2. That parol evidence was admissible to show that the property mortgaged formed a part of the land referred to in the pending suit.

3. That, in the absence of fraud or collusion, J., the mortgagee, was bound by the decree subsequently entered in the cause, finding against the mortgagor and in favor of B., even though he had no actual notice of the pendency of the suit when he took the mortgage.

4. The fact that costs were taxed against B. in the equity cause was not sufficient to establish the existence of fraud so as to relieve J. from being bound by the decree.

5. Even if the plaintiff's evidence as to possession by the mortgagor was sufficient to make out a *prima facie* case, there was like evidence sufficient to rebut the same.

6. Considering the want of certainty as to the description of the land mortgaged, the dispute as to possession, and the effect of the decree, there was nothing in the rulings as to admission or exclusion of evidence or in the charge of the court which required the grant of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Claim case between J. C. Johnson and H. A. McKay. Judgment for defendant, and plaintiff brings error. Affirmed.

On October 1, 1895, Mrs. Julia McKay executed a mortgage to J. C. Johnson on several tracts of land in Jones county. Among the property thus mortgaged was "all that tract of land in Jones county, Georgia, containing 153 acres, known as the 'Zachariah Emerson Place,' part of lots No. 125 in the 11th District, and part of No. not known." Also "the Thomas Bazemore place, containing 196 acres, more or less, joining the land of Sarah Emerson, Elisha Owens, Madison T. Bazemore, and H. D. McKay." The execution and levy followed the description in the mortgage. H. A. McKay, executor of G. W. F. McKay, filed a claim. At the trial the plaintiff introduced a deed from Hammock, administrator of Zachariah Emerson, to Hugh McKay, dated September 5, 1854, describing the 153-acre tract as in the mortgage. Also

a deed from Thomas J. Bazemore to Hugh McKay, dated September 28, 1848, describing the 196-acre tract exactly as it was described in the mortgage. It was admitted that the mortgagor, Mrs. Julia McKay, was the sole heir at law of Hugh McKay. Plaintiff testified that Hugh McKay was in possession of these two places at the time of his death, and that after his death his widow went into possession thereof, and remained in possession until she settled the suit between herself and George McKay. These two places adjoined and lay broadside of each other. She was in possession of these lands at the date of the execution of the mortgage to the plaintiff. On cross-examination he testified that he knew she was in possession from going on the land with her and in assisting in collecting the rent. Did not remember what was the year. "I may have stated in the former trial that what I knew about her possession I got from her." Do not know when the husband died. "My recollection is that she was in possession in 1894. What I know about her possession is what she told me, and from going upon the place with her to collect the rent. The mortgage is dated October 1, 1895. She was collecting rents for that place at that time. I got the description of the land from the deeds placed in my possession." There was much evidence seeking to establish the boundaries of the Emerson and Bazemore places described in the mortgage, and a plat thereof, made by Childs, a surveyor, who ran the lines according to information derived from persons who pointed out a hedge row which forms a part of one of the lines, and indicated what they thought were the lines. Maj. Jones, who pointed out some of the lines and assisted the surveyor, testified: "I do not think I could go around any of these places now and show the lines. I do not know anybody that could." The surveyor who made the map testified that it was "correct, according to the information obtained from Major Jones. Lot 125 in the 11th District is from five to seven miles away from these lands." Other witnesses for the plaintiff testified as to what they knew concerning the boundaries of the two tracts, stating also that what they knew as the Bazemore and Emerson places would be contained in a tract of 1,143 acres as the same was described in the petition resulting in the decree on which claimant relied. The evidence for the claimant tended to show that it was impossible to identify the lines of the Bazemore and Emerson places on which the plaintiff claimed to have a mortgage. The claimant also introduced the record of a suit between Mrs. Julia McKay and George W. McKay. In it she set out a contract made in 1856 between Sarah McKay and her two sons, Hugh and George. It recited that Sarah McKay was the owner of certain property for life, that she had theretofore given to her two sons certain property, and that they had divided it among

themselves. Under this division 1,143 acres therein described had been assigned as the portion belonging to Hugh McKay. "This agreement is only to affect property that has come into possession of the said George and Hugh from the said Sarah, and not what may have come into their possession from other sources, there having been land and railroad stock heretofore sold and the proceeds of the same have been equally divided between the two sons. They are hereby prohibited from calling on each other to respond for any part of the proceeds thereof, further than has already been done." There was also attached a copy of the will of Hugh McKay, the husband and father of the parties to this agreement, in which the devise of his estate was to his wife for life, and after her death the property was to be equally divided between the two sons, or the whole to go to the survivor of them, should they not then not be both in life, to them and their heirs forever. The theory of her petition was that under the contract of 1856 the 1,143 acres of land became the absolute property of the mortgagor, Julia McKay's husband, Hugh, but that when the latter died in 1891 George McKay improperly entered and took possession of the land claiming the same as his own. The petition alleged that George had possession of the papers, and petitioner was not able accurately to describe the property. She did, however, describe the 1,143-acre tract as adjoining M. T. Bazemore on the east, William Paulk on the north, Gordon on the northeast, Finney on the southwest, George McKay on the southeast; said lands lying on the waters of Town creek, in Jones county. This petition alleged that these lands were acquired by Sarah McKay by purchase from various persons with the proceeds of property bequeathed for life by her husband; that Sarah McKay died in 186-; and that petitioner's husband, Hugh McKay, died in 1891. This petition was filed on March 25, 1895. George McKay's answer to this suit was filed on April 16, 1895, several months before the execution of the mortgage from Julia McKay to Johnson, the plaintiff in *fi. fa.* In his answer he admitted possession of the 1,143 acres, claiming that right of possession and title vested in him under the contract of 1856 and the will of his father on the death of Hugh McKay, petitioner's husband, without children. On October 19, 1896, there was a verdict finding "for the defendant the premises in dispute covered by the declaration." A decree was entered accordingly, but the land was described as 1,123 acres, more or less; and, instead of following the petition and contract, naming the coterminous proprietors as they existed in 1856, the decree gave the names of the coterminous proprietors as they existed at the time it was entered. This appears from the testimony of a witness (Tom Gordon) who shows that the adjoining landowners as described in the decree would have been a good

description of the entire tract of which Hugh McKay died in possession. And by other evidence in the case it appears that the Bazemore and Emerson places were included in the land of which he died possessed. In the decree there was an order that the defendant pay costs. The claimant relied on the decree, the contract of 1856, the will of Hugh McKay, Sr., and offered evidence to show that George McKay, the claimant's testator, was in possession of the 1,143 acres containing the Bazemore and Emerson places at the time of the execution of the mortgage. He offered evidence that one of the places was not cleared, that the other one was rented, and that George McKay collected the rent for 1895.

There have been three trials in the case. The plaintiff in *fi. fa.* made a motion for a new trial on the ground that the verdict was contrary to law and to the evidence, and because the court erred: (1) In the charge on the subject of *lis pendens* and the notice by the suit between Julia McKay and George McKay. (2) In allowing parol evidence to be considered to show that the Bazemore and Emerson places were included in the property therein referred to, movant contending that the suit would only be notice affecting him if it on its face showed that the Bazemore and Emerson places formed a part of the subject of the controversy. (3) In refusing to permit Johnson to testify that he had no actual notice of the suit. (4) In excluding the evidence of Maj. Jones that he knew where the lines of the home place were; that Hugh McKay showed him the lines. (5) In admitting the evidence of Maj. Jones (on cross-examination): "I only know what Childs surveyed from what Henry McKay told me. According to what Henry showed me, he was not on the Emerson line." This was objected to as hearsay. The motion was overruled, and the plaintiff excepted.

Hardeman & Moore and R. N. Hardeman, for plaintiff in error. Johnson & Johnson, for defendant in error.

LAMAR, J. (after stating the foregoing facts). The mortgage of 1895 described the property as in the deeds of 1848 and 1854. Neither of these deeds gave corners, courses, lines, or distances. One did not name the adjoining landowners, and the other gave the coterminous proprietors as they existed in 1848. Naturally, in half a century there had been great and radical changes in this regard. And while the descriptions in neither the deeds nor the mortgage were void, as ruled when the case was here before (119 Ga. 196, 45 S. E. 992), yet it was necessary to resort to extrinsic evidence to show that the land levied on was that described in the *fi. fa.* Whether this burden was carried in the first instance by the plaintiff, or whether it was rebutted by the claimant's testimony, was a question for the jury. The inherent difficulties of the plaintiff's case in this re-

gard, the change of coterminous proprietors, the destruction of buildings and fences, the obliteration of old lines, resulting from the lapse of time were increased by the special obliteration due to the fact that these two lots were included in a still larger tract of 1,143 acres, held by the same person for more than 40 years. While there was some evidence that the Bazemore and Emerson places were in possession of the mortgagor in 1895, that fact really added little to the description, because there was no evidence as to the extent of these places. The plaintiff in *fi. fa.* contends that the petition filed in March, 1895, did not operate as notice by way of *lis pendens* when he took the mortgage in October, 1895, because of the insufficient description of the land therein sued for, and because the contract of 1856 recited that the division therein alluded to did not affect lands previously acquired by either of the sons. He claims that it could not apply to the Bazemore and Emerson places, because the deeds to those two tracts had been made to Hugh McKay in 1848 and 1854. The fact that Hugh McKay had acquired these two places before 1856 necessarily led to the conclusion that they were excepted out of the agreement. For the petition distinctly alleges that the 1,143 acres had been acquired by Sarah McKay by purchase from various persons with the proceeds of property bequeathed to her for life by her husband. It is entirely possible that she could with these proceeds have bought these very lots from her son Hugh.

Nor was there any error in excluding the testimony of the plaintiff that he had no actual knowledge of the suit when he took the mortgage. The very purpose of the rule of *lis pendens* is to charge with notice in law when there is no notice in fact. Civ. Code 1895, § 3936. There was evidence from which the jury could have found that George McKay was in possession of the mortgaged property. That itself was notice. The mortgagee therefore took subject to that notice, as well as to the notice imparted by the suit. There is no contention that the decree rendered in that suit was not binding on the mortgagor and the mortgagee, unless it was void for collusion. There was no evidence tending to show the existence of any fraud, except that the plaintiff contends that the decree putting the cost on the defendant indicates that there had been a settlement. But the verdict was generally for the defendant. It was an equity case. The costs could therefore be taxed against either party. Civ. Code 1895, § 4850. Even if it was improper, only George McKay could complain. Certainly the fact that he was required to pay the costs is not sufficient to avoid a decree otherwise in his favor.

The charge that the description of the land mentioned in the pleadings must have been sufficient to put Johnson upon inquiry as to whether it included the Bazemore and Emerson

places was not error against the plaintiff. The petition gave the outside boundaries of the 1,143 acres, and was sufficient to identify the whole tract so as to operate as *lis pendens*. It was obviously necessary to resort to parol testimony to show that a part was included in a properly described whole. Rarely, if ever, does a description of an entire tract contain a proper description of a portion in the center of the tract.

There was nothing requiring the grant of a new trial in the exclusion of evidence as to what others had stated to the witness about the line. It is extremely doubtful whether any of the land mortgaged could, under the evidence, have been so marked and identified as to enable it to be properly described by the levying officer in making conveyance as a result of the sheriff's sale. Certainly, the mortgage itself contained no such description. But at last the case is controlled by the fact that the petition of the mortgagor showed that the 1,143 acres were in possession of George McKay, claiming title by reason of a certain contract and will; that George McKay filed his answer admitting the possession and asserting the title; and that this petition and answer were filed months before the plaintiff took his mortgage. It further appears that the mortgaged property was a part of the 1,143 acres. There is no proof that the judgment finding that the land belonged to George McKay was the result of fraud or collusion. This judgment bound the mortgagor and the plaintiff, who was in privity with her. Considering the case as a whole, and irrespective of the other assignments of error which could not be controlling, the judgment is affirmed. All the Justices concur.

(121 Ga. 803)

POWELL v. GEORGIA, F. & A. RY. CO.

(Supreme Court of Georgia. Jan. 28, 1905.)

APPEAL—REVIEW—RULINGS ON EVIDENCE—CONTRACT—CONSIDERATION—ACTION FOR SERVICES—INSTRUCTIONS.

1. In order to properly present for decision by the Supreme Court the question whether or not error was committed in admitting given evidence, the complaining party must make it appear not only that the evidence was admitted over his objection, but also what grounds of objection he urged before the trial court at the time the evidence was offered.

2. Where the promoters of a railroad mutually agree to render without compensation their personal services in furthering the enterprise, one of them who performs services in pursuance of the agreement cannot exact payment therefor from the railway corporation receiving the benefit of the same. Such an agreement does not lack a good and valuable consideration; and, though the corporation be not a party thereto, it may, as matter of defense, negative any implied promise on its part to pay for the services so rendered by showing that they were performed for its benefit under that agreement. If one of the parties to it is a partnership, the members of which assent to its terms and undertake to comply therewith, services performed by one of the partners are legally to be

regarded as having been rendered by the partnership, and not by him as an individual.

3. The court fully, fairly, and correctly submitted to the jury the contention of the plaintiff that the services performed by him were rendered, not in pursuance of any such agreement, but under circumstances from which the law would imply a promise by the defendant company to pay therefor what they were reasonably worth.

4. A charge to the effect that it is incumbent on a plaintiff to make out his case, in every essential element, "to the satisfaction of the jury," is not calculated to so operate to his prejudice as to afford cause for a new trial, when it appears that he made no request to charge as to how the burden of proof resting upon him could be successfully carried.

5. In charging upon the contentions of the defendant, the court did not express any opinion as to what had been proved; the evidence fully warranted the finding of the jury; and for no reason assigned should the verdict be set aside. (Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by M. D. Powell against the Georgia, Florida & Alabama Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

T. S. Hawes and Toomer & Reynolds, for plaintiff in error. Donalson & Donalson, for defendant in error.

EVANS, J. The plaintiff below, M. D. Powell, brought suit against the Georgia, Florida & Alabama Railway Company, formerly the Georgia Pine Railway Company, for \$6,000, in which amount the plaintiff alleged the defendant company was indebted to him for services rendered by him in procuring its right of way, superintending the construction of its roadbed, etc. The defendant filed an answer denying all liability in the premises. On the trial the plaintiff introduced evidence tending to show he had performed services in behalf of the company as alleged, which services he had been induced to perform under an implied, if not an express, promise on the part of the company's officials to pay therefor. The defendant, on the other hand, introduced evidence in support of its contention that such services as were rendered by the plaintiff were performed by him in compliance with an understanding between the promoters of the enterprise, of whom he was one, that they were to receive no compensation for their services in building the road, as they, in their capacity of stockholders, would be mutually benefited by the construction of the road, which they contemplated selling at a profit after it was completed between two designated points. The jury returned a verdict in favor of the defendant, whereupon the plaintiff made a motion for a new trial, which was overruled by the court, and he excepted.

1. It appears that Powell Bros., a partnership composed of the plaintiff and his brother E. R. Powell, subscribed to stock, and was largely interested in the success of the

project of building the road, as were Henry Bruton and J. P. Williams, other promoters of the enterprise. The defendant offered witnesses who testified that both of the members of the firm of Powell Bros. agreed that they would, in order to subserve the interests of that firm, contribute their personal services in securing a right of way and superintending the construction of the road, provided Bruton and Williams would likewise, without compensation, lend their aid in promoting the project, and that it was under this arrangement, which was assented to and carried out by all parties at interest, that the plaintiff rendered the services performed by him. The defendant also tendered in evidence a letter dated July 27, 1898, of which the following is a copy: "Mr. J. P. Williams, Prest., Savannah Ga.—Dear Sir: Your favor of the 9th inst. just received. As I have been away from home for two weeks or would have replied to you earlier. I don't think Mr. Henry Bruton will attempt to put in any account for services rendered the G. P. Ry. Co. as he very well understands the agreement in regards to salaries, before the commencement of the construction of the road, and I will certainly oppose paying Mr. Bruton for any services he has rendered to the G. P. Ry. Co., as I did hard work and for a long time, but did not expect one cent for it, as it was my understanding that we was to attend to the work without any salaries for services. Yours truly, E. R. Powell." Complaint is made in the motion for a new trial that the court erred in admitting this letter "over plaintiff's objection," but what objection he urged against its admission is not stated. Such an assignment of error cannot be considered by this court, for the reason that it is incumbent on a plaintiff in error to make it appear what were the grounds of objection stated to the trial court at the time the evidence objected to was offered by the opposite party. *Tilley v. McJunkin*, 116 Ga. 426, 42 S. E. 741; *Butts v. State*, 118 Ga. 750, 45 S. E. 593. It is true in the present case, as the Chief Justice remarked was true in the case of *Frey v. Macon Sash Co.*, 112 Ga. 244, 37 S. E. 376, that, "in making the motion for a new trial, reasons were assigned why the evidence was inadmissible; but, as has been frequently held, this court cannot consider such reasons where it does not appear that they were presented to the trial judge at the time the evidence was offered."

2. In view of the evidence summarized in the preceding division of this opinion, it is obvious that there is no merit in the further complaint of the plaintiff that the evidence did not warrant the court in submitting to the jury the contention of the defendant that the services for which the plaintiff sought compensation were really rendered to the company by the firm of Powell Bros., and not by M. D. Powell, the plaintiff, as an individual. The court further instructed the jury,

in effect, that if the plaintiff performed the services rendered under an agreement to which Bruton, Williams, and Powell Bros. were parties, whereby none of these parties was to receive compensation for services rendered in furthering the enterprise, then the plaintiff could not legally call on the defendant company for payment for the services performed by him of which it received the benefit. Exception is taken to this portion of the charge on the grounds (1) that it precluded the jury from finding that the company had made an implied promise to pay the plaintiff for his services; (2) that the alleged agreement was without consideration; and (3) the company, not being a party thereto, could take no advantage thereof, even if it was operative and binding on the persons who entered into it. Evidently these contentions grow out of a misapprehension of the law. The mutual promises of the parties to the agreement to perform services without compensation constituted a valid consideration for the obligations each assumed under that agreement. By express covenant, the defendant company was to receive the benefits of this agreement; and it follows, necessarily, that in accepting the fruits thereof the company in no wise impliedly promised to pay the plaintiff anything for services performed by him in compliance with this agreement.

3. The court fully and fairly submitted to the jury the contention of the plaintiff that he had never been a party to any such agreement, but had performed services for the company under circumstances from which the law would imply a promise on the part of the company to pay him therefor what they were reasonably worth. On the other hand, the court instructed the jury that the plaintiff was bound to show he performed the alleged services "under some contract, either express or implied." This charge is excepted to on the ground that it excluded from the consideration of the jury "any services which may have been rendered to defendant, by plaintiff and accepted by it," for which services the law would imply a promise to pay, "though not performed under any express or implied contract." We infer that the criticism thus sought to be made on the charge is that the jury may have understood the court to mean that the plaintiff was bound to show that there was an express or implied contract made before he performed any services. The jury could not have received this impression, for in the same connection the court stated to the jury that "an implied contract would be any action" by the defendant company, or conduct on its part, such "as induced Powell to perform the services," acceptance by the company of his services, and ratification of their performance. The court further charged: "If there is no express contract, then it might be under some implied contract; some contract that arose from the action and conduct of the parties;

arose from the fact that he went forth and performed the services, and the defendant accepted the services, and encouraged him in performing them, and ratified or enjoyed by taking the benefit of the services." The plaintiff insists that this instruction was erroneous, in that it cut off all right to a recovery, save in the event the jury should "find that the services rendered by the plaintiff to defendant had been noticed or encouraged by the defendant." The point is not well taken. The court merely informed the jury that, under such circumstances as were detailed, the law would imply a promise to pay. The term "noticed" was not employed; nor did the court by this charge make it incumbent on the plaintiff to show, as a condition precedent to a recovery, that the company "encouraged" him in performing services in its behalf. The charge was in accord with the evidence on which the plaintiff relied as disclosing that the officials of the company knew that the plaintiff was assisting in constructing its road, encouraged him to continue his services, and ratified his action by accepting the fruits of his toil, and enjoying the benefits flowing therefrom. If the plaintiff desired any further instructions to the jury on this line, he should have presented a timely request in writing.

4. In another ground of the motion for a new trial, exception is taken to the following charge: "When the plaintiff brings a suit into court, the burden of proof is on him to make out his case to the jury to the satisfaction of the jury in every essential element." The assignment of error on this charge is that "it imposed upon the plaintiff a greater burden than is imposed by law," and "incorrectly stated to the jury the rule of law as to the weight and preponderance of evidence." The court was not undertaking to instruct the jury as to the law relating to the weight and preponderance of evidence, but merely to inform them that under the law (Civ. Code 1895, § 5160) the burden of proof rested on the plaintiff, not upon the defendant, and it was necessary that the plaintiff should prove every fact essential to making out his case. The court added: "The burden would be on Mid Powell to show that he performed this service, and that the services were worth the amount that he charged for them, or such other amount he claims for them under the proof." We fail to see how the plaintiff was prejudiced by the court telling the jury that the burden was on the plaintiff to establish these facts by proof which was to them satisfactory, for it left them free to find in his favor if they credited the testimony submitted in his behalf, irrespective of the question whether he had established his contentions by a preponderance of the evidence. The jury could not have understood the court to mean that they were at liberty to act arbitrarily in the matter, and to capriciously expect him to produce more or better proof than was suffi-

cient to satisfy the minds of reasonable men honestly endeavoring to arrive at the real truth of the controversy. If either of the parties desired the court to specially charge how the plaintiff could successfully carry the burden resting upon him, or to charge on the subject of the weight or preponderance of evidence, a request to so charge should have been presented. *Gunn v. Harris*, 88 Ga. 439, 14 S. E. 593 (5). In the case cited the losing party was the defendant, and he insisted that a charge on the burden of proof similar to that excepted to in the present case was more favorable to the prevailing party than the law justified.

5. There was considerable difference of opinion on the part of the witnesses as to the extent and value of the plaintiff's services. He complains that the court charged: "They first contend that the services were performed, and put further proof of how each was performed." The exception to this charge is that "it contained an expression by the court that a material fact in controversy, to wit, the extent of the services rendered by the plaintiff to defendant, had been proved." By referring to the entire charge of the court, which is a part of the record, we find that, in using the pronoun "they," the trial judge referred to the defendant company. But his statement that it had "put further proof of how" the services of the plaintiff had been performed did not amount to an expression of opinion as to the extent of such services, or to anything more than a statement that the defendant had introduced evidence as to how they were performed. The play is apparently upon the use of the term "proof," rather than of the word "evidence." As is conclusively evidenced by the verdict, the jury either did not dream that the court had expressed an opinion that the extent of the plaintiff's services was shown by the defendant's evidence, or else wholly disregarded what the court said in this connection, and found for the defendant on the issue whether or not the plaintiff was a party to an agreement under which he was to perform these services without compensation. In other words, the jury found that, irrespective of the extent and value of the services rendered, he could recover nothing from the company, because he had bound himself to perform such services free of charge to it. The evidence fully warranted this finding, and for no reason assigned in the plaintiff's motion for a new trial should the verdict be set aside.

Judgment affirmed. All the Justices concur.

(121 Ga. 775)

KENDRICK v. SEABOARD AIR LINE RY.
(Supreme Court of Georgia. Jan. 28, 1905.)

RAILROADS—INJURY TO TRESPASSER—NONSUIT.

1. A railroad company owes to a trespasser walking upon its tracks the duty not to hurt

him willfully or negligently after his presence becomes known to its servants in charge of one of its trains.

(a) In view of the presumption of negligence raised by law against the defendant company, the evidence introduced in behalf of the plaintiff was such as, if not overcome by evidence showing due diligence on the part of the company, would authorize a recovery by the plaintiff, and accordingly it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by Mamie Kendrick against the Seaboard Air Line Railway. Judgment for defendant. Plaintiff brings error. Reversed.

Williams & Harper, for plaintiff in error.
E. A. Hawkins, for defendant in error.

EVANS, J. Hozie Kendrick was killed by the running of the cars of the defendant railway company, and his widow sued for the value of his life. On the trial the plaintiff offered evidence tending to show that the homicide occurred under the following circumstances: The deceased lived near the city of Americus, and was going from his home to Americus, walking upon the railroad track. When he had reached a point within the yards of the railway company near the coal chute, he was standing near the rail of the main line, watching a freight train, which was moving in his direction with considerable noise. While thus engaged he was struck by an engine running backwards on the main line, and knocked about 10 feet in advance of the engine, and then run over by it. The switchman testified he was riding on the footboard of the engine which killed the plaintiff's husband; that the engine was running backwards at a speed of 7 or 8 miles per hour, and that within about 75 yards of the place of the catastrophe he observed something on the track, and when the engine approached to 40 yards of the place he recognized the object to be a man. He immediately gave a signal to stop, but, as he was standing on the footboard of the tender on the fireman's side, the signal was not seen by the engineer. The deceased was looking at the freight train, which was coming from the east on a parallel track. When the engine was about three feet from the deceased, he turned his head, and apparently observed his danger, and attempted to get off the track. Just at this time the freight train, which was going in an opposite direction with the engine, was passing the place where the deceased was standing. As soon as the deceased was struck by the engine, the switchman gave a signal of distress, which was answered by the engineer with a blast of the whistle, and the engine was stopped. The engine was equipped with steam brake, but no brake was applied until after the engine struck deceased. By applying the brakes the engine could have been stopped in about 10 yards at the rate of speed it was running. The homicide occurred about half

past 6 o'clock in the month of December. At the time and prior to striking plaintiff's husband the bell on the engine was ringing. Another witness testified that he had frequently used the railroad track through the yard in walking to and from Americus, and had seen other people "going backwards and forwards there sometime." Upon the conclusion of the plaintiff's evidence she was nonsuited, and the bill of exceptions complains of the grant of the nonsuit.

The plaintiff's husband was walking down the track of the railway company at the time he was killed by the running of the cars. The proof that one pedestrian may have frequently, and others occasionally, used the railroad track in the company's yards as a footpath, is insufficient to establish an implied license to pedestrians to use the track. See *Grady v. Railroad Co.*, 112 Ga. 668, 37 S. E. 861. The plaintiff's husband at the time of his death was therefore a trespasser. The general rule is that "as to a trespasser walking upon the track of a railroad the duty of observing ordinary care and diligence for his protection does not devolve upon the company's servants in charge of a train until his presence upon the track becomes known to them." *Hambright v. Railroad Co.*, 112 Ga. 36, 37 S. E. 99. When the plaintiff proved that the switchman knew her husband was upon the track, then the burden was on the railway company to show that the death could not have been averted by the exercise of proper care. The company owed the deceased no duty except not to hurt him willfully or negligently after his presence became known to its servants in the operation of the locomotive. *Grady v. Railroad Co.*, supra. But when the company was charged with knowledge of the presence of a trespasser on its track it immediately owed the trespasser the duty of exercising ordinary care and diligence to prevent any injury to him. The signal of the switchman was not heeded. The conclusion of the switchman was that the signal could not have been observed by the engineer because of his location on the footboard of the tender. Let this be granted. The record does not disclose whether or not there was a fireman on the engine. If there was a fireman, and he had been on his box, he probably would have observed the signal; and, if he did observe it, his duty would have been to have acted with reference thereto. Assuming there was a fireman, the evidence is silent as to his position, or his knowledge of the signal. He may have been engaged in other duties which would have prevented him from seeing the signal, but this did not appear from the evidence. If there was no fireman, then it would become a question as to whether the switchman exercised due care in placing himself on the footboard of the engine so that his signals could not be seen by the engineer. The plaintiff's evidence establishing a duty on the part of the railroad's servants to exer-

cise ordinary diligence in avoiding any injury to the person of the plaintiff's husband, and the factum of the injury by the operation of the engine, was sufficient to raise the presumption of negligence against the company. Civ. Code 1895, § 2321. Of course, the defendant might show that due care was exercised so as to rebut the presumption, but until that was done the plaintiff's right to recover existed. The court should have submitted the case to the jury for them to determine whether the defendant's servants exercised ordinary care after the presence of the deceased on the track became known to its servants, or whether, under all the circumstances of the case, the killing of the plaintiff's husband was wanton or willful.

Judgment reversed. All the Justices concur.

(121 Ga. 817)

BUTLER et al. v. TIFTON, T. & G. RY. CO.
(Supreme Court of Georgia. Jan. 28, 1905.)

RAILROADS — LOCATION OF STATION — SPUR TRACK — CONTRACT TO BUILD — DISMISSAL OF SUIT — RES JUDICATA.

1. The right of a railroad company to contract for the location and maintenance of stations may be restricted by the fact that the public has an interest in the times and places for stoppage of trains to receive and discharge freight and passengers.

2. There is no such restriction on the company's power to contract to build a spur track from its main line to a sawmill or other private enterprise.

3. The validity of such contract was recognized in *Tifton Co. v. Bedgood & Co.*, 43 S. E. 257, 116 Ga. 949, 951, and it was not error to overrule the demurrer.

4. Instead of reducing an agreement to writing, the parties, by reference, may adopt the terms of a contract already in writing.

5. A party must be held bound by a ruling which he invoked, and by a judgment in his favor which he procured.

6. If, in a pending suit, the plaintiff offers an amendment, and the defendant demurs thereto on the ground that "it sets up a new and distinct cause of action," and such demurrer is sustained, the judgment dismissing such suit will not bar the plaintiff from suing on the cause of action set out in the amendment offered, but disallowed for the reason that it was a new and distinct cause of action.

7. Such ruling on the demurrer further shows that the merits of the matter set out in the amendment were not and could not have been determined in the first suit.

8. It was error to sustain the plea of res adjudicata.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Action by J. L. Butler and others against the Tifton, Thomasville & Gulf Railway Company. From a judgment both parties bring error. Reversed.

Many of the facts involved in the present case are stated in 116 Ga. 945, 43 S. E. 257. While the record is voluminous, the following is a synopsis of what is material to an understanding of the points involved in the decision: The Union Lumber Company own-

ed 1,617 acres of land in Colquitt county, the timber privileges on which it sold to Huber & Stokes. On October 24, 1899, this firm entered into a contract with the Tifton, Thomasville & Gulf Railway Company, by which, in consideration that they would locate their sawmill on the premises, and ship all the lumber cut from this land over the railway company's line, the latter agreed to build a side track to the sawmill, and to haul the timber therefrom at a rate as low as that charged other shippers. On November 8, 1899, Huber & Stokes sold the timber and assigned this contract to Bedgood & Co. The latter, on April 21, 1902, brought an action against the railway company for damages for breach of the contract to build the side track. The company's demurrer to this petition was sustained by this court (116 Ga. 945, 43 S. E. 257) on the ground that the contract sued on was not assignable. On the return of the remittitur Bedgood & Co. offered an amendment to the petition setting up that a competitor of the defendant had a line of road near the timber described; that it was to the advantage of the defendant to enter into an agreement by which it would secure the freight from the sawmill, instead of allowing it to go over the other road; that for this reason the contract in reference to the side track was made; that prior to the purchase by Bedgood & Co. of the timber from Huber & Stokes, and before the payment of any purchase money therefor, Bedgood & Co. informed the officers of the railway company that they were negotiating to acquire the timber, and desired to know if the railway company would carry out the contract and put in the spur track if the plaintiffs should purchase the timber and have transferred to them the contract aforesaid; that the railway officials notified Bedgood & Co. that the railway company would carry out the contract with plaintiffs should plaintiffs purchase, and did then and there assent to the transfer of said contract to plaintiffs, and on this assent being given plaintiffs parted with \$7,550 in the acquisition of the timber rights aforesaid; that, in addition to the above-mentioned consideration, plaintiffs agreed, as a part of the trade, to assume and carry out the obligations of Huber & Stokes under the contract aforesaid; that plaintiffs were financially responsible, and the railway company agreed for the contract to be transferred to plaintiffs, and agreed and fully bound itself to carry out for plaintiffs all the terms of the contract as they had bound themselves to do with Huber & Stokes, and never denied its obligation until about the time of the filing of this suit; that about March 1, 1900, the railway company insisted under the contract upon plaintiffs giving to it the output of the mill, and again stated to plaintiffs that, if plaintiffs would haul the cut of the mill to the main line, then the railway company would hasten the construction of the spur track, and put it in at once,

and to this end had their engineer mark out the line; that, though plaintiffs were not bound to ship said lumber over defendant's line until the completion of the spur track, yet, relying on the obligation aforesaid, they did, as requested by the railway company, ship the output of their mill over the road. To this amendment the defendant demurred upon several grounds; among others, that the amendment sought to add a new and distinct cause of action. After argument it was ordered and adjudged "that the amendment offered by plaintiffs to said declaration be disallowed on the ground that the same sets up a new and distinct cause of action." Thereupon, on July 21, 1903, Bedgood & Co. brought a new suit, containing, among other things, all the allegations set forth in the foregoing amendment, and alleging the items of damage, the extra expense of hauling lumber to the main line, aggregating \$6,511.91. To this second suit the railway company filed both a demurrer and a plea of res adjudicata. The demurrer was both general and special, and attacked the petition on many grounds; among others, that the contract was vague and indefinite, not assignable, without consideration, void under the statute of frauds, involved the title to land, of which the city court had no jurisdiction, contrary to public policy, being an undertaking by a quasi public corporation to perform an unlimited amount of work during an unlimited time. There were also many other grounds of special demurrer, which it is unnecessary to state in detail. The court overruled the demurrer, to which judgment the railway company, by cross-bill, excepted. The court sustained the plea of res adjudicata, to which was attached as an exhibit the original suit with the amendment and the judgment disallowing the amendment on the ground that it set up a new cause of action. To this judgment sustaining the plea of res adjudicata the plaintiffs excepted.

Shipp & Kline, for Butler and others. J. L. Sweat, J. H. Merrill, and J. A. Wilkes, for railway company.

LAMAR, J. (after stating the foregoing facts). 1-3. The public has an interest in the location of depots and the time and place at which trains must stop for the reception of freight and passengers. A railroad company's power to contract in reference thereto is therefore not unrestricted, but public policy must be considered in determining the legality of such agreements. See the cases cited in 7 Rap. & Max, Ed. Dig. 201-204. But such limitation on its power to contract does not apply to a case where the railroad company covenants to build a spur track from its main line to a sawmill or other private enterprise. The interest of the public cannot in any way be seriously affected by the construction and maintenance of such track. *Austin v. Augusta Co.*, 108 Ga. 692, 693, 84 S. E. 852, 47 L. R. A. 755; *Graham*

v. R. Co., 120 Ga. 757, 49 S. E. 75 (3). Indeed, the validity of such contract was recognized in *Tifton Ry. Co. v. Bedgood*, 116 Ga. 949, 951, 43 S. E. 257. The allegations of the petition then under review were so nearly identical with those in the present case that it is unnecessary further to consider the question raised by the demurrer, which the court properly overruled.

4-6. In the case last cited this court held that, while the contract bound the railroad company to build a spur track for Huber & Stokes, it could not be assigned to Bedgood & Co., so as to give the latter a right of action for its breach. On the return of the remittitur the plaintiffs offered to amend the petition by alleging that they not only had an assignment from Huber & Stokes, but that the railway company assented to the assignment, and agreed that, if Bedgood & Co. would buy the land, build the mill, and ship the lumber over its lines, it would build the spur track. In other words, the amendment averred that there was an independent agreement between Bedgood & Co. and the railway company in reference to the building of the spur track. Instead of reducing this agreement to writing, however, the parties adopted terms which were already in writing, and by reference or otherwise parties can adopt the terms of a contract between others. *American Co. v. Continental Co.*, 188 U. S. 107, 23 Sup. Ct. 265, 47 L. Ed. 404; *International Co. v. Hardy*, 118 Ga. 512, 45 S. E. 311. Compare *Town of Douglasville v. Johns*, 62 Ga. 427 (3). The amendment therefore set out a cause of action. But the court held that it "set up a new and distinct cause of action"; that the original suit was on a contract between Huber & Stokes and the railway company, while the amendment sought to recover for an entirely different cause of action arising out of a contract between different parties. Yielding to that decision, Bedgood & Co. thereupon brought the present action, making therein most of the allegations contained in the amendment which had been thus disallowed by the court. To this the railway company filed a plea of *res adjudicata*, and upon the production of the record in the former suit the plea was sustained.

It is evident that Bedgood & Co. have not had a hearing on the merits, and that the matters set up in the present suit were not passed on in the former. Civ. Code 1895, §§ 5095, 3744. It is further evident that the facts set out in the present case could not "have been put in issue in the cause where the judgment was rendered." Civ. Code 1895, § 3742. For when Bedgood & Co. endeavored to secure a hearing on the new matter, they were prevented from so doing by the order sustaining the company's demurrer. Having secured a judgment sustaining their position, the railway company must be held bound by the ruling which it invoked, and by the judgment in its favor which it secured.

Brown v. State, 109 Ga. 571, 34 S. E. 1031; *Papworth v. City*, 111 Ga. 55, 36 S. E. 311; *Neal Co. v. Chastain*, 121 Ga. —, 49 S. E. 618. The very terms of the record offered in support of the plea of *res adjudicata* show that "the new cause" could not be barred by a judgment in an "old" and "different cause," one so different that the new could not be added to it by way of amendment. This is not a second suit for the same cause of action, but a new suit for a distinct cause of action. That it is new and distinct from that formerly brought appears from the record attached to the plea. The case should not have been dismissed.

Judgment reversed. All the Justices concur.

(121 Ga. 725)

HEWIN et al. v. CITY OF ATLANTA.

(Supreme Court of Georgia. Jan. 27, 1905.)

MUNICIPAL CORPORATIONS—BUSINESS TAX—CLASSIFICATION—TRADING STAMPS—INJUNCTION—ILLEGAL TAX—PARTIES.

1. An agreement between a number of merchants and a corporation provided that the latter should print the names of the former in its subscribers' directory, and circulate a number of copies of the book in a named city, and that the merchants should purchase of the corporation a number of so-called trading stamps, to be delivered to customers with their purchases (and not to be otherwise disposed of), and by them preserved and pasted in the books furnished by the corporation until a certain number had been secured, when they should be presented to the corporation in exchange for the customers' choice of certain articles kept in stock by the corporation.

Held: (1) That the furnishing of the trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense. (2) That authority in a municipal charter "to make just and proper classification of business for taxation," and "to classify business, and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise, and classifying the furnishing of such stamps as a separate business, subject to taxation. (3) That whether the furnishing of the trading stamps be treated as a gift, or as a part of the contract of sale of the merchandise, which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word "business," in a commercial or legal sense, means something done or carried on for a livelihood, profit, or the like. (5) That, even if the General Assembly is authorized to impose a tax upon one who gives away his property, the giving away of property is not a business, within the meaning of a charter provision authorizing the taxation of business.

2. An application for an injunction, filed jointly by the trading stamp company and one or more merchants who are its customers, seeking to enjoin the collection of a tax imposed

under an ordinance of the character above referred to, is not bad for misjoinder of parties.

3. Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and are not compelled to pay the same, and bring separate suits against the tax officer for damages.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by S. W. Hewin and the Atlanta Trading Stamp Company against the city of Atlanta. W. D. Payne and the Atlanta Milling Company filed interventions. From an order denying an injunction, Hewin, Payne, and the Atlanta Trading Stamp Company bring error. Reversed.

S. W. Hewin and the Atlanta Trading Stamp Company, a corporation, filed a petition against the city of Atlanta, in which an injunction was prayed to restrain the city from enforcing an ordinance under which a business tax had been levied upon all persons furnishing "trading stamps to their customers." W. D. Payne filed an intervention, and was duly made a party. The Atlanta Milling Company, a corporation, also filed an intervention, and was made a party, but its name was subsequently stricken from the case. The defendant filed both a demurrer and an answer. At the hearing the judge refused the injunction prayed for, and Hewin, Payne, and the Atlanta Trading Stamp Company excepted.

The trading stamp company entered into an agreement with its coplaintiffs and other merchants in the city of Atlanta, the material parts of which are as follows: The trading stamp company agrees "to print in the directory of their subscribers' book the name, business and address of the party of the second part. To deliver to the people of — said books, soliciting the trade of such persons and explaining to them how to use the same. To advertise, and in every way to use their best endeavor to promote the business interest and trade of the party of the second part." The merchant agrees: "(1) To receive of the party of the first part a sufficient number of trading stamps to be supplied as discounts for cash trade to all persons who may call for them, and the party of the second part also agrees to give out such stamps as follows: One stamp to be given for each and every ten cents represented in a purchase; ten stamps for one dollar, etc. Said party of the second part also agrees not to sell said stamps or dispose of them in any other way. (2) To pay the party of the first part 50 cents per hundred for all stamps disposed of; and to make weekly settlements with the party of the first part for each full page of stamps used. (3) To co-operate in every way possible with the party of the first part in promoting the best interests of all merchants named in said subscribers' book." The nature of the trading stamp business, and the elements

which compose it, are fully set forth in the record, and it appears that three distinct factors co-operate to produce the business: (1) The trading stamp company; (2) the retail merchant; and (3) the stamp collector.

The stamp company maintains a store in which is kept a large number of articles commonly used as necessities and adornments for the house and kitchen. These articles are matters of general commerce. Their sale is not prohibited by the state, nor do they affect the public health or safety. They are not sold by the stamp company. The stamp company issues small books, which contain a directory of the merchants who give its stamps, with the address of the merchant and the character of his stock. These books contain a sufficient number of blank pages in which are pasted the stamps as collected by the retail purchaser. A book is completed when it contains 990 of the stamps. Canvassers are sent out into the city by the stamp company, who invite the proposed retail purchaser to visit the store and inspect the stock of goods carried by the company. When he does this, it is explained to him that, by paying cash for his purchases from any of the merchants whose names are in the book, he will be given a stamp for each 10 cents, 10 stamps for \$1, and so on. He is informed that in order to obtain the stamps he will pay no more for the article actually purchased than he would pay if he purchased either on credit, or the same article from a merchant who did not give the stamp; the cash purchase, with a request for the stamp, does not increase the price paid for the article which is the subject-matter of the sale. He is told to paste his stamps in the book given him, and when he has accumulated 990 stamps he will then be free to select any article he may desire in the store of the company. The company explains to the merchant that it will sell him the pad of stamps for \$5; that by using the stamps he will increase his cash trade; his business will be advertised by the stamp company through its canvassers, by its books, and by it in the newspapers. He contracts to give the stamps at the ratio of one for each 10 cents only upon cash purchases. He stipulates that he will not give the stamps for credit purchases, nor will he sell the stamp by itself.

Briefly stated, the company sells to the merchant a pad of stamps, and, in return, advertises his business. The merchant gives the stamps to his customers for cash purchases. The customer, when he obtains a book, presents it to the trading stamp company, and takes away the article selected by him. There are advantages derived by each of the three parties to this transaction. The pad of stamps cost the company but little for the printing. They are upon common paper, with mucilage applied to the back. From a mere sale of the stamp it derives a large gross profit. Its expenses consist of

taxes, license fee, clerk hire, canvassers, salaries, insurance, and the price paid for the articles with which it redeems the book. The merchant, by getting cash, is enabled to discount his own bills by the payment of cash. He is saved the losses which are incident to a credit business, such as failure, expense of litigation incurred in the attempt to collect accounts, bookkeeper's hire, stationery, and so on. But the chief benefit derived by the merchant is the novel way in which his business is advertised. In place of paying a high price for an advertisement in the newspaper, which is read by but a few of the total subscribers, and followed up by a still less number, he pays, by using the trading stamps, only for an advertisement which actually produces a customer with cash. It is a system of advertising which is claimed to involve no waste, and to be direct, effective, and immediate in producing material results. The consumer pays no more for the article purchased when the stamp accompanies it than he does by purchasing the article either for credit, or from a merchant who does not give the stamp. By paying cash he avoids, to a large extent, the evils which are incident to credit purchases. By merely preserving the stamps until his book is completed, he ultimately obtains an article of considerable value. When the cost of conducting the business is deducted, the trading stamp company realizes whatever profit is derived from the sale of the stamps to the merchant. The business is one into which the element of chance does not enter in any of its various steps. The price paid by the merchant to the company is uniform. It is \$5 for a book of stamps. The stamps are all alike. None of them possess any inherent value. One is the exact equivalent in every respect of all the others. No chance is injected between the merchant and the collector. The merchant is required to give at the ratio of one stamp for every 10 cents. One hundred dollars spent at separate times in dime purchases will produce exactly the same number as \$100 spent in one purchase. No chance appears in the transaction between the collector and the company. When the book is produced and marked "Canceled," the one producing it wanders at will throughout the store of the company, and, when he has determined which article he will take, it is pointed out by him, his address taken, and the article delivered. The article desired by the purchaser is not selected by any turn of dice or cards. His right to any article which he may desire is determined alone by the physical fact of producing a book containing 990 stamps.

The Atlanta Trading Stamp Company opened its store in Atlanta, and a number of merchants bought stamps, and were using the same in their business according to the method outlined in the foregoing summary. In March, 1904, the mayor and general coun-

cil of Atlanta adopted an ordinance, those portions of which are material to the present case being as follows:

"Section 1. Be it ordained by the mayor and general council that any person, firm or corporation who furnish trading stamps, coupons, gift schemes, rebate checks or punch cards or similar stamps or cards, as a part of or premium upon the sales of goods, wares or merchandise, shall pay an annual license therefor of one hundred (\$100) dollars, no license to be issued for less than the sum named for one year.

"Sec. 2. Be it further ordained that the furnishing of the stamps, coupons, etc., named in section one (1) of this ordinance is hereby classified as a separate business, and the above license is fixed thereon for the furnishing of said articles, alone or in connection with another business and provided further that this ordinance shall not be enforced until on and after July 1, 1904."

This ordinance was attacked in the petition upon numerous grounds, and the bill of exceptions assigns error upon the refusal of the judge to grant an injunction upon each of the grounds upon which the ordinance is attacked. The assignments of error which are referred to in the opinion are as follows:

"Because the mere gift of the stamp was not a business, trade, calling, avocation, or profession, and could not be classified as such by the city of Atlanta, nor could said city, under its charter, require the license in question, or any other license, for the furnishing of such stamps by the merchant."

"Because the furnishing of stamps by the merchant was a mere incident or method of conducting the business, and no power was conferred upon the city of Atlanta to require a license for the incidents of a business, or the methods or means by which it was carried on."

"Because, under the charter of said city, the power of the city to require a license for a business which paid an ad valorem tax was limited to \$50."

"Because the attempted classification by said ordinance was purely arbitrary and fanciful, and neither just nor proper."

Rosser & Brandon and John L. Hopkins & Sons, for plaintiffs in error. J. L. Mayson and W. P. Hill, for defendant in error.

COBB, J. The legality of the trading stamp business has been the subject of numerous decisions. It has been held in a number of cases that there is nothing in the business which subjects it to the control of the state or its subordinate public corporations under the police power. While the question has never been before this court, rulings in other states seem with practical, even if not entire, unanimity to concur in the conclusion not only that the business is legitimate, but that the right to engage in it without

undue interference from states and municipalities is guarantied by the Constitution of the United States to the same extent, and subject only to the same restrictions, that can be placed around a person engaged in any lawful business not within the range of the police power. Among the numerous cases that might be cited on this question, we call attention to the following: *City of Winston v. Beeson* (N. C.) 47 S. E. 457, 65 L. R. A. 167; *State v. Dodge* (Vt.) 56 Atl. 983; *State v. Ramseyer* (N. H.) 58 Atl. 958; *State v. Shugart* (Ala.) 35 South. 28; *Long v. State* (Md.) 22 Atl. 4, 12 L. R. A. 425, 23 Am. St. Rep. 268; *Com. v. Sisson* (Mass.) 60 N. E. 335; *People v. Gillson* (N. Y.) 17 N. E. 343, 4 Am. St. Rep. 465; *Young v. Com.* (Va.) 45 S. E. 327. See, also, 57 Cent. Law J. 421. But the legality of the trading stamp business is not involved in this case. The city of Atlanta has not proceeded under the police power. It has by its ordinance treated the furnishing of stamps by merchants as a business, and attempted to tax it as such; the ordinance attempting to place it as a business upon exactly the same footing with other classes of business not within the range of legislation under the police power delegated to the city. While the tax levied is referred to in the ordinance as a license, the ordinance, taken as a whole, shows that it is not to be treated as a license, in the strict sense of that term, but simply as a business tax imposed upon the merchants, just as similar taxes are imposed upon others engaged in pursuits and avocations which are not regulated by the city under its police power.

The city of Atlanta has authority under its charter to impose a tax upon any person carrying on "any trade, business, calling, or avocation, or profession" within the city, not to exceed \$200 in any case, and not exceeding \$50 where the person also pays an ad valorem tax on merchandise or materials. It has also power "to classify business, and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," and also "to make a just and proper classification of business for taxation." See *Anderson's Code of Atlanta* (1899) §§ 64, 65, 250. The ordinance treats the furnishing of trading stamps by a seller of merchandise to his customers as a business, and taxes it as such. It is therefore unnecessary to determine whether one thus engaged in furnishing trading stamps is carrying on a "trade, calling, or avocation, or profession"; the authorities seeking to proceed against the merchants under their power to tax business, and not having sought to classify the furnishing of stamps under any of the other occupations referred to. The questions to be determined, as the case is now presented, are whether the retail merchant, who furnishes trading stamps to his customers under a contract with the trading stamp company, as set forth in the statement of facts, is en-

gaged in a business, within the meaning of the charter of the city authorizing a tax to be imposed upon persons engaged in business, and whether the business is of such a character that it can be disconnected and isolated from the other business of the retail merchant in such a way as to make the retail merchant a member of two classes for the purposes of taxation; that is, a merchant and a furnisher of trading stamps. It is conceded that the trading stamp company is engaged in a business, and the record discloses that it has been taxed, and has paid the tax imposed upon it. But is a merchant who simply furnishes the stamps purchased by him from the trading stamp company, and delivers them according to the contract into which he has entered (that is, to cash customers), in so doing, engaged in a business at all; and, if so, is that business one actually separate and distinct, and legally severable from his business as a merchant, within the meaning of the charter of Atlanta, conferring power and authority to classify businesses for taxation? If the delivery of the trading stamps to a cash customer is purely voluntary as between the merchant and his customer, the transaction being without consideration—a mere gift—then we suppose no one would contend that, in delivering the stamps under such circumstances, the merchant was engaged in a business at all. While the word "business," as used colloquially, carries with it a very broad meaning, still, as used in its legal and commercial sense, it applies only to that in which one engages for the purpose of livelihood, profit, or the like. This idea of business runs through all of the definitions contained in the dictionaries. This interpretation of the word "business" was recognized in the case of *Brush Electric Light Company v. Wells*, 110 Ga. 198, 35 S. E. 365. If the furnishing of stamps by a retail merchant to his customers is therefore a mere gift, it cannot be a business, within the ordinary and usual meaning of that term as used in the commercial world. Laws and ordinances imposing taxes are strictly construed, and authority to tax a business will not, in such legislation, be construed to authorize the taxing of one engaged in transactions from which he cannot possibly derive any profit, which cannot be the means of a livelihood, and which cannot be carried on without inevitable loss; persons so engaged not being engaged in any business, within the ordinary meaning of that term, nor within the meaning in which it must have been used in laws authorizing or imposing taxes. But it is said that the furnishing of the trading stamps is not a gift; that, when the merchant holds out to the world that he will furnish trading stamps to cash customers, such purchasers are entitled to demand the delivery of the stamps, and therefore a cash transaction involves both a sale of the article of merchandise as well as of the stamp; that, while the stamp

has no intrinsic value, it is a symbol of that which has value; that the title to the article finally delivered by the stamp company to the stamp collector is really sold by the merchant when the stamp is delivered; and that the merchant would then be practically engaged in selling every character of article which it is possible for the stamp collector to obtain from the stamp company upon the presentation of the stampbook. If the stamp is sold with the article with which it is delivered, of course the title to the stamp passes immediately upon delivery, and this would also be true if the furnishing of the stamp were a mere gift. The cash purchaser owns the stamp from the time it is delivered into his possession. But can it be properly said that the title to that which is finally purchased with the stamps passes to the customer of the retail merchant at the time the stamp is delivered? Suppose 100 stamps represent 100 different transactions with 100 different merchants, none of whom are engaged in the furniture business, and upon presentation of the stamps to the stamp company a chair is delivered. Could it be contended that each of these 100 merchants is subject to classification as a dealer in furniture on account of the delivery of this chair; and, if not, would they all be taxable as joint sellers of some character? We do not think the contention is sound that the title to the article finally selected by the stamp collector passes at the time of the delivery of the stamp, though the title to the stamp does pass, and whatever that is worth—whatever its purchasing power—is the property of the stamp collector. The stamp simply represents the contract of the stamp company that, when a given number are presented, the holder of the stamps can select an article from the stock of the company in exchange for the stamps. The stamps, in certain quantities, have a purchasing power with the trading stamp company, and their value is simply the result of this purchasing power; and, if the merchant is to be treated as the seller of the stamps at all, he simply sells the right to demand of the stamp company what it has agreed to furnish, and does not sell the article which the trading stamp company actually furnishes to the collector when the book is delivered. The transaction does not differ in essential particulars from one where a merchant, in consideration of a \$100 purchase, returns to the purchaser \$5 in gold. The title to the \$5 vests in the purchaser upon delivery, with the right to use it to purchase any article that it will buy; but certainly the title to the article subsequently purchased was never in the merchant, and cannot pass with the delivery to the customer of the \$5. The result would be the same if, instead of giving \$5, the merchant gave the purchaser an order on another merchant for an article worth \$5. And this would be the same as if the purchaser were given 50 different orders at different times. We do not think that, even treating

the furnishing of the trading stamps as a sale, it is a sale of the article finally procured from the stamp company, so as to make the merchant furnishing the stamp one engaged in the business of selling that particular article, whatever it may be. If the transaction partakes of the nature of a sale at all, it is simply a sale of the stamp.

Treating the furnishing of the trading stamps as a sale and a sale of the trading stamps, is it a business which can be carried on for a livelihood, profit, or the like, when disconnected from every other business? When coupled with another business, it may result in profit flowing to the owner of that business. Standing alone, it cannot be made the subject of profit, even if it can be carried on at all. Under the contract between the stamp company and the merchant, and under the plan, scheme, or device—whatever it may be properly characterized—such a thing as a person engaged in the furnishing of trading stamps, and doing nothing else, does not come within the remotest range of the contract, or the scheme therein provided for. Attached to a business, the furnishing of stamps thrives, and profits result. Detached from the business, it instantly dies; and it dies, not by withering gradually away, but its death is instantaneous. The business of the merchant can live without the sale of trading stamps, but the furnishing of trading stamps cannot live unless there is a business to which it can fasten, and from which it can draw its life blood. What has been said is applicable, no matter what the business to which the furnishing of trading stamps is attached—whether it be that of a merchant, or of one who follows a trade or profession.

If an occupation is so made up as to include two or more separate and distinct classes of business, each of which could be maintained as a separate business—that is, a business in the sense in which that term is above used—then, under the power to classify subjects of business for taxation, the municipal authorities might be empowered to impose a separate tax upon each class of business embraced within this occupation. The department store is a familiar illustration of different classes of business going to make up one occupation. So it is with the hotel keeper, who, in addition to furnishing lodging and meals, sells cigars, liquors, newspapers, operates a barber shop, etc. So where a merchant undertakes himself to deliver his goods to his customers, and operates in connection therewith the business of delivering goods by wagon. See *Johnson v. Macon*, 114 Ga. 426, 40 S. E. 322 (2). In *Macon Sash Co. v. Macon*, 96 Ga. 23, 23 S. E. 120, a tax was imposed upon a wagon which was used by one engaged in the business of contracting and selling builders' supplies; and it was held that the owner of the wagon was liable to the tax, notwithstanding he also paid a tax imposed upon him as a contractor or builder. In *Mayor of Savannah*

v. Dehoney, 55 Ga. 33, it was held that where the city of Savannah had imposed a tax upon the owners or lessees of public stables, and in the same ordinance there was a provision imposing a tax upon every person engaged in the business of transporting passengers by omnibuses, it was a question of fact whether the use of omnibuses was an incident to the business of one who was the owner of a public stable, and, if so, such owner would not be liable to a second tax because he used an omnibus in connection with the business in which he had been taxed. See, also, *Mayor of Savannah v. Feeley*, 66 Ga. 34. But where the business is made up of different elements, and there is only one business, a municipal corporation, under a power to classify businesses, cannot separate this business into its different elements, and call that a business, for taxation which from its nature is dependent for its existence not upon anything inherent in itself, but upon its connection with the business which is itself subject to taxation. In other words, the power of a municipal corporation to tax mere incidents of business is not conferred by a charter which authorizes it to tax a business. In *Rogers v. Sandersville*, 120 Ga. 192, 47 S. E. 557, it was held that, where one engaged in the sale of soda posted bills advertising the sale of his goods, he was not engaged in business as a billposter, but, was simply engaged in performing what was an incident to his business as a seller of soda, and was not liable to a tax under an ordinance imposing a tax upon all persons engaged in the business of a billposter. In the opinion Mr. Justice Lamar used the following language, which is appropriate to the present case: "What he did was for the purpose of making or increasing sales, and the various steps leading to that end were part and parcel of the business of selling." It may be that the General Assembly would have authority to divide an occupation into its various elements, and to tax each, and also tax every incident of every business; but certain it is that a municipal corporation which is simply given the right to tax a business and classify business has not had conferred upon it authority either to divide a business into its elements for the taxation of each, or to tax that which is merely an incident of a business, and which could not alone, from its very nature, constitute a separate and distinct business.

In the cases above cited the furnishing of trading stamps by a merchant to his customers is sometimes referred to as a business, but a careful reading of the opinions will show that this term is used by the writers in its broad and colloquial sense, and that no question similar to the one now before us was under consideration in any of the cases. There are a few cases where the question of taxing the use of trading stamps by merchants has been the subject of decision. In *Humes v. Ft. Smith (C. C.)* 93 Fed. 857, an

ordinance which had the effect to impose a tax upon the use of trading stamps by merchants was upheld; but this tax was levied under an act of the Legislature of Arkansas authorizing cities of certain classes to license, tax, and regulate gift enterprises, and the act defined the term "gift enterprises" so as to include the use of trading stamps by merchants. This was also true of *Lansburgh v. District of Columbia*, 58 Alb. Law J. 488, where the tax was imposed upon gift enterprises under an act of Congress which defined this expression in such a way as to include the use of trading stamps by merchants. In *Fleetwood v. Read (Wash.)* 58 Pac. 665, 47 L. R. A. 205, the Supreme Court of Washington held that, under an act which authorized a city to grant licenses for any "lawful purpose," a license tax for the purpose of revenue could be imposed upon merchants who used trading stamps. The question as to whether the furnishing of trading stamps by merchants was in itself a business, so as to be thus classified for the purposes of taxation, was not involved in that case. In *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916, the Supreme Court of California held that a tax on merchants using trading stamps could not be justified as a tax on a lottery, since a lottery was unlawful and could not be licensed, and that the mere use by one merchant of trading stamps, when other merchants did not engage in their use, was not a sufficient reason for passing an ordinance imposing a tax burdensome in amount, if not prohibitory, on all merchants issuing trading stamps, and that such an ordinance was discriminating in its nature, unreasonable, and void, as in restraint of trade. Mr. McQuillin, in his treatise on *Municipal Ordinances* (page 659), in enumerating the cases in which a tax upon trades, occupations, avocations, etc., had been sustained, mentions gift enterprises, and in a note says the term "gift enterprise" includes trading stamps and similar schemes; the authorities cited by him to sustain this being the *Humes* and *Fleetwood* Cases, *supra*; and these cases, as has been shown, dealt with legislative acts defining gift enterprises. In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term "business," it is not a business at all. It is simply a mode or manner of business—an instrumentality or incident of a business. When resorted to for the purpose of increasing the business to which it is annexed, it occupies the same relation to that business as newspaper advertising, circulars, dodgers, and the like; and, if the city of Atlanta can classify as a business advertising through the medium of the trading stamp, it can also classify as a business advertising through the journals of the city, or through the medium of a person employed to walk the streets with the sand-

wich upon which the goods, wares, and merchandise of a merchant are advertised, or the employment of a dwarf who carries upon his shoulder a barrel upon which the wares of a merchant are advertised, and who stops at every street corner and seats himself upon it. These and other methods equally unique have been resorted to, but no one has ever pretended that the merchant, in thus attempting to increase his profits from the sale of his goods, was engaging in a new business, and not simply carrying on the business of selling goods. In the case of *Keely v. Atlanta*, 69 Ga. 583, in which the provisions of the charter of Atlanta above referred to were under consideration, it was held that these provisions conferred power upon the municipal authorities to divide a general merchandise business into specific classes, such as dry goods, boots and shoes, and the like, and to levy a tax upon each of such classes. There is nothing in that decision which would authorize the taxing of the mere incidents of a business, which in themselves could not exist without the business to which they were annexed. We think that the classification in the ordinance under consideration was unreasonable and arbitrary, and could in no sense be declared just and proper, as the General Assembly has determined must be the case with all classifications for taxation made by the city of Atlanta.

2. It is contended, though, that, even if the judge erred in his conclusion as to the validity of the ordinance, the demurrer was properly sustained, for the reason that there was a misjoinder of parties; that the application for injunction could not properly be made jointly by the trading stamp company and one or more merchants who were its customers. The trading stamp company was not a necessary party, but it seems to us that it was a proper party. While it had paid its tax, and was not affected by the ordinance so far as further taxation upon its business was concerned, the effect of the ordinance was to embarrass and hamper those who dealt with it, and diminish its business, even if it did not have the effect to entirely destroy it. If the city of Atlanta were to impose a business tax upon a merchant, and then impose a tax upon every customer who entered his door, it would be at once apparent that the merchant was vitally and peculiarly interested in the question as to whether his customers should be burdened with this tax. In such a case it would seem that the court would entertain a joint application by the merchant and his customers to restrain the enforcement of the tax attempted to be collected without authority of law upon the customers, when the effect of the collection would be to interfere with the customer by imposing a burden upon his right to buy, and to interfere with the merchant by impairing or destroying his right to sell.

3. It is also contended that injunction was not the remedy; that the parties should have paid the tax under protest, and then have brought suit against the tax officer for damages. If a lawful tax had been levied, and the question was whether the individual came within the description of persons subject to the tax, a question of fact would have been raised, and equity would not interfere, but would remit the party to his action at law. But where there is no law authorizing the collection of the tax, it is no tax, and equity will enjoin the attempt to collect it by any one at the instance of the person who is about to be made the subject of the illegal exaction. *Decker v. McGowan*, 59 Ga. 805; *Vanover v. Davis*, 27 Ga. 354. The ordinance was void. There was hence no law authorizing the imposition of the tax. It was no tax; it was nothing; and the one attempting to enforce its collection was a wrongdoer; and those against whom the exaction was sought to be made could properly unite in an application to a court of equity to enjoin the enforcement of the ordinance, and would not be driven to their separate actions of trespass against the wrongdoer, who, under the guise of a tax officer, was attempting to collect that for which there was no authority.

Judgment reversed. All the Justices concur.

(121 Ga. 785)

COLLINS v. COCHRAN.

(Supreme Court of Georgia. Jan. 28, 1905.)

PARTITION FENCES—AGREEMENT TO MAINTAIN—TRESPASSING ANIMALS—ARBITRATION.

1. Coterminous landowners may by agreement assume an obligation to maintain a partition fence, each agreeing to keep up a designated part; and, if the hogs of one enter the land of the other through a defect negligently left in that part of the fence which the first was bound to repair, he is liable for the damages done by such hogs.

2. The validity of the obligation of the coterminous owners to maintain a sufficient fence against their stock is not affected by the fact that they do not contemplate maintaining, and do not in fact maintain, a fence of such character and height as to constitute a lawful fence, under the statute. By agreement they can take their fence, relatively to the rights of each against the other, from under the operation of the statute.

3. Where in such case the owner of the hogs agreed that the amount of the damages should be submitted to arbitration, and that certain of the hogs should be retained by the party injured as pledge for the payment of the damages assessed, and subsequently the owner of the hogs refused to make a submission to arbitration, the pledgee could recover the reasonable expense in the meantime incurred by him in feeding such hogs.

(Syllabus by the Court.)

Error from Superior Court, Mitchell County; I. A. Bush, Judge pro hac.

Action by J. A. Cochran against D. B. B. Collins. Judgment for plaintiff. Defendant brings error. Affirmed.

Jesse W. Walters and R. J. Bacon, Jr., for plaintiff in error. Sam S. Bennett, for defendant in error.

SIMMONS, C. J. Suit was brought by Cochran against Collins. From the petition and the evidence of the plaintiff, it appeared that the plaintiff and defendant owned and occupied adjoining farms. For more than 20 years there had been between these farms a line fence, which, though not built and maintained in such way as to make it a lawful fence under the statute, was sufficient to keep stock from passing from one farm to the other. The occupants of the farm now owned by plaintiff had kept up the north end of the fence; the occupants of the other farm, the south end. After the plaintiff and defendant had become the owners of the farms, they entered into an agreement to keep up and repair the line fence; the plaintiff undertaking to maintain the north end, and the defendant undertaking to maintain the south end as his predecessors in title had done. The defendant neglected to keep up the south end of the fence, and suffered it to get out of repair, by reason of which a large drove of his hogs broke through into plaintiff's land and destroyed a portion of his crops. The plaintiff drove them out, and gave defendant notice that they had broken through. Still defendant neglected to repair the fence, and his hogs twice again, within the next two days, went upon plaintiff's farm, through the defective south end of the fence, and destroyed a part of plaintiff's crops. The plaintiff impounded some of the hogs, afterward releasing all except a few. These he retained, under an agreement with the defendant, as a pledge, until the amount of the damage could be determined by arbitration. Subsequently defendant refused to submit the matter to arbitration, and plaintiff then brought suit for damages for the breach of the contract as to the maintenance of the fence. He prayed damages for the value of the property destroyed by the defendant's hogs, and also prayed judgment for the cost of feeding the hogs pending the effort to arbitrate. There was a verdict for the plaintiff, and the defendant moved for a new trial. The motion was overruled by the trial judge, and the movant excepted.

1, 2. Coterminous landowners may by agreement or by prescription assume an obligation to maintain a partition or line fence, each agreeing to keep up a designated part. 12 A. & E. Enc. Law (2d Ed.) 1047. The validity of this obligation is not affected by the fact that they did not contemplate maintaining and do not in fact maintain a fence of such character as to constitute a lawful fence under our statutes on the subject of

fences. *Albright v. Bruner*, 14 Ill. App. 812. By agreement they can take their fence, relatively to the rights of each against the other, from under the operation of the statute. *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11. As to the other, each party was bound to maintain his portion of the fence agreed upon, without regard to the character of fence prescribed by the statute. When the defendant violated his contract by failing to repair the portion of the fence which he had agreed to maintain, and his stock, because of such failure to repair, entered through this portion of the fence into the farm of the plaintiff, and damaged the crops, the defendant was liable for the damage so done. The provisions of our Code which relate to fences have no application to the present case. This is not an action for the statutory penalty for failing to maintain a statutory fence, but is a suit for a failure to keep up and maintain a fence under a private contract which, relatively to the parties, took the fence entirely out of the statutory provisions. For this reason the authorities cited by the plaintiff in error have no application. Nor does it matter that the plaintiff below was not shown to have so maintained his portion of the fence as to make it comply with the statutory requirements as to statutory fences. It was enough that he kept up his portion of the fence in accordance with his agreement, and in such manner that stock could not get through it. The defendant made a valid and binding contract with plaintiff. He violated this contract, and, as a direct consequence of this violation, the plaintiff's property was injured. Defendant was therefore liable to respond in damages for the injuries so inflicted.

3. Under the facts in the present case, the plaintiff could recover not only the value of the crops destroyed, but also the cost of feeding those of the hogs which he kept while endeavoring to arrange a submission of the matter to arbitration. The defendant had agreed that the amount of the damage should be submitted to arbitration, and that the plaintiff should in the meantime keep these hogs as a pledge for the payment of the amount assessed as damages. Defendant subsequently refused to make the submission, and should be held liable for the expense of feeding his hogs from the time of his agreement to arbitrate to the time when he finally refused to make the submission.

The motion for new trial complained that the verdict was without evidence to support it, and also that the court erred in charging substantially in accord with what is laid down herein. There was no error in overruling this motion and refusing a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 647)

NEIL v. HARRIS.

(Supreme Court of Georgia. Jan. 27, 1905.)

EXECUTORS AND ADMINISTRATORS—CREDITS—REPAIRS.

1. The rulings, instructions, and judgment brought under review by this writ of error were not in accordance with the judgment and direction of this court when the case was formerly here (45 S. E. 387, 117 Ga. 733); the direction then given having been misconstrued by the trial judge.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Action by Z. H. Neil against W. H. Harris, executor. Judgment for defendant, and plaintiff brings error. Reversed.

John P. Ross, for plaintiff in error. A. L. Miller and L. L. Brown, for defendant in error.

FISH, P. J. Mrs. Neil brought an action against W. H. Harris, as executor of the will of her father, H. O. Harris, and Mrs. Walker, in which she prayed, as against the executor, the specific performance of a parol gift of a house and lot in the town of Ft. Valley, which she alleged had been given to her by her father during his lifetime. She further alleged that, in pursuance of the gift, she had gone into possession of the property during her father's life, and had ever since held it adversely, and, upon the faith of the gift, had made improvements thereon of a permanent nature, both during her father's lifetime and since. The executor, in his answer, denied the gift, and that Mrs. Neil had ever been in adverse possession of the property, but alleged that she had never held it otherwise than permissibly. He further set up in his answer that since the death of his testator he, at the request of Mrs. Neil, and believing that the property belonged to the estate of the testator, had paid out for repairs and improvements on the premises in dispute a given sum from the estate of his testator; and he prayed that, if it should be determined that the title to the property was in Mrs. Neil, it should be made subject to the amount which he had so paid, and that a special lien or charge against it for such sum should be declared in his favor, as executor. Mrs. Neil, by way of replication to the answer of the executor, alleged that the executor paid for the repairs and improvements he claimed to have made on the premises out of her distributive share in her father's estate, in accordance with an agreement between her and the executor at the time. Upon the trial, evidence was submitted in behalf of both Mrs. Neil and the executor upon this issue. The trial resulted in a verdict for Mrs. Neil. The executor moved for a new trial on many grounds, in one of which it was alleged that the court erred in refusing to instruct the jury, as requested by him, that if the

jury should find in favor of the gift, and "if it be shown that the executor, acting in the belief that the property in question was the property of the estate, at the request of the plaintiff, or with her knowledge and consent, put improvements on the property to preserve it as an asset of the estate, then [the jury] should direct that the value of such improvements, with seven per cent. interest thereon since they were made, be set up as a charge against the property superior to the claim of the plaintiff." In another ground of the motion it was alleged that the court erred in failing to submit to the jury the question as to the amount expended by the executor for repairs and improvements on the property. A new trial was refused, and the case was brought to this court, and is reported in 117 Ga. 733-749, 45 S. E. 387. This court there held that the request to charge in reference to the executor's right to recover the amount which he, at the request of the plaintiff, had spent in improving the property, if it had stood alone, would have been a proper and pertinent charge; but as it was made in connection with and as a part of another request, which was not legal and appropriate, it was not incumbent upon the court to separate the good from the bad, and therefore there was no error in refusing to give the charge as requested. It is obvious that when this court there held that a charge that if the jury found for the plaintiff, and further found "that the executor, acting in the belief that the property in question was the property of the estate, at the request of the plaintiff, or with her knowledge and consent, put improvements on the property to preserve it as an asset of the estate, then [the jury] should direct that the value of such improvements, with seven per cent. interest thereon since they were made, be set up as a charge against the property superior to the claim of the plaintiff," would have been a proper and pertinent charge, it, of course, held that the right of the executor to recover for money expended in improving property belonging to the plaintiff depended upon the existence of such a state of facts. Clearly, then, the executor could not lawfully reimburse himself out of the plaintiff's property for money expended by him for improvements thereon, if her contention was true—that he had paid for improvements upon property which he recognized to be hers, as an advance payment to her upon her distributive share in the estate of her father. In other words, if the legal effect of the transaction was that she, through him, paid for the repairs and improvements upon the property with money which he merely advanced to her upon and against her distributive share in the estate of her father, he could not recover the money from her. But if she did not thus, through him, pay for the repairs and improvements, but he, at her request, or with her knowledge and consent, paid for them, not for her, but for the estate,

believing that the property belonged to the estate, he could reimburse himself, as executor, from the property for the money so paid by him. Such was the intention of this court when it further held, in ruling upon another ground of the motion for a new trial, that, "under the pleadings and the evidence, the court did err in failing to instruct the jury to find the amount which the executor had expended for repairs and improvements on the property, as he was under no obligation to repair or improve the premises for the plaintiff, and, if he did so, he was entitled to be reimbursed for the money so paid out by him." While this language, standing alone, may not have been sufficiently guarded and qualified to clearly express the court's intention and meaning, yet, construed in the light of the issue made by the contentions of the parties in reference to the claim of the executor for money expended for repairs and improvements upon the property, and of the ruling of this court upon the executor's request to charge, its meaning was and is that the trial court, in framing and submitting to the jury questions of fact to be determined by them as a basis for the court's decree, should have instructed the jury to find the amount, if any, which the executor had expended for repairs and improvements upon the property in the belief that it belonged to the estate of his testator. Such, too, was the meaning of the language with which the present writer, speaking for the court, concluded the opinion, and gave direction for the new trial which was granted, when it was said: "As the judgment of the court below is reversed solely upon the ground that the court erred in failing to instruct the jury to find what amount, if any, the executor had, at the request or with the consent of the plaintiff, expended for repairs and improvements upon the premises in dispute, a new trial is ordered upon this question alone, with direction that in all other respects the decree rendered in favor of the plaintiff be allowed to stand; and, if there should be a finding in favor of the executor upon the question indicated, then the said decree shall be so amended as to provide that the land recovered by the plaintiff be subjected to the repayment to the executor of the amount so expended by him, with lawful interest thereon." The sole question here, referred to, upon which the new trial was ordered, was necessarily a question made by the pleadings in the case; and that question, as made by the pleadings, was what amount, if any, the executor had, at the request or with the consent of Mrs. Neil, expended for the estate in repairing and improving the property in controversy, and not what amount he had so spent for her in part payment of her distributive share in the estate of her father. The parties were not at issue as to whether the executor had paid for any repairs and improvements upon the property,

but they were at issue upon the question whether he paid for them for the estate, believing the property belonged to it, or paid for them for Mrs. Neil, knowing the property belonged to her, as an advance to her upon her distributive interest in the estate. By her pleadings she admitted that the executor had paid for them, but alleged that "they were made by said executor upon the distinct agreement that they were to be charged against the distributive share of petitioner," and averred, "upon information furnished her by said executor himself, that they were in fact so charged." When the case came on for another trial in the superior court, the judge construed the direction given by this court as a "mandate" that the single issue to be tried by the jury should be "what amount, if any, the executor, W. H. Harris, had, at the request or with the consent of the plaintiff, expended for repairs and improvements on the premises in dispute," and so instructed the jury. Mrs. Neil offered evidence tending to show that the executor, at the time that he paid for the repairs and improvements made on the premises in dispute, knew that the property belonged to her, and that he, as executor, made such payments out of funds belonging to the estate of his testator as a part of her distributive share in such estate. The executor admitted that the estate had always been solvent. The court rejected this evidence offered by Mrs. Neil. The former decision of this court and the direction therein given were misconstrued by the learned trial judge, and he therefore erred in refusing to permit Mrs. Neil to introduce evidence in support of her contention as to the payments made by the executor for repairs and improvements, and also erred in his instructions to the jury limiting the issue to be tried as above indicated. It certainly was not the intention of this court, in the decision heretofore rendered and the direction then given, to eliminate from the case the issue made by the pleadings as to the payments made by the executor for repairs and improvements on the property in controversy; and, in view of the pleadings then, and what was said in the opinion rendered by this court, we do not think the construction placed by our learned Brother of the superior court upon the direction given by this court was required, though the language used by the writer may not have been as clear and unambiguous as it should have been. In justice to him, however, it may be said that, while he was clearly of the opinion that the construction which he placed upon the language of this court was correct and required, his charge clearly indicates that he thought the instruction given by this court, as he interpreted it, was too limited as to the issue to be submitted to the jury upon the new trial, and that he ruled upon the admission of evidence and instructed the jury as he did simply be-

cause he felt that the ruling of this court compelled him to do so.

Judgment reversed. All the Justices concur.

(121 Ga. 798)

SHARPE & DRAKE v. HODGES.

(Supreme Court of Georgia. Jan. 28, 1905.)

ADMINISTRATOR — ACTION BY—EVIDENCE—COLLATERAL ATTACK.

1. There was no error in admitting in evidence a paper purporting to be letters of administration issued to the plaintiff, over the objection of the defendants that the paper on its face did not show whether it was an original or a copy.

2. A judgment of a court of ordinary appointing an administrator cannot be collaterally attacked by testimony contradicting the recitals contained in the letters of administration issued upon such judgment.

3. Irrespective of the right of the defendants to collaterally attack such judgment on the ground of fraud in its procurement, the court properly instructed the jury to find against the defendants on this issue, as there was no evidence of fraud.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; A. G. Powell, Judge pro hac.

Action by C. S. Hodges, administrator of Alley Huguley, against Sharpe & Drake. Judgment for plaintiff, and defendants bring error. Affirmed.

Donalson & Donalson and T. S. Hawes, for plaintiffs in error. Albert H. Russell and B. B. Bower, for defendant in error.

EVANS, J. This was a proceeding brought by C. S. Hodges, as administrator de bonis non cum testamento annexo of Alley Huguley, against Sharpe & Drake, a partnership, to recover possession of a certain tract of land and damages for trespasses already committed thereon, and to obtain an injunction to restrain further trespasses. The defendants denied the title of the plaintiff, and averred that they had a prima facie title to the land, and that the appointment of the plaintiff as administrator amounted to a legal fraud upon them, he having procured the appointment for the sole purpose of recovering possession of the land for his own private benefit and profit, and not for the benefit of any heir or creditor of the estate of Alley Huguley. On the trial the plaintiff showed the loss of the original grant from the state to Alley Huguley, and introduced a certified copy thereof. He also introduced a paper purporting to be letters of administration de bonis non cum testamento annexo granted to him on the estate of Alley Huguley, and proved damages to the freehold committed by the defendants. The defendants offered no evidence, and the jury, following the instructions given them by the court, returned a verdict in favor of the plaintiff for the premises in dispute and \$500 damages. The defendants, by direct bill of exceptions,

complain of various rulings made by the trial court.

1. Objection was made to the introduction of the paper purporting to be letters of administration on the ground that it did not appear on its face whether it was an original or a copy. There is nothing in the record indicating that the paper was a copy. It was submitted to the presiding judge, and he inspected it, and allowed it in evidence. The paper was regular on its face, and the court evidently assumed it to be the original letters of administration granted by the ordinary. If the paper was not in fact a genuine document, as it purported on its face to be, the defendants were at liberty to so show by evidence. There was no merit in the objection made to its introduction.

2. The appointment of an administrator by the court of ordinary is a judgment by a court of general jurisdiction with respect to this subject-matter. Its judgments import verity, and are not open to attack in any other forum. The letters of administration recited every essential jurisdictional fact, and it is to be presumed, until they are set aside in the proper court, that the recitals are true. The defendants undertook to collaterally assail the letters of administration by showing, on the cross-examination of the plaintiff, that he had not taken oath as administrator before the ordinary who had issued the letters of administration. So far as the record discloses, the defendants were trespassers, and were in no wise interested in the Huguley estate. A person not interested in the assets of an estate has no right to raise any question as to the legality of a judgment, regular on its face, appointing an administrator. *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134. His only concern is that, if the plaintiff shows such title in the estate as will authorize a recovery against him, he will not be subjected to suits by any other person as heir at law or as administrator of the same estate. If the administrator relies for his authority to bring the suit upon letters of administration issued by the proper court, and regular on their face, a judgment in that suit would protect the defendants against further suit by any other representative of the estate, or any person claiming an interest therein. It follows, therefore, that the court properly overruled the motion of the defendants to rule out the letters of administration on the ground that it appeared from the testimony of the plaintiff that the letters of administration were illegally issued, in that he did not take oath or execute bond before the ordinary who had issued them.

3. It appeared from the testimony of the plaintiff that at one time Hodges & Powell, a firm of which the administrator was a member, claimed title to the land by virtue of a purchase from some person holding adversely to the Huguley estate, and had brought suit against Sharpe & Drake to re-

strain a trespass upon the identical land now in controversy, which suit was still pending. The plaintiff admitted that his original purpose was to get the land, but he discovered that the title was in the Huguley estate, had opened up correspondence with the heirs of that estate, and as a result of the correspondence had procured the appointment as administrator, and sought to recover the land for the purposes of administration. He denied that the suit was for his private benefit, but stated that in the event of a recovery he would like, if able to make a satisfactory trade with the persons entitled to the land, to buy it from them. He insisted, however, that the suit was for the benefit of the estate. The court held that this testimony was insufficient to show any fraudulent purpose on the part of the plaintiff, and refused to submit the issue of fraud to the jury. As has already been pointed out, the appointment of the administrator and his letters were regular on their face, and were not open to collateral attack, and the evidence could very properly have been excluded by the court. However, no objection seems to have been made to the introduction of this evidence, and the court merely held, as matter of law, that the issue of fraud set up in the defendants' answer was not sustained, and directed the jury not to consider this issue, but to confine their investigation to the question of title and to the amount of damages sustained by the plaintiff. The court committed no error in so doing. The evidence relied on to establish the plea of fraud, even if that plea could properly be set up in defense to the action, was insufficient to establish the alleged fraudulent purpose of the plaintiff, and a finding in favor of the defendants on that issue would have been unwarranted either by law or the evidence.

Judgment affirmed. All the Justices concur.

(121 Ga. 659)

MORGAN COUNTY v. WALTON COUNTY
et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

TAXATION—PERSONAL PROPERTY—SITUS—MANUFACTURING PROPERTY.

1. Under the undisputed evidence, it was proper for the court to direct a verdict. The verdict directed, while in the main correct, was not so in every particular. The judgment will therefore be affirmed, with direction that the court below so amend the verdict and judgment as to make them conform to the principles of law announced in the accompanying opinion.

(Syllabus by the Court.)

Error from Superior Court, Walton County; R. B. Russell, Judge.

Action by the county of Morgan against the county of Walton and others. From the judgment, both parties bring error. Judgment on bill of exceptions of the county of Morgan affirmed, with directions. The other appeal affirmed.

E. H. George and Saml. H. Sibley, for Morgan county. Henry D. McDaniel and J. W. Arnold, Sr., for Walton county, et al.

CANDLER, J. This case was before this court at the March term, 1904, and a full statement of the facts out of which it arose will be found in the opinion rendered by Mr. Justice LAMAR in *Walton County v. Morgan County*, 120 Ga. 548, 48 S. E. 243. See, also, *Morgan County v. Walton County*, 120 Ga. 1028, 48 S. E. 409. Neither of the parties was satisfied with the result of the last trial, at the conclusion of which a verdict was directed by the court, and both the plaintiff and the defendants filed bills of exceptions. On the return of the remittitur from this court in the case of *County of Walton v. County of Morgan*, 120 Ga. 548, 48 S. E. 243, the defendants amended their answer, and for the first time claimed that if the part of the tax act of 1902, under the terms of which the tax in question was sought to be recovered from the county of Walton by the county of Morgan, was constitutional, it was not applicable to the machinery and other personal property used in connection with the manufacturing plant. On the former hearing the county of Walton insisted that the act, if constitutional, only applied to the real estate and to the personal property that might be in or connected with the buildings containing the machinery, and not to personal property outside and not connected with said buildings, or the machinery in the buildings. On the return of the remittitur this position was changed, and it offered an amendment claiming that the personal property and the machinery in the mill were not taxable. The following, taken from the amendment offered, clearly states the contention: "The defendant avers that the machinery in the mill buildings * * * is personal property, and not part of the realty, and was returned as such personalty, as provided by law. The various machines, attachments, appliances, implements, and tools for preparing, picking, carding, spinning, warping, dyeing, weaving, finishing, and baling, which comprise the machinery employed to convert cotton into thread and cloth in the High Shoals manufacturing plant, can be removed from the mill buildings without essential injury thereto or to the freehold, or to such machines and other articles in question; not being actually attached to the realty, but movable at pleasure. The return of the company for 1903 embraced, in the item, 'Machinery, \$67,000.00,' all the numerous small articles, attachments, appliances, implements, tools, furnishings, and supplies used in running the machinery, not being parts of the machines and not permanently attached thereto, as well as supplies, such as bobbins, spools, shuttles, harness, roving cans, and other findings, but not including such supplies as dyestuffs, oil, sizing, and similar arti-

cles which are consumed in the manufacturing process, and which were returned in the item, 'Raw material, \$34,000.00'; the value of the articles so embraced in the item, 'Machinery, \$67,000.00,' relatively to the whole valuation, being \$3,000 to \$4,000, or approximately five per cent. of \$67,000." On the trial it appeared that some of the machinery located in the main building, which was clearly shown to have been in Morgan county, was not permanently attached to the building, and that all of it could be removed without detriment to the building; that some of the appliances were not only movable in fact, but were actually moved from one place to another in the mill; that the machines not screwed down were worth about \$4,000; that the dyestuffs and things actually used in the making of the goods were worth from \$4,000 to \$6,000; and that, without knowing exactly how much cotton was in the mill on the 15th of March, some of it was actually in the mill, being manufactured. The witness would say that perhaps \$20,000 worth of it was actually in the mill, in the process of manufacture. He thought as much as a half of it was at High Shoals the day the return was made. The court held that the item of machinery was all taxable in Morgan county, except the machines not screwed down, and that the personalty used with the machinery, such as roving cans, bobbins, shuttles, etc., worth \$4,000, was not liable for taxation in Morgan county; thus reducing the amount returned under the head of machinery from \$67,000 to \$59,000. The remainder of the property embraced in the return was held to be taxable in Walton county. Morgan county excepted, and assigns error especially upon the ruling depriving it of the tax on \$4,000 worth of machinery not screwed down; \$4,000 of cans and machinery necessary to the operation of the plant, and actually used therein; \$1,000 for horses and wagons used in the operation of the plant; \$4,000 to \$6,000 worth of dyestuffs actually used in the operation of the plant; the cotton actually in the mill, and used in the operation of the mill, estimated at one-half of the return under the head of "material on hand." Walton county and the High Shoals Manufacturing Company excepted to the refusal of the court to give certain charges requested in writing, and also to the direction of a verdict against them; claiming that there were issues of fact in the case which should have been passed upon by a jury.

In view of the able opinion of Mr. Justice LAMAR, delivered when this case was formerly before this court, it is entirely unnecessary to discuss many of the questions made by the records now before us. Under the undisputed evidence in the case, the court below should have directed a verdict, and, in the main, the verdict directed was proper. Prima facie, personal property is returnable where the owner resides. Under

the Constitution, the Legislature may fix a different situs for all personal property. It may likewise make a classification which is not arbitrary, and provide that certain classes of personal property, because of their relation to real estate, and the uses made thereof on the real estate, may be taxed therewith, and treated as a part thereof for purposes of taxation. This is wholly independent of the question as to whether the personal property has lost its character as personalty, and, by becoming a fixture, is to be treated as a part of the realty. Where the classification is general, and based upon the fact that the personalty is used in connection with the operation of the realty, the Legislature, by general law, may, under the Constitution, require such property to be returned along with and as a part of the real estate with which it is thus intimately associated by use. It was therefore ruled when the case was here before that "the General Assembly may provide that fixtures, machinery, or improvements in manufacturing plants, or personal property attached thereto or in actual use therein, shall be returned and taxed with the real estate." In the opinion rendered at that time (*Walton County v. Morgan County*, 120 Ga. 557, 48 S. E. 247) it was said: "But in view of the provision of the Constitution that taxes must be collected under a general law, [the General Assembly] could not provide that cotton or merchandise, or other personal property dis severed from real estate, belonging to individuals, should be taxed in one county, and the same class of property belonging to a corporation should be taxed in another county. * * * Nor was the question as to where such personalty should be returned in any way affected by the fact that the goods had been manufactured by the company, nor by the use to which the cotton might be put after March 15, 1903. The source and intended uses of the property did not put it into a class by itself, but left it to be returned in the same way as similar property would be returned by other taxpayers." Consequently it was decided that merchandise in the store, cotton, vehicles, and live stock were to be returned in Walton county, where the manufacturing company had its corporate residence. The record in the case now before the court raises the question, however, as to where cotton and raw material in process of manufacture should be returned. Confessedly, it is on the dividing line. It is not machinery; it is not a part of the plant; and yet it was actually in the mill on the day of the assessment of taxes. But clearly it was not taxable in Morgan county as cotton. After it was manufactured it was not taxable in Morgan county as goods. During the transition period it did not, however, come within the letter or the spirit of the rule under which the machinery and the appurtenances could be classified as fixtures physically attached to the land, or appurte-

nances which were either parts of the machine or necessarily used in connection therewith. The raw material was dissevered from the plant. It was only temporarily in the mill, and was as much taxable in Walton county as though the company had shipped it to a distant state, there to be converted into cloth. We think the court properly held that material, raw, manufactured, and in process of manufacture, was taxable in Walton county; that the live stock and vehicles were likewise there taxable; but that all the machinery, whether attached to the building, or consisting of appliances used in connection with the machinery, were, when properly classified, a part of the plant, and taxable in Morgan county.

In view of the fact that the conclusion reached by the court below was, in the main, correct, and as it is desirable to put an end to this protracted litigation, we affirm the judgment on the bill of exceptions brought by Morgan county, but direct that the court below so amend the verdict directed on the trial as to require the county of Walton to pay to the county of Morgan the tax on all the machinery, whether attached to the building or not, and upon all the appliances used in connection with the machinery; the whole amounting, in value, according to the return, to \$8,000. The judgment on the bill of exceptions brought by the county of Walton and the High Shoals Manufacturing Company is affirmed.

Judgment on bill of exceptions filed by the county of Morgan affirmed, with directions; on the other bill, affirmed. All the Justices concur.

(121 Ga. 831)

WALL v. MOUNT.

(Supreme Court of Georgia. Jan. 30, 1905.)

STATUTORY BOND—ESTOPPEL—EXECUTION—CLAIMANT'S BOND—PLEADING—AMENDMENT—APPEAL—JURISDICTIONAL AMOUNT.

1. An instrument void as a statutory bond may yet be good as a common-law obligation.

2. Where the obligors have secured an advantage arising from the instrument being treated as valid, they are not entitled to the additional advantage of having it treated as invalid.

3. Where, therefore, instead of making the instrument payable to the levying officer, as required by statute, the claimant made the same payable to the plaintiff in *fi. fa.*, and agreed to produce the property in the event it was found subject on a trial of the claim case, the obligors would be liable to the plaintiff on proof that the officer had surrendered the property to the claimant by virtue of the bond, and that thereafter the same had been found subject on the trial of the claim case.

4. The plaintiff was entitled to the allowance of the amendment setting up the facts entitling him to recover on the instrument as a voluntary bond.

5. The right to appeal is governed by the pleadings, and in a suit on a bond in the penal sum of \$100, with no allegation that the damages were \$50 or less, the court properly refused to sustain the motion to dismiss the appeal on the ground "that the original summons

and cause of action did not show that the amount involved exceeded \$50.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; H. C. Sheffield, Judge.

Action by A. T. Wall against William Mount and another. Judgment for defendant Mount, and plaintiff brings error. Reversed.

Wall obtained a judgment against Hucky. The execution was placed in the hands of Watson, special constable, who it is alleged was not familiar with the duties of the office. He levied the *fi. fa.* on certain cotton which was claimed by Hillsman. The latter, with Mount as security, gave a bond in the sum of \$100, payable to Andrew Wall, plaintiff in *fi. fa.*, reciting the levy, and conditioned that, "if the principal shall well and truly deliver said property to said officer [Watson] on the day and place of sale, provided such said property shall be found subject to said *fi. fa.*, this bond to be void." On this instrument was indorsed, "Bond approved. J. W. Simmons, N. P. & Ex. J. P." There were several trials of the claim case, and it appears that during the litigation Hillsman left the county, and the property was afterwards found subject. Thereupon Wall brought suit in the justice's court against Hillsman, principal, and Mount, security. The summons required the defendants "to answer the complaint of A. T. Wall in an action upon a bond, a copy of which said bond is annexed to this summons." There was a return of "non est" as to Hillsman. Mount alone was served, and he alone defended. He denied any indebtedness, and alleged that the bond was void; that it was not a forthcoming bond; that it had never been delivered to or accepted by the levying officer, nor had it been properly approved. In the justice's court the judgment was in favor of the plaintiff. Mount appealed. Wall moved to dismiss the appeal because the original summons and cause of action did not show that the amount involved exceeded \$50. He excepted to the court's refusal to sustain his motion. During the trial it appeared that the bale of cotton weighed 575 pounds, that at the time of the levy it was worth 10½ cents per pound, and that at the time the bond was given it was worth 9%. The plaintiff offered interrogatories of a justice of the peace who presided in one of the trials of the claim case. He testified that on the trial there was in court a forthcoming bond for the cotton; that after the trial Hillsman, the claimant, took the case by certiorari to the superior court; and that in answering the certiorari the justice returned the forthcoming bond, with all the other papers, to the clerk of the superior court. It was admitted that the bond sued on was the same as that returned by the justice to the clerk. Wall, the plaintiff, testified that in one of the trials in which the cotton was involved Mount swore "that he gave bond for

the bale of cotton, took possession of it, sold it, and kept the money, and was holding the proceeds to await the result of the litigation." The court refused to allow the plaintiff to introduce in evidence the bond sued on, holding that both the evidence and the face of the bond failed to show that it had been accepted and approved by the levying officer, to which ruling Wall excepted. Wall then offered what was called an "equitable amendment," setting up, among other things, the fact that the defendant, by reason of the invalid bond, had got possession of the property levied on, sold the cotton, and was now in possession of the proceeds; and that therefore the plaintiff was entitled to a judgment against the defendant for its value. This amendment was disallowed, and the plaintiff excepted. The bond having been excluded from the evidence, the court, at the conclusion of the plaintiff's case, directed a verdict for the defendant.

W. H. Gurr, for plaintiff in error. H. A. Wilkinson, for defendant in error.

LAMAR, J. (after stating the foregoing facts). 1-8. The cotton was under levy. Presumptively it would have been sold, and the proceeds turned over to the plaintiff in *fi. fa.* The sale was prevented by the claimant giving a bond, in which he bound himself to return the property in the event it was found subject to the execution on the trial of the claim case. This bond was improperly made payable to Wall, the plaintiff in *fi. fa.*, instead of to Watson, the levying officer, as required by Civ. Code 1895, § 4615. It was therefore defective as a forthcoming bond. But if it was the means by which the possession was changed from the constable to the claimant, if it served the purpose for which it was given, if it injured the plaintiff and benefited the principal, it was not void, but effective as a common-law bond. The obligors, having secured the advantage arising from the instrument treated as valid, ought not to be relieved from liability by securing the additional advantage of having it treated as invalid. And there are many cases in our Reports where, though bonds failed to comply with the order or statute under which they were given, the principals and their sureties were held liable thereon by virtue of a common-law liability. The benefit secured was sufficient consideration to support the cause of action thereon, irrespective of any question depending upon the fact that the instrument had a seal. It was error to exclude the bond when it was offered in evidence. *Farmers' Co. v. Middle Georgia Co.*, 94 Ga. 673, 20 S. E. 117; *Ware v. Laird*, 93 Ga. 342, 20 S. E. 635; *White v. Spillers*, 85 Ga. 555, 11 S. E. 616; *Everett v. Westmoreland*, 92 Ga. 671, 19 S. E. 37 (4); *Anderson v. Blair*, 118 Ga. 212, 45 S. E. 28; *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *Justices v. Sloan*, 7 Ga. 34; *Stephens v. Crawford*, 8 Ga. 499; *Dennard v. State*,

2 Ga. 137; *Park v. State*, 4 Ga. 329; *Jones v. Gordon*, 82 Ga. 570, 9 S. E. 782; *Justices v. Ennis*, 5 Ga. 571; *Colley v. Morgan*, 5 Ga. 178; *Faircloth v. Freeman*, 10 Ga. 251; *Bowden v. Taylor*, 81 Ga. 199, 6 S. E. 277 (2).

5. Even if the contention of plaintiff is correct, this was not a suit upon a forthcoming bond, and there was no presumption that it was given for exactly twice the value of the property levied on, and nothing to indicate that the recovery could be limited to \$50. Besides, the right to appeal is fixed by the pleadings. This being an action on a bond in the penal sum of \$100, the court properly refused to dismiss the appeal on the ground "that the original summons and cause of action did not show that the amount involved exceeded \$50." But, for the reasons stated on the other branch of the case, there should be a new trial.

Judgment reversed. All the Justices concur.

(121 Ga. 749)

CITY OF ELBERTON et al. v. HOBBS.

(Supreme Court of Georgia. Jan. 28, 1905.)

WATERS AND WATER COURSES—RIPARIAN RIGHTS—CONDEMNATION OF WATER—INJUNCTION.

1. A municipality which buys a piece of land on a nonnavigable stream several miles distant from its corporate limits does not thereby become entitled as riparian owner to take from the stream a supply of water for the inhabitants of the city. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *City of Emporia v. Soden*, 25 Kan. 588, 605, 37 Am. Rep. 265; *Sparks Mfg. Co. v. Newton*, 41 Atl. 385, 57 N. J. Eq. 367; *Id.*, 45 Atl. 596, 60 N. J. Eq. 399; *1 Farnham, Waters and Water Rights*, § 137.

2. The right of the owner of land through which a nonnavigable stream flows to have its waters come to his land in the natural and usual flow is inseparably annexed to the soil, and is parcel of the land itself, and comes within the protection of the constitutional provision which forbids the taking of private property for public purposes without just and adequate compensation being first paid. *Persons v. Hill*, 33 Ga. Supp. 141; *Hough v. Doylestown*, 4 Brewst. 333.

3. Equity will enjoin a municipal corporation from taking a water supply from a stream in violation of the rights of a riparian owner, though he may not at once be seriously injured thereby. *Persons v. Hill*, *supra*; *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 45 S. E. 267, 118 Ga. 255; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Pine v. New York (C. C.)* 103 Fed. 337; *1 Farnham, Waters and Water Rights*, p. 616.

4. Applying the principles above announced to the facts of the present case, the court did not err in granting an interlocutory injunction.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by L. G. Hobbs against the city of Elberton and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Jos. N. Worley, for plaintiffs in error. Dean & Hobbs, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 750)

CITY OF ELBERTON et al. v. HOBBS.
(Supreme Court of Georgia. Jan. 28, 1905.)**EMINENT DOMAIN—RIGHT TO PROCEED.**

1. Failure to secure the property by contract, by reason of the inability of the parties to agree upon the compensation to be paid therefor, is an essential prerequisite to the condemnation of private property for public uses. Civ. Code 1895, §§ 4653, 4659.

2. The grant of an interlocutory injunction was not erroneous.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by L. G. Hobbs against the city of Elberton and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Jos. N. Worley, for plaintiffs in error.
Dean & Hobbs, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 781)

CENTRAL OF GEORGIA RY. CO. v. BAGLEY et al.

(Supreme Court of Georgia. Jan. 28, 1905.)
RAILROADS—KILLING STOCK—PETITION—OWNERSHIP—NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

1. An allegation in a petition by two plaintiffs that certain personalty therein described is "the property of petitioners" is, in effect, an averment that they are joint owners thereof; there being nothing in the petition to indicate several ownership by one or the other in any portion of the property.

2. That portion of the petition which contained the averment of negligence was sufficient as against the demurrer filed thereto.

3. The assignments of error on the admission of evidence were not well taken.

4. The fact that a witness is an employé of one of the parties is a proper matter to be considered by the jury in passing upon his credibility.

5. The extracts from the charge which were assigned as error were not subject to the objections made thereto. The evidence warranted the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by S. E. Bagley and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

See 48 S. E. 179.

The plaintiffs brought suit against the defendant for damages alleged to have arisen from the killing of two mules and a horse by one of the defendant's trains, the petition alleging that the animals were "the property of petitioners." The allegations of negligence set out were as follows: "Petitioners show that the negligence in running said train consisted of the facts, that the engine pulling said train was not properly sounded, and the engineer did not keep a proper look-out ahead of the engine, and did not blow the whistle and ring the bell, and did not

try to stop the train when petitioners' mules were discovered on the track in front of the train, but ran the train in a very fast and reckless manner, thereby injuring and damaging petitioners as aforesaid." The defendant demurred on the ground that the petition did not allege whether the plaintiffs owned the animals jointly or as partners, or whether each owned one or more of the animals, and that the allegations of negligence were insufficient, in that it was not alleged that after the mules came on the track the engineer had any time to do any of the acts the failure to do which is alleged to be negligence, or that he had any time to do these acts after the mules were discovered on the track. The demurrer was overruled, and the defendant excepted pendente lite. The trial resulted in a verdict for the plaintiffs, and the defendant's motion for a new trial was overruled. It complains of the judgments overruling the demurrer and the motion for a new trial.

Wm. D. Kiddoo, for plaintiff in error.
Shipp & Sheppard, for defendants in error.

COBB, J. 1. It is well settled that allegations that the plaintiff "is owner of" the property involved, or that it "belongs" to him, or he is "seised," and the like, are allegations of an ultimate fact, and not of a mere conclusion of law. See 21 Enc. P. & P. 718, and citations. The demurrer seems to concede this, and avers that an allegation that the animals were "the property of petitioners" does not sufficiently show the character of ownership. The necessary inference to be drawn from this averment is joint ownership in each of the animals referred to in the petition. It is certainly not to be inferred that one of the plaintiffs owned one animal, and the other two.

2. The allegations of negligence in the petition were sufficient. The plaintiffs relied on certain omissions of duty which they claimed constituted negligence. These omissions were subject to explanation by the defendant. It could show that, relatively to the plaintiffs' property, the omissions did not constitute negligence, because the animals could not have been seen earlier, and that after they were seen the engineer did not have time to stop the train before striking the animals. These were, however, matters of defense, and need not have been alleged in the petition.

3. It is complained in the motion for a new trial that the court refused to allow the engineer to answer the following question: "Now, then, was it possible for you to do anything else besides what you did to prevent the injury?" The court allowed the witness to testify that after seeing the animals he did everything in his power to stop the train. In two other grounds of the motion, complaint is made of the court's refusal to allow similar questions to be answered by the engineer. We think the court

went quite far enough in allowing the witness to testify that he did everything in his power to stop the train. The evidence sought was a conclusion of the witness, resting largely upon his mere opinion. This kind of evidence is usually inadmissible. In a case like the present it is better for the engineer to state what he did, and leave to the jury the determination of the question whether, in doing the things detailed, he did everything to prevent the injury which he ought to have done. The engineer not only could but did actually state what he did. See *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239 (2); *So. Mut. Ins. Co. v. Hudson*, 115 Ga. 639, 42 S. E. 60 (2).

4. It is also complained that the court, after charging the jury that the fact that witnesses were employes of the defendant was no reason for disbelieving their testimony, added, "except in determining what weight and credit you will give to the testimony of the witnesses." The court stated the rule with absolute correctness. The fact that a witness is an employe of a party to a case is a matter bearing upon the interest of the witness, which the jury may consider in passing upon his credibility, and it was not error to instruct the jury to this effect.

5. Error was assigned upon the following charge: "Now, I charge you, gentlemen, that when stock has been shown to have been killed by the locomotive, cars, or other machinery, that the law presumes negligence on the part of the railroad; that that makes out a prima facie case for the plaintiff; that is, nothing else appearing, the plaintiff would be entitled to recover. I charge you that the defendant may come in and overcome that presumption. That, like all presumption, is a matter that can be overcome by proof. I charge you that presumption may be overcome by showing that the defendant used all ordinary diligence and care to prevent the accident; to prevent the killing." The objection to this charge was that it should have been qualified "so as to apply only to the peculiar facts of negligence alleged in the petition." The argument upon this assignment of error was that, as the plaintiffs could not recover except upon the negligence alleged, the court should have qualified the charge by saying that the presumption simply went to this extent. It is now settled that the presumption arising upon proof of the injury establishes only the negligence alleged, and, if it is shown by uncontradicted evidence that there was no negligence as alleged, the presumption is overcome, and the plaintiff is not entitled to recover, although the proof may show other acts of negligence. *Central of Georgia Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956. The portion of the charge complained of is absolutely correct in every particular. It simply says that, upon proof of the injury alleged, there is a presumption of negligence,

and that, nothing else appearing, the plaintiff would be entitled to recover, but that this presumption may be overcome by proof showing that the defendant exercised all ordinary and reasonable care and diligence. These are simply the general principles of law applicable to such a case, and giving them without qualification was not of itself error. As to the propositions of law contained in the charge, they require no qualification to make them sound, and the assignment of error is subject to the criticism that complaint is made of a correct instruction because some other sound proposition was not given in the same connection. See *Atlantic Coast Line Rd. Co. v. Williams*, 120 Ga. 1042, 48 S. E. 404 (1).

It was further complained that the judge erred in stating the contentions of the parties, this assignment of error being an effort to raise the same question as was sought to be raised by that which has just been considered. The judge, in a general way, stated the contentions of both parties; and, if a more elaborate statement of the contentions had been desired, an appropriate written request should have been made in due time.

The charge was not as full as it might have been, but it contained the general principles of law applicable to the case, and, if amplification had been desired, appropriate requests should have been made. See, in this connection, *Smith v. Mfg. Co.*, 112 Ga. 680, 37 S. E. 861 (2).

The evidence was conflicting, but there was evidence from which the jury could find that the presumption against the company had not been rebutted, and the discretion of the trial judge in refusing to grant a new trial will not be interfered with.

Judgment affirmed. All the Justices concur.

(211 Ga. 591)

SUTHERLAND v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

MURDER—INDICTMENT—ARREST OF JUDGMENT.

1. An indictment for murder need not specifically allege that the deceased was a human being. That such was the fact is sufficiently implied from setting out the name of the deceased. 11 Enc. Pl. & Pr. 143, and cases cited.

2. An indictment found in July, 1904, charged that the accused on June 4, 1904, with malice aforethought, "did kill and murder [one James Broner] by shooting the said James Broner with a certain pistol which [the accused] then and there held, and giving to the said James Broner then and there a mortal wound, of which mortal wound the said James Broner died." From such allegations it sufficiently appeared that James Broner was killed by the accused prior to the finding of the indictment.

3. The motion in arrest of judgment was properly denied.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

¶ 1. See Homicide, vol. 26, Cent. Dig. § 204.

Bob Sutherland was convicted of murder, and brings error. Affirmed.
See 48 S. E. 915.

M. B. Eubanks, for plaintiff in error. John C. Hart, Atty. Gen., and Moses Wright and W. H. Ennis, Sols. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concur.

(121 Ga. 592)

BAKER v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

MURDER—INDICTMENT—ARREST OF JUDGMENT.

1. This case is controlled by the decision this day announced in *Sutherland v. State*, 49 S. E. 781.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Courtney Baker was convicted of murder, and brings error. Affirmed.

See 48 S. E. 967.

F. W. Copeland, for plaintiff in error. John C. Hart, Atty. Gen., and Moses Wright and W. H. Ennis, Sols. Gen., for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur.

(121 Ga. 818)

NORMAN & HARRELL v. GREAT WESTERN TAILORING CO. .

(Supreme Court of Georgia. Jan. 28, 1905.)

APPEAL—REVIEW—EXCEPTIONS—PLEADING—AMENDMENT—FILING ANSWER—ACTION ON ACCOUNT.

1. Without exceptions pendente lite and an assignment of error thereon, a ruling made on August 10th cannot be brought under review by a bill of exceptions tendered February 27th following.

2. Where a demurrer is filed to a suit upon an account on the ground that no sufficient bill of particulars is attached, and the judge gives plaintiff 10 days within which to amend to meet this objection, and the plaintiff does so amend, there is no error in subsequently refusing to dismiss the action on the ground that the defendant was not served with a copy of the amendment.

3. Where, after the first term the defendant offers to file his answer, and the same is refused by the court on the ground that the case is in default, and the record is silent as to whether the case had been marked in default on the docket, this court will presume, in favor of the ruling of the court below, that such entry had been made.

4. Where the defendant in a suit upon an account is in default, it is unnecessary, under Civ. Code 1895, § 5078, for the plaintiff to make out his case by proof.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Action by the Great Western Tailoring Company against Norman & Harrell. Judgment for plaintiff, and defendants bring error. Affirmed.

W. F. Way, for plaintiffs in error. Shipp & Kline, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(121 Ga. 773)

ALLEN v. CONFEDERATE PUB. CO.

(Supreme Court of Georgia. Jan. 28, 1905.)

CONTRACT—CONSIDERATION—CLAIMS AGAINST ESTATE—DEFENSES—AUTHORITY OF AGENT.

1. A contract which contains a promise by one party to publish and deliver books of a certain character, and a promise by another to pay for the same at a stipulated price when delivered, while executory in its nature, is not unilateral. Each promise is a sufficient consideration to support the other. The death of the latter promisor does not terminate the contract.

2. A plea of plene administravit which fails to allege that the legal representative, at the time the assets were administered, did not know of the existence of the claim of the plaintiff as a creditor, is insufficient.

3. An agent to collect and settle a claim has no implied authority to submit the matter to arbitration.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 332.]

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by the Confederate Publishing Company against H. E. Allen, executor of J. H. Allen. Judgment for plaintiff, and defendant brings error. Affirmed.

The Confederate Publishing Company, a corporation, brought suit against H. E. Allen, as executor of the will of J. H. Allen, upon a written contract, of which the following is a copy: "Americus, Ga., Dec. 8th, 1900. Confederate Publishing Co. Please deliver to me the 12 volumes of your Confederate History, for which I will pay you or order on demand, the sum of \$60.00, and the books shall be shipped to me or left at my residence or place of business. I understand no definite time can be promised for delivery. I waive all right to countermand this order, basing my subscription solely on the representations on the back hereof. [Signed] H. J. H. Allen." On the back of this contract appeared a statement, signed by the Confederate Publishing Company, setting forth the character, scope, and design of the work, which statement, taken as a whole, constituted an undertaking on the part of the plaintiff to publish and deliver the books referred to in the foregoing order. It was alleged that the books were delivered to the defendant, and that he refused to pay for the same. The defendant filed an answer in which he alleged that, for want of sufficient information, he could neither admit nor deny the allegations in reference to the making of the contract, but denied that the books were ever delivered to him. He specially pleaded that no attempt was made to fulfill the con-

tract until after the death of the testator; that the books were of peculiar value to the testator, but of no value to his heirs; and that therefore his death terminated the contract. The defendant further pleaded that the estate of J. H. Allen had been duly administered, and that plaintiff had not filed with the defendant a notice of its claim within 12 months from the date of his qualification, as required by law. These special pleas were stricken on demurrer, and error is assigned on this judgment. By amendment the defendant pleaded that the contract had been rescinded, and that the question of the liability of the estate on the contract was, by agreement with an agent of the plaintiff, submitted to the decision of an attorney at law—such agent agreeing that the attorney's decision should be final—and that the decision of such attorney was that there was no liability, and that the defendant had never accepted the books, and, while they were in his possession, they had ever been subject to the plaintiff's order. At the conclusion of the evidence, the judge directed a verdict for the plaintiff, and error is assigned upon this judgment.

Lane & Maynard and W. P. Wallis, for plaintiff in error. J. A. Ansley and Shipp & Sheppard, for defendant in error.

COBB, J. 1. The contract was executory, but it was not unilateral. J. H. Allen agreed to pay for the books when delivered, and the writing upon the back of the contract which was signed by the plaintiff was, in effect, an agreement on its part to deliver the books therein described in accordance with the terms of the contract. There was a promise on the part of the plaintiff to publish and deliver the books, and a promise on the part of the deceased to pay for the same when delivered. Each promise was a sufficient consideration for the other. But even if the contract be treated as unilateral, it was binding upon J. H. Allen during his lifetime, and his legal representative after his death, until there was a withdrawal communicated to the plaintiff before its promise was executed either in whole or in part. Allen did not attempt to withdraw during his lifetime, and his executor made no effort to withdraw until after the books were published and offered to him in compliance with the undertaking of the plaintiff. The death of J. H. Allen did not terminate the contract. Civ. Code 1895, § 3438. A mere notice to the plaintiff that Allen had died would not amount to a withdrawal on the part of the executor, even if he was at liberty to withdraw at the time this notice was given. Under either view of the case, the executor was bound to comply with the undertaking of his testator as set forth in the writing sued on. See, in this connection, *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410, and citations.

2. The plea of plene administravit did not allege that the estate had been fully admin-

istered without notice of the plaintiff's claim, and was therefore defective and properly stricken on demurrer. *McIntosh v. Hamblton*, 35 Ga. 95, 89 Am. Dec. 276 (3). While it is alleged that the plaintiff had not filed its claim within 12 months from the date of administration, it did not allege that the defendant did not know of the existence of this claim when he administered the estate.

3. The evidence, at most, showed the agent with whom the defendant dealt to be an agent to collect and settle. While an agent of this character is allowed some discretion in the matter of settlements, the discretion allowed is personal, and cannot be delegated to another; and hence a submission to arbitration is not within the scope of his authority. 1 Am. & Eng. Enc. Law (2d Ed.) 1031; *Mechem on Agency*, § 405.

Judgment affirmed. All the Justices concur.

(123 Ga. 30)

MINNESOTA LUMBER CO. v. HOBBS & LIVINGSTON.

(Supreme Court of Georgia. Jan. 30, 1905.)

PETITION—MOTION TO DISMISS—SPECIAL DEMURRER—RES JUDICATA—PLEADING—CORPORATIONS—CONTRACTS—POWERS OF SUPERINTENDENT—BEST AND SECONDARY EVIDENCE.

1. Defects in a petition, such as may be cured by appropriate amendment, cannot properly be made the subject-matter of a motion to dismiss made at the trial term of a case, but can only be taken advantage of by way of special demurrer to the petition filed at the appearance term. A petition capable of withstanding a general demurrer, as was the petition filed in the present case, should not be dismissed on motion made at the trial term.

2. That a plaintiff cannot maintain a pending action because of a recovery in a former suit is a defense which must be set up by a special plea, unless the facts on which it is based appear on the face of the petition, and cannot be urged by way of a motion to dismiss predicated on evidence admitted without objection, or on an admission by the plaintiff as to such former recovery.

3. To enter into a contract in behalf of a corporation chartered for the purpose of manufacturing lumber, under which the other party is to haul logs to be sawn into lumber by the company, is within the apparent scope of the authority of its superintendent or other managing official; and in the absence of any charter limitation on their powers it is to be presumed that they likewise have authority to act for the company in the matter of determining whether or not it will live up to the terms of the contract or repudiate the same in whole or in part.

4. The best evidence of the contents of a writing is the writing itself when the contents thereof are sought to be proved; but the writing itself is not the best evidence of what a given individual told another were its contents.

5. Save as to the finding of attorney's fees, the verdict of the jury was warranted by the evidence, and should be upheld if the plaintiff will voluntarily write off the amount recovered as attorney's fees.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Action by Hobbs & Livingston against the Minnesota Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

W. S. Humphreys, John Murrow, and J. A. Humphreys, for plaintiff in error. Shipp & Kline, for defendants in error.

EVANS, J. The firm of Hobbs & Livingston, in a petition filed in the city court of Moultrie, complained that it had been endangered by the Minnesota Lumber Company because of the breach of a contract set forth in the petition. The defendant corporation filed a demurrer, and also a plea denying all substantial averments of the petition. The case was submitted to a jury, who returned a verdict in favor of the plaintiffs for \$1,820, together with \$180 attorney's fees. A motion for a new trial was made by the defendant, but was overruled by the court. Within 30 days of the trial the defendant sued out a bill of exceptions, therein complaining of certain rulings made during the progress of the case, and assigning error on the judgment overruling the motion for a new trial.

1. Upon the call of the case the defendant moved to dismiss the suit on the ground that no cause of action was set forth in the petition, because the plaintiffs failed to allege any steps taken to make the loss of the defendant as little as possible, and because the petition did not allege what the actual loss to the plaintiffs was, or what amount of actual profits the plaintiffs would have realized in the event the contract had been performed. So far as these special objections to the petition are concerned, the court was clearly right in refusing to sustain the motion to dismiss. If the defendant desired to specially demur to any portion of the plaintiffs' petition, a proper special demurrer should have been filed at the appearance term of the case. A motion to dismiss is the equivalent of a general demurrer, and may be made at the trial term, if the petition is fatally defective; but such a motion cannot reach mere defects in pleading such as may be cured by appropriate amendment. As against a general demurrer, the petition in the present case stated a cause of action, and accordingly the motion to dismiss was properly overruled.

The defendant also urged the court to require the plaintiffs to elect "which they would sue for—the profits that they were entitled to on the business under the contract, or for damages sustained on account of the breach" thereof alleged in the petition. The court declined so to do. If the petition was open to attack on the ground of vagueness or duplicity, the point should have been made by special demurrer filed at the appearance term. The petition set forth a contract, and alleged a breach thereof, and a recovery was asked for damages arising from such breach, to be measured, in part, by the loss of profits which the plaintiffs had

sustained. There was nothing in the petition which justified the defendant in calling on the court to compel the plaintiffs to elect between two remedies, or to pursue one course rather than another in making out the case.

2. Before the introduction of any evidence it was admitted that a suit between the same parties, based on the same contract, for an amount claimed as due upon a part performance thereof by the plaintiffs, had been tried at the same term of the court, and had resulted in a verdict and judgment for the plaintiffs. Upon this admission the defendant moved to dismiss the pending suit on the ground that the judgment in the former suit was a bar to any subsequent action for any breach of the contract occurring prior to the commencement of such initial suit. The court overruled the motion, and error is assigned on this ruling, both in the bill of exceptions and in the motion for a new trial. There was no plea of former recovery filed by the defendant. The only defense relied on was a general denial of the various paragraphs of the plaintiffs' petition. The defendant corporation, if desirous of availing itself of the defense that the contract for a breach of which damages were claimed was an entire and indivisible one, and that the former suit was exhaustive of the plaintiffs' right to sue, should have filed an appropriate plea specially urging this defense. *Williams v. Rawlins*, 33 Ga. 117 (10); *Tommey v. Finney*, 45 Ga. 158; *Central Railroad v. Coleman*, 88 Ga. 294, 14 S. E. 382, and cases cited. As the pleadings stood, the admission was wholly irrelevant to any issue in the case, and afforded no cause for dismissing the plaintiffs' action. The pleadings set forth the mutual altercations between the parties, and evidence which neither tends to establish or disprove any allegation made therein is inadmissible. If irrelevant evidence be admitted without objection, it can have no probative value in the determination of the case, which the court and jury are called on to decide upon the issues raised by the pleadings of the respective parties. It was not the right of the defendant, at the trial term of the case, to interpose any such defense without making affidavit that "at the time of filing the original plea or answer [the defendant] did not omit the new facts or defense * * * for the purpose of delay, and that" such defense was not then "offered for delay," unless, in the discretion of the court, the circumstances of the case or substantial justice between the parties required that the defendant should be permitted to amend without attaching such affidavit. No offer to amend the defendant's answer was made, or affidavit presented, nor was the court called on to exercise any discretion in the premises. The requirements of the act of December 21, 1897, with regard to tardily presenting a new and distinct defense, were wholly disregarded by the de-

fendant, and the court was asked to dispense with proper pleadings, ignore that act (Acts 1897, p. 35), and dismiss the action on mere motion of the defendant based on an admission of the plaintiffs which the defendant regarded as fatal to a recovery in the pending suit. The question of law involved was not one which could be properly presented by a motion to dismiss, the petition, which, on its face, disclosed nothing of which the defendant could take advantage as matter of defense. *Killen v. Compton*, 57 Ga. 63; *Kennon v. Petty*, 59 Ga. 175. Accordingly, the court rightly declined to grant the motion to dismiss.

3. The contract alleged by the plaintiff was that the defendant corporation employed the plaintiffs to haul logs from a certain lot of land to defendant's tramroad, about a mile and a quarter distant, at \$4.50 per thousand feet, the dimension of the logs to be computed by their mean diameter. It was alleged that the contract was to continue of force till the 7th day of April, 1903, and that, after plaintiffs had entered upon a performance of the contract, the officers and agents of the defendant corporation notified plaintiffs that they would not pay for the hauling of the logs in accordance with the terms of the contract, whereupon plaintiffs were forced to suspend operations, and sustained the damages alleged in the petition. The defendant denied entering into any such contract, or committing any breach thereof. On the trial one of the members of the plaintiff firm testified that the contract alleged was made by him with two named persons who were the president and superintendent, respectively, of the defendant corporation. Objection was made to this testimony on the ground that it did not appear that these officers of the corporation had authority to make in its behalf such a contract. The defendant was a corporation duly chartered and engaged in the business of manufacturing lumber. A necessary incident of the business was to provide the logs which were to be sawn into lumber. In an enterprise of this character the superintendent of the corporation has power to contract in behalf of the corporation with reference to matters proper and usual in the ordinary conduct of the corporate business. He may employ labor, contract for the hauling of logs, and do any act relating to the actual operation of the mill. As a general rule, a president has no inherent power to contract for the corporation; and, unless his powers are enlarged by the charter or by-laws, his duties are confined to presiding and voting as a director. 2 *Cook, Corp.* § 716. The contract was alleged to have been made with both the president and the superintendent of the corporation. The plaintiff had the right to assume, in the absence of any limitation in the charter or by-laws, that the superintendent had authority to contract in behalf of the corporation with regard

to the carrying on of the business for which it was chartered.

What is said above also applies to the contention of the defendant that the court erred in admitting over a similar objection evidence to the effect that the person whom the witness just referred to had testified was the superintendent of the defendant said to a member of the plaintiff firm that unless he consented to a different basis of measurement than that which had been agreed on he could take the plaintiffs' teams out of the woods. Whether or not this person was the superintendent of the defendant corporation was, under the evidence submitted, a question of fact for the jury. If he was so in fact, then he was acting within the apparent scope of his authority in notifying the plaintiffs that the corporation he represented would no longer live up to its agreement with respect to the manner in which the logs were to be measured, and the plaintiffs had a right to treat this declaration as a breach of the contract, and to act accordingly.

4. In the course of the trial testimony was admitted tending to show that pending the negotiations which led up to the making of the contract the president of the defendant corporation stated that it held a lease covering the land from which he desired the timber cut and hauled, which lease would expire on April 7, 1903. Objection was made to this testimony on the ground that the written lease was the highest and best evidence. The plaintiffs were not undertaking to prove that there was, in point of fact, a lease, but only to prove that the defendant's president had said there was, and had stated, as a reason for wanting the logs hauled before April 7th, that the lease expired on that date. Nor was it necessary to a recovery by the plaintiffs that it be shown that any such lease had ever been executed. The plaintiffs did allege and prove that the contract was not to remain of force longer than a given period, which expired on April 7th. The best evidence of what the defendant's president stated was his reason for wanting the contract performed by that date was proof of what he said was his reason. The plaintiffs proposed to show nothing more. The testimony objected to might have been wholly irrelevant, but it was not inadmissible for the reason assigned by the defendant.

5. No exception is taken to the amount of the verdict other than a general assignment that the verdict was without evidence to support it. The plaintiffs' evidence tended to show that they were to be compensated for hauling the logs at the rate of \$4.50 per thousand feet, the logs to be measured in accordance with a certain rule prescribed in *Scribner's Lumber and Log Book* for ascertaining the mean diameter; that within the contract period the plaintiffs could have hauled a certain number of logs, if permitted to do so, which, at the contract price, would

have entitled them to payment of a sum in excess of the amount of damages assessed by the jury; and that by reason of the defendant's repudiation of the contract the plaintiffs had been endamaged in that sum. We cannot, therefore, say that the verdict was without evidence to support it, so far as this item of damages is concerned. The jury included in their verdict \$180 as attorney's fees. There was no evidence before them authorizing the recovery of any amount as attorney's fees, so this part of their finding cannot be upheld. Accordingly, we have given direction that if, within 10 days after the filing of the remittitur in the court below, the plaintiffs will voluntarily write off the recovery of attorney's fees, the judgment overruling the motion for a new trial shall stand affirmed; otherwise a new trial be had.

Judgment affirmed on condition. All the Justices concur.

(121 Ga. 751)

MORRIS v. GLOVER et al.

(Supreme Court of Georgia. Jan. 28, 1905.)

CONSTITUTIONAL LAW—COUNTY TREASURER—ABOLITION OF OFFICE—CONTEST OF ELECTION—MANDAMUS—RECANVASS OF VOTES.

1. The local act approved February 29, 1876 (Acts 1876, p. 322), providing for the consolidation of the office of county treasurer of Cobb county with the office of clerk of the superior court of that county, making the clerk ex officio treasurer and fixing his fees, is unconstitutional and wholly inoperative, in that, under the Constitution of 1868, the General Assembly was without power to expressly abolish the office of county treasurer, or to accomplish the same result by indirection, by depriving the treasurer of the emoluments of that office, and transferring the duties thereof to the clerk of the superior court. Decision in *Massenberg v. Commissioners*, 23 S. E. 998, 96 Ga. 614, approved and followed. Dictum in *Hall v. Burks*, 24 S. E. 349, 96 Ga. 622, disapproved.

2. Mandamus, and not a proceeding to contest an election, is the remedy of one who was the sole candidate for a particular office, but who was ignored by the board of canvassers, the members of which refused to consolidate the votes cast in his favor, or to declare any result, so far as that office was concerned.

3. Where a board of canvassers has dissolved before properly performing its functions, its members may, by mandamus, be compelled to reconvene and recanvass the votes in accordance with the direction of a court having jurisdiction of the subject-matter.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Mandamus, § 154.]

(Syllabus by the Court.)

Error from Superior Court, Cobb County; J. H. Lumpkin, Judge.

Application by J. G. Morris for a writ of mandamus to J. B. Glover and others. From an order denying the writ, plaintiff brings error. Reversed.

This was a mandamus proceeding instituted by J. G. Morris, who claims to have been duly elected treasurer of the county of Cobb at an election for county officers held in that county on October 5, 1904. The purpose of the proceeding was to compel the superin-

tendents of that election, who were named in the plaintiff's petition as defendants, to consolidate the votes cast in his favor as county treasurer, for which office he was the only candidate, and to certify the result, and make proper return thereof. The defendants filed a demurrer to the petition, in which they set forth their contention that "there is no such office as treasurer of Cobb county, separate, apart, and distinct from the office of the clerk of the superior court of said county"; the office of treasurer having been consolidated with that of clerk of the superior court by an act of the Legislature approved February 29, 1876, "whereby all the duties required to be performed by the treasurer of said county were devolved upon the clerk of the superior court of said county, and whereby said clerk became ex officio treasurer of said county." On the hearing of the demurrer, the court sustained this contention of the defendants; holding that the local act relied on by them was not, for any of the reasons urged by the plaintiff, inoperative and of no effect. To the judgment dismissing his petition on demurrer, the plaintiff duly excepted. The main attack made on this local act is that it is unconstitutional, in that the Legislature sought by indirection to abolish one of the county offices recognized by the Constitution of 1868, by devolving the duties of the office of treasurer upon the clerk of the superior court, and styling him ex officio treasurer, which it was not within the power of the General Assembly to do.

N. A. Morris and Rosser & Brandon, for plaintiff in error. J. Z. Foster, for defendants in error.

EVANS, J. (after stating the facts). 1. The controlling question is the constitutionality of the act approved February 29, 1876 (Acts 1876, p. 322), consolidating the office of county treasurer of the county of Cobb with the office of clerk of the superior court of that county, making the clerk ex officio treasurer, and fixing his fees. The act is alleged to be violative of article 9, § 1, of the Constitution of 1868, in force at the time of its passage. This article and section of the Constitution provides that: "The county officers recognized as existing by the laws of this state, and not abolished by this Constitution, shall, where not otherwise provided for in this Constitution, be elected by the qualified voters of their respective counties or districts, and shall hold their offices for two years. They shall be removable, on conviction, for malpractice in office, or on the address of two-thirds of the Senate." This clause of the Constitution was construed in *Massenburg v. Commissioners of Bibb County*, 96 Ga. 614, 23 S. E. 998, and it was there ruled that: "The office of county treasurer having been, under the law existing previous to the adoption of the Constitution of 1868, recognized as a county office, and that office

not having been abolished, but, on the contrary, recognized, by that Constitution, it became and was thereby established as a constitutional office, and could not thereafter, while that Constitution was of force, be abolished by an act of the Legislature." The contention of the plaintiff in error is that the local act (Acts 1876, p. 322) consolidating the office of county treasurer with the office of clerk of the superior court is, in effect, the abolition of the office of county treasurer, and is therefore void.

It was expressly held in *Massenberg v. Commissioners*, supra, that it is incompetent for the Legislature to directly abolish a constitutional office. Can the Legislature by indirection accomplish what it is restrained from doing by the organic law of the land? Among the incidents of public office are the discharge of its duties and the enjoyment of its emoluments by the individual entitled to the office. At the time of the ratification of the Constitution, the duties of the office of county treasurer were discharged by an individual elected by the people for a definite term, invested by law with all the rights and duties appertaining to this office. He was styled the county treasurer, and was included among the county officers embraced in the section of the Constitution which provided for the future election and prescribed the tenure of service of certain county officials whose offices had theretofore been lawfully created. The county treasurer held a separate and distinct office, expressly recognized by the Constitution. He was an officer declared by that instrument to be a county official who was to be elected by the people for a term of two years. If the duties and emoluments of his office be transferred to another officer, then there would exist the anomalous condition of an officer recognized by the Constitution, without duties or emoluments. The duties and emoluments are of the substance of the office; its name, but the semblance. If the Legislature may consolidate the office of treasurer with that of the clerk of the court, why should not the authority be extended to consolidating the other county offices, so that the clerk might, ex officio, discharge the duties of all county officers? There is no more reason why the clerk, with legislative sanction, should be ex officio treasurer, than there is that he should also be, at the will of the General Assembly, ex officio tax receiver, tax collector, and sheriff. It cannot be seriously contended that the framers of the Constitution, by express recognition of separate and distinct offices, with separate and distinct functions, contemplated that the Legislature might devolve the duties of two or more offices upon one functionary. In those governments where the lawmaking power is not fettered by a written Constitution limiting its authority, offices may be created, consolidated, or abolished at legislative will. Likewise, an office created by statute, but not defined in or recognized

by the Constitution, may be abrogated by statute. But where an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute, nor can the office be filled in any manner other than that prescribed by the Constitution. *People v. Bollam* (Ill.) 54 N. E. 1032. When the Legislature assumed to transfer to the clerk of the superior court all the duties and emoluments which belonged to the office of treasurer, it practically abolished the office of treasurer. There is no recognition in the statute of such an official as a county treasurer. The functions of his office are to be discharged by the clerk, *virtute officii*. It has been held that the taking away of the salary amounts to the abolition of the office. *Reid v. Smoulter* (Pa.) 18 Atl. 445, 5 L. R. A. 517. If the withdrawal of the emoluments will accomplish this result, a fortiori the transfer of both compensation and duties to another official would have the same effect. See *Throop on Pub. Off.* § 20.

The clerk of the court, by this local act, is either treasurer of the county of Cobb, or the office of treasurer is extinct. If the clerk is the treasurer, and should be guilty of malpractice in the administration of the functions pertaining to the office of treasurer, could he be removed from the office of clerk of the superior court for such malpractice? Would it not be a good reply for the clerk to say, "I have faithfully discharged my duties as clerk, and my malfeasance as treasurer cannot forfeit my office as clerk"? The act declares that the clerk is ex officio treasurer. If this means that his office is that of "clerk," and that his duties comprehend both the duties of clerk and those of county treasurer, then he is not the treasurer, and no such office as county treasurer longer exists. If he is both clerk and treasurer, a malfeasance in the office of treasurer would not justify his expulsion from the office of clerk. Yet the Constitution declares that a county officer is "removable, on conviction, for malpractice in office." Therefore, should the clerk embezzle funds received as county treasurer, he might escape the constitutional penalty of removal from office.

The Constitution of 1868 bears internal evidence of the construction that each constitutional office should be filled by a separate individual. Article 3, § 1, par. 4, provides that no person holding a military commission, or other appointment or office having any emolument or compensation annexed thereto, under this state or the United States, or either of them, except justices of the peace and officers of the militia, shall have a seat in either house of the General Assembly. The office of justice of the peace is a constitutional office, and, to entitle the holder of that office to a seat in the General Assembly, the framers of the Constitution deemed it necessary to make an express exception.

The case of *Hall v. Burks*, 96 Ga. 622, 24

S. E. 849, is apparently antagonistic to the conclusion we have reached in this case. In that case it was said that it "was, under the Constitution of 1868, competent and constitutional for the General Assembly to pass an act 'consolidating' the offices of clerk of the superior court and treasurer of a given county, to the extent of devolving the duties of the treasurer upon the clerk, and making the latter ex officio treasurer." This dictum of the court was clearly obiter, as will be seen from an examination of the report of the case, as well as from the transcript of the record on file in the office of the clerk of this court. The assignment of error was that the trial judge erred in not sustaining the contention of the plaintiff that the act of February 28, 1876 (Acts 1876, p. 325), "abolishing the office of county treasurer, and vesting the clerk of the superior court with the duties of treasurer, was and is unconstitutional and illegal, and cannot have the effect of depriving him of said office, because both the Constitution of 1868 and 1877 provides for the uniformity of the laws and offices of the state, and this local act destroys that uniformity by abolishing the office of treasurer in Dougherty county, and not in the whole state, and because, at the time of the passage of said local act, and now, the general law of the state provided that no other officer should be county treasurer, and this local act is in variance with said general law, and is therefore unconstitutional and illegal. Sections 5027, 5228, Const. 1877, and Code 1882, §§ 542, 546; Const. 1868, §§ 5018, 5140; and Code 1873, §§ 542, 546." The attack made on this local act was that it was violative of a constitutional provision requiring that all laws affecting public office should have uniform operation throughout the state, and that it was special legislation upon a subject-matter for which provision had been made by an existing general law. Such was the meaning placed on the assignment of error by this court at the time, as will appear from the statement of the case in the official report, and this interpretation of the assignment of error was correct. The local act was not unconstitutional for the reasons assigned, because the Constitution of 1868 contained no inhibition against special legislation in given cases, as does the Constitution now of force. Civ. Code 1895, § 5732. The court very properly held that the local law was not unconstitutional because of the objections then urged against it, but the unguarded statement that it was, under the Constitution of 1868, competent for the General Assembly to pass an act of this kind, consolidating two county offices, was altogether too broad. "This court has no authority to decide any question on any writ of error, unless there are in the bill of exceptions 'plainly and specifically set forth the errors alleged to have been committed,' and a 'special assignment of error' raising the

question." *Kelly v. Strouse*, 116 Ga. 874, 43 S. E. 280 (9). The ruling announced in *Hall v. Burks* cannot be extended beyond the adjudication of the questions made by the above-quoted assignment of error, and the proposition stated in the first head-note to that case is, so far as it concerns the question now presented for decision, mere obiter dictum, and not a binding adjudication thereof.

2. The plaintiff's petition was demurred to on the further ground that, if he had sustained any wrong, he had "a complete and adequate remedy by a proceeding to contest said election." The allegations of the petition disclose that the plaintiff was the only candidate for the office of treasurer, and that he received 193 votes. While some of the votes cast for the candidate who was running for the office of clerk read, "For clerk and county treasurer," no ballots were cast for him "as treasurer," and he was not a candidate for the office of treasurer. Clearly, therefore, a contest was out of the question. The plaintiff sought by mandamus merely to require the managers of the election to properly consolidate the returns and declare the result. This was the remedy to be pursued. *Tanner v. Deen*, 108 Ga. 35, 33 S. E. 832.

3. The defendants also made the point that, as disclosed by the petition, the managers of the election had met, consolidated the returns, and adjourned sine die, long before the bringing of the present proceeding, and could not be reassembled at the instance of petitioner for the purpose of consolidating the returns in accordance with any order which the court might pass. Though the power of a court to compel by mandamus a board of canvassers to reconvene and canvass the votes in accordance with its directions has been called into question, the weight of authority is that this may be done. See 10 Am. & Eng. Enc. L. (2d Ed.) 808, and cases cited. This court, in *Tanner v. Deen*, supra, held that the remedy of mandamus could not be defeated simply because the returning board had dissolved before properly performing its functions.

Judgment reversed. All the Justices concur.

(121 Ga. 787)

SOUTHERN COTTON OIL CO. v. DUKES.

(Supreme Court of Georgia. Jan. 28, 1905.)

INJURY TO EMPLOYÉ—PETITION—AMENDMENT—APPLIANCES—INSPECTION BY SERVANT—CONTRACT OF INFANT—RATIFICATION—CLAIM FOR DAMAGES—INSTRUCTIONS.

1. When, in an action for personal injuries, the original petition alleges certain acts of negligence, and by amendment additional acts of negligence are alleged, and the plaintiff, in open court, abandons all right to recover on the acts of negligence alleged in the original petition, it is not error to submit the case to the jury entirely upon the issues made by the amendment;

making no reference to the issues of negligence raised by the original petition.

2. As a general rule, a servant is under no obligation to inspect the appliances about which he works, or that part of the plant by which his safety may be affected, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation.

3. When machinery, though not perfect in all respects, can be and has been used with safety under given circumstances, a servant using such machinery is warranted in acting upon the assumption that the master has fulfilled and will continue to fulfill his duty to see that the circumstances are such that the machinery can be used with safety, unless it is apparent to the servant that the master has failed to fulfill his duty in this respect, or such failure can be ascertained by the servant's using that degree of care which the law imposes upon him.

4. One seeking to hold an infant bound upon a contract, for the reason that the consideration of the contract was retained after arrival of the infant at majority, has imposed upon him the burden of showing possession of the consideration after majority, and retention for a sufficient length of time that a ratification of the contract is to be inferred.

5. If the infant "has lost, expended, or squandered the consideration during his minority, this is nothing more than the law anticipates of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate."

6. A "linter" in an oilmill, who is an infant, is not engaged in a profession, trade, or business, within the meaning of Civ. Code 1895, § 3650, so as to make him bound by a contract made with his employer in reference to a claim for damages for personal injuries sustained in the course of his employment.

7. The fact that an infant is receiving the proceeds of his own labor is not alone sufficient to establish that permission on the part of his parent has been given to engage in the business in which the amounts secured by him are earned.

8. The charge was not subject to any of the criticisms made in the assignments of error. The evidence authorized the verdict, and no reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by A. P. Dukes against the Southern Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dukes brought suit against the Southern Cotton Oil Company for personal injuries sustained while working as an employé of the defendant in an oilmill. The negligence alleged in the original petition was the failure of the defendant to furnish machinery equal in kind to that in general use, and ordinarily safe for those who operate it with proper care; the specific act of negligence alleged being that the defendant furnished a seed shaker which was connected by a belt with the main shafting in a building in which the seed shaker was so arranged that it became choked up, and would not run; that the belt connecting the shaker with the main shafting was pieced, spliced, and otherwise defective, so that when the plaintiff, in the performance of his duty, went to place in position the belt connecting the seed shak-

er with the main shafting, additional tension was put on the belt on account of the choked condition of the shaker, and the belt broke, throwing the plaintiff into a pulley, and thereby injuring him seriously and permanently. By amendment the plaintiff alleged that the defendant was negligent in failing to furnish a reasonably safe place for the plaintiff to work, of which fact the defendant had knowledge, or had reasonable opportunity to have had knowledge, and of which the plaintiff had no knowledge, and could not have known by ordinary care; that the place in which plaintiff was ordered to work by the superintendent in charge of the mill was especially dangerous at the particular time of the injury, by reason of the fact that the seed shaker mentioned above, which, with the other machinery and belting to which it was attached, was ordinarily and reasonably safe at other times, had, upon the Saturday night before (the plaintiff's injuries having been sustained on Monday), become unsafe and dangerous by reason of the fact that it had become choked with cotton seed and other obstructions, which fact the defendant knew, or could by the exercise of ordinary care have known, and the plaintiff did not know, and could not, by the exercise of reasonable care, have informed himself; and that by reason of these facts the risk of his employment was unusually and unreasonably increased. The defendant, in its answer, admitted that the plaintiff was an employé, and was injured while attempting to place the belt upon the shafting, but, upon various grounds, denied any liability. It was alleged that the plaintiff was employed as a "linterman," and not as a seed-shaker man, and that, when he was engaged in putting the belt upon the shafting, he was outside the line of his duty; that he did not exercise ordinary care while engaged in placing the belt upon the shafting; that the machinery was of good quality, not defective, reasonably adapted to the use intended, and could be, had been, and was being used with safety to the employé; that it was inspected and tested, and always kept in a safe condition for use in a proper manner; that the seed shaker was not choked; that the belt was not unserviceable, and that the injury was caused solely by the plaintiff's unskillfulness and careless handling of the belt; that the defendant had settled with the plaintiff for all wages and damages sustained, and that he had executed and delivered to it, under his own hand, a written release from all claims resulting from the occurrence alleged in the petition; that he had been instructed and informed as to the dangers incident to the work in which he was engaged; that he well knew the dangers, and had taken the risk incident thereto. The trial resulted in a verdict for the plaintiff for \$3,500. The defendant made a motion for a new trial, which was overruled, and it excepted.

J. J. Beck and King, Spalding & Little, for plaintiff in error. W. D. Sheffield and A. G. Powell, for defendant in error.

COBB, J. 1. It appeared from the plaintiff's evidence that the belt was in a defective condition, and that its condition was well known to him; and thereupon, in open court, plaintiff's counsel announced that he would not contend for a recovery upon the allegations of negligence alleged in the original petition, which related to the defective character of the machinery furnished, but would rely entirely upon the averments of negligence contained in the amendment. The court, in its charge to the jury, did not submit any issue growing out of the acts of negligence alleged in the original petition, but submitted the case upon the issues made by the amendment and the answer. Error is assigned upon the failure of the judge to submit the issues involved in the original petition and answer. We do not think there was any error in this action of the court. The effect of the announcement in open court was the same as if the plaintiff had stricken from his petition the allegations of negligence contained in the original petition. They were thereafter not necessary to be considered, and the court did not err in not submitting to the jury the issues made by the original petition.

2, 3. When a master furnishes for the use of a servant machinery which is defective, or not properly adapted to the work which the servant is employed to perform, and the use of such machinery subjects the servant to dangers which may result in injury, and the servant either knows, or could by the exercise of reasonable diligence discover, that the machinery is defective and not adapted to the work in which he is engaged, the master is not generally responsible to the servant for an injury received as the result of the use of such machinery. But the mere fact that machinery is not perfect and not adapted to use under all circumstances will not necessarily prevent a recovery by the servant, resulting from the use of such machinery. If the machinery, though defective, can be safely used for certain purposes and under certain circumstances, and the servant has reason to believe that it will not be used except for such purposes and under such circumstances, he has a right to recover for injuries which he might sustain as the result of the master permitting the use of the machinery for other purposes and under other circumstances; such purposes and circumstances not being brought to the knowledge of the servant, and he not being able to inform himself of them by the use of ordinary care. It was admitted that the belt was not perfect. It was therefore defective in that sense. It was, however, not a belt that was so defective as not to be proper for use under any circumstances. See *Eagle & Phenix Mills v. Herron*, 119 Ga. 389, 46 S. E. 405.

The seed shaker and sand screens, which were in a room other than the one in which the plaintiff was hurt, were not perfect in all respects. The seed shaker would become choked, and the evidence shows that it had become choked on previous occasions. When not in a choked condition, it could be safely used; and the belt, though defective in some particulars, could be used with safety when the seed shaker was not in a choked condition. So long as the seed shaker was not choked, it was proper for the master to allow the belt to be used in connection therewith, and the servant would not be at fault in using the machinery consisting in part of the defective belt and the imperfect seed shaker. Whether the shaker was in a condition to be properly used with the belt furnished was a matter that could be ascertained, and it was the duty of the master to cause inspections to be made for this purpose at proper times, and the failure to make proper inspections at proper times would be negligence on his part. If the servant was also bound to inspect the shaker before using the belt, then he would be negligent if he used the belt without making such inspection. But was he bound to make such inspection? When he reported for work at the proper time and at the proper place, did not the servant have a right to assume that the master had performed his duty by making the inspection necessary, and that the machinery was in such condition that it was safe for operation; the choked condition of the seed shaker not being apparent to the servant at the time? The condition of the shaker being discoverable only by inspection, and the duty of inspection not being within the scope of the work for which he was employed, he had a right to rest upon the assumption that the master had performed his duty to see that the machinery was in proper condition for work; that is, that the seed shaker was not choked. See *Duke v. Bibb Mfg. Co.*, 120 Ga. 1074, 48 S. E. 408. In *McDonnell's Case*, 118 Ga. 86, 92, 44 S. E. 840, it was held that a machinist who was employed to repair the pop valve upon an engine was not bound to inspect the boiler of the locomotive upon which he was at work, and that therefore his widow was entitled to recover from his employer for his homicide, resulting from an explosion of the boiler, notwithstanding the boiler was in a dangerous and defective condition at the time he was at work, and that this fact could have been easily ascertained by an inspection of the boiler. See, also, *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955 (2). The defect in the seed shaker not being patent and apparent to the servant at the time he attempted to place the belt in position, and there being no duty imposed upon him to make an inspection for defects which were not apparent, he was not at fault in attempting to do that which, under ordinary circumstances, could have been done with safety. See 1 *La Batt on Master & Servant*, § 406.

4. 5. The plaintiff was a minor at the time of the injury, as well as at the time of the alleged settlement relied upon by the defendant as an accord and satisfaction. It does not appear from the evidence that the plaintiff had in his possession at the time he arrived at majority any of the money which was paid to him under the settlement. If when he arrived at majority he had in his possession the whole amount paid to him, or possibly if he had any substantial part thereof, the retention of the same by him after arrival at majority might have amounted to a ratification. See *McKamy v. Cooper*, 81 Ga. 678, 8 S. E. 812. But there is nothing in the evidence to bring the case within this rule, and the burden was on the defendant to show a ratification resulting from possession and retention of the proceeds by the plaintiff after his arrival at majority. If an infant has "lost, expended, or squandered the consideration during his minority, this is nothing more than the law anticipates of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate. Otherwise the rule would practically strike down the shield which the law, by reason of his inexperience and youth, throws around him." Field on Infants, § 15. See, also, *Clark on Contracts* (2d Ed.) p. 173. In *Shuford v. Alexander*, 74 Ga. 293, which was an action at law, it was held that one who entered into a contract during infancy might, upon arriving at majority, disaffirm the contract, and recover property parted with by him, or its value, or damages for fraud practiced upon him in such transaction, without offering to rescind the contract or to return the consideration. The rule might be different if the infant was compelled to resort to a court of equity. See *Thomason v. Phillips*, 73 Ga. 140.

6. 7. An infant who, by permission of his parent or guardian, or by permission of the law, practices a profession or trade, or engages in any business as an adult, is bound by all contracts connected with the occupation in which he is engaged. Civ. Code 1895, § 3650. One engaged as a "linter" in an oilmill is not engaged in a profession or trade, within the meaning of this section. In *Howard v. Simpkins*, 70 Ga. 322, 325, a mere clerk was held not to be engaged in a profession or trade, and the same reasoning would exclude from the operation of this section one occupying the position of a linter in an oilmill. While such a person is, in a sense, engaged in a business, he is not engaged in a business within the meaning of this section of the Code, which applies only where the infant is carrying on a business of his own. But even if the plaintiff could be properly considered as carrying on a business, there is no evidence that he was doing so with the permission of his parent. The mere fact that an infant is working and collecting the proceeds of his labor does not

show permission by his parent for him to receive for his own that which, in law, belongs to the parent. Evidence that the parent knew that he was receiving the proceeds of his own labor might be sufficient to authorize an inference that permission had been granted for him to engage in the occupation, and receive for his own use the proceeds of his labor.

8. The motion for a new trial contains numerous grounds assigning error upon the failure of the judge to charge certain propositions of law claimed to be relevant to the case; the assignments of error in some cases being upon specific extracts from the charge, and a complaint that other propositions were not charged in connection therewith. Such assignments cannot be considered. See *Roberts v. State*, 114 Ga. 450, 40 S. E. 297. Many, if not all, of these assignments seek, however, to raise questions that are fully covered by the foregoing discussion, and which was rendered necessary under the general grounds of the motion. The evidence was conflicting on many material points, but there was evidence authorizing a finding that the master had failed in his duty to furnish the servant a safe place to work—that is, the place at which he was working was not safe when the seed shaker, which was a part of the machinery, and in another room, was allowed to become choked—and a recovery was therefore authorized under the amendment to the petition. There was no error in failing to submit to the jury the question as to whether the plaintiff was a volunteer in attempting to place the belt upon the shafting. He testified positively that he did this under the instruction of Graves, the defendant's superintendent; and Graves admitted that he had authority to order the plaintiff to do this work, if he had seen fit to exercise it, but testified that he did not remember whether he gave this order. A careful examination of his evidence shows that there is nothing in it which could be construed as a denial of what plaintiff testified. The charge, as a whole, appears to have fairly submitted to the jury all of the controlling issues in the case; and, if any amplification had been desired on any of the points involved, they should have been made the subject of timely written requests. We see no reason for reversing the judgment. Judgment affirmed. All the Justices concur.

(121 Ga. 666)

MACON & B. RY. CO. v. ANDERSON.

(Supreme Court of Georgia. Jan. 27, 1905.)

NEW TRIAL—INSTRUCTIONS—CARRIERS—INJURY TO PASSENGER—CONTINUANCE.

1. The ruling announced in *Americus R. Co. v. Luckie*, 13 S. E. 105, 87 Ga. 6, does not require the grant of a new trial because the court read to the jury Civ. Code 1895, § 2322, as a whole, thus giving in immediate connection each principle contained therein.

2. Though the negligence charged was the premature announcement of the station, it was proper for the jury to consider whether the plaintiff knew, when he went on the lower step, that the point for alighting had not been reached.

3. It was therefore proper to instruct the jury that, along with the other circumstances of the transaction, they might consider whether there was any light at the place.

4. Where it appears that the absent witness is the only disinterested person by whom the material fact can be proved, the motion for a continuance is not defective because of the failure to allege that such material fact cannot be proved by any one else.

5. In the present case, however, the showing was defective under Civ. Code 1895, § 5129 (Cobb v. State, 35 S. E. 178, 110 Ga. 314), and also because it appeared that the movant did not know what the witness would testify, and there was no affidavit from the informant or other showing that the witness did have knowledge of any fact material to the issue.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; L. S. Roan, Judge.

Action by W. H. Anderson against the Macon & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson brought suit against the plaintiff in error for damages occasioned by a sudden start of the train while he was standing on the bottom step of the platform, claiming that he had been induced to put himself in this position by reason of the negligent and improper announcement of the station before the train reached the usual stopping place. The verdict was for the plaintiff. There was a motion for a new trial on several grounds, and, among others, that the court refused to grant a continuance on account of the absence of a witness who was on the train at the time of the occurrence, and who, the movant was informed, would testify as to certain facts material to the company's defense stated in the motion. It was stated that the only other witnesses by whom these facts could be proved were officers and employes, who were therefore in a position where it might be contended that they were not disinterested. The motion was overruled, and the defendant excepted.

Cabaniss & Willingham, for plaintiff in error. Persons & Persons, for defendant in error.

LAMAR, J. (after stating the foregoing facts). 1. While it may be necessary in the same case to give in charge the principle contained in Civ. Code 1895, § 2322, and that set forth in section 3830, it would be because of the different theories raised by the evidence, and not because the defenses under the two sections are identical. Section 2322 treats of an active plaintiff who himself caused the injury. Section 3830 deals with a plaintiff who may have been passive, and may therefore not have caused, but might have avoided, the injury. Neither section is

exhaustive of defenses which may be made. But relating, as they do, to different conditions, the two sections should not be charged in immediate connection one with the other, but separate and apart. The instructions on each should be adjusted to the particular issue arising from the testimony. While there is no conflict between them, to read them together is misleading, though to jurors who have not the opportunity to analyze and compare they appear to be contradictory. To say that the plaintiff cannot recover if he caused the injury (section 2322) is very clear. But to connect that with the immediate statement that the plaintiff could not recover if he could have avoided the injury, "but in other cases the defendant is not relieved, although the plaintiff may have in some way contributed to the injury" (section 3830), is calculated to make the jury think that "causing the injury" (section 2322) might be one of the "other cases" (section 3830) against which the defendant is not absolutely relieved if it appeared that, though he originally caused the injury, he might at the same time, by the exercise of ordinary care, have avoided the consequences. Again, to tell the jury that, if the plaintiff could have avoided the injury, he cannot recover (section 3830), and in the same breath to say that, if "both parties were at fault (section 2322), plaintiff's damages may be diminished," is likewise misleading. Ry. Co. v. Hatcher, 118 Ga. 273, 45 S. E. 239. The rule to this effect announced in *Americus R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, has several times required the grant of a new trial, where the two sections were read to the jury in immediate connection, and without proper explanation. But no case has ruled that to read the whole of either section by itself was improper. Nor, on principle, is there any reason for such a holding. Section 2322 states a principle, and then furnishes its own qualification or exception. If the charge does not cover the issues involved in the case, that is ground for other and specific assignment of error, setting out what it improperly omitted. But the assignment that "he read section 2322 as a whole, and stated in immediate connection with each other, without proper explanation, two distinct rules of law, thus qualifying the former by the latter," furnishes no reason for the grant of a new trial.

2, 3. The announcement of the station was at night. The only negligence assigned was that it was made before the regular stopping place had been reached. The motion alleges that, while the charge was abstractly correct, it was error for the court, in enumerating the circumstances to be weighed by the jury, to instruct them to consider whether there were any lights at the place. If the theory of the plaintiff was correct, it was proper for the jury to consider whether he knew of that fact when he put himself on the bottom step, and in a position where he might be injured

if there was any sudden motion of the train. On this issue the question of light or no light was important.

4. The motion for a continuance may not have been defective because it failed to show that the defendant had no witness other than the one served with a subpoena, by whom the material facts stated in the motion for continuance could be established. It did appear that he was the only disinterested witness by whom it could prove these facts vitally essential to its defense. This was an important element in passing upon the sufficiency of the showing. Compare *Maynard v. Cleveland*, 76 Ga. 53 (3); *Compton v. State*, 108 Ga. 747, 32 S. E. 843; *Salmons v. State*, 118 Ga. 763, 45 S. E. 611.

5. In the motion for a continuance it was stated that, while the counsel for the defendant had not talked with the witness, they had had other parties to do so, and had been informed that the witness would swear to the material facts stated in the motion. In order to make a legal showing under these circumstances, it was ruled in *Thompson v. State*, 24 Ga. 297, that it must appear that the absent person is in fact a witness to some matter necessary to be shown, and if the movant knows of this from information only he ought to submit the affidavit of his informant. The motion was defective also in failing to meet the requirement in Civ. Code 1895, § 5129, it not being alleged that the application was not made for the purpose of delay. *Cobb v. State*, 110 Ga. 314, 35 S. E. 178.

The evidence was conflicting, but was sufficient to support the finding for the plaintiff. No error of law appears. The verdict was approved by the presiding judge, and this court will not interfere with his refusal to grant a new trial.

Judgment affirmed. All the Justices concur.

(121 Ga. 567)

FITTS v. CITY OF ATLANTA.

(Supreme Court of Georgia. Jan. 26, 1905.)

CONSTITUTIONAL LAW — PUBLIC MEETINGS — REGULATION—TITLE OF ACT—CRIMINAL LAW—CONTINUANCE—CERTIORARI—ANSWER — SENTENCE.

1. The ordinance of the city of Atlanta (Municipal Code, § 1841), declaring it unlawful to hold public meetings in the streets of that city without the consent of the municipal authorities, is not unconstitutional, either because it curtails or restricts the liberty of speech, or makes an arbitrary discrimination in favor of some persons against others, or because the city had no legal power to enact it; nor is such ordinance void upon the ground that it is an unreasonable and oppressive exercise of police power.

2. The act approved December 19, 1893 (Acts 1893, p. 173), entitled "An act to amend the charter of the city of Atlanta, to wit: The act incorporating the city of Atlanta, approved February 28th, 1874," etc., and empowering the mayor and general council of such city to provide by ordinance for the regulation of public

meetings and public speaking in its streets by preventing the obstruction of the same or the gathering of disorderly crowds thereon, is not violative of that provision of the Constitution which prohibits the passage of any statute containing matter different from that which is expressed in the title thereof. *Sayer v. Brown*, 48 S. E. 649, 119 Ga. 539, and cases cited.

3. Where it appeared that the accused violated a municipal ordinance for the previously announced purpose of testing its constitutionality, it was not error to refuse to continue the case made against him merely to give his counsel time to investigate the constitutional questions claimed to be involved therein.

4. The allegations in the petition for certiorari as to the circumstances which it was claimed disqualified the mayor, as acting recorder, to try the petitioner, were not only not verified by the answer, but were expressly denied therein. Neither did the answer verify the statements made in the petition in reference to the petitioner being required, under the sentence imposed, to work upon the public works. "Points made in a petition for certiorari, not verified by the answer of the trial judge, present nothing for determination either by the superior or the supreme court."

5. When the penalty is left by the statute to the discretion of the trial judge, within certain fixed limits, his judgment will not be disturbed upon the ground that the sentence was excessive, if the penalty imposed does not exceed the limit provided.

6. Where complaint was made in a petition for certiorari that the trial court overruled objections to the testimony of named witnesses upon designated subjects, without setting forth, either literally or in substance, the testimony to which the objections were made, an assignment of error that the court erred in overruling such objections was not well taken.

7. The certiorari was properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

J. L. Fitts was convicted of violating a city ordinance. From an order of the superior court overruling certiorari, he brings error. Affirmed.

Alonzo Field and A. M. Brand, for plaintiff in error. James L. Mayson and W. P. Hill, for defendant in error.

FISH, P. J. J. L. Fitts was adjudged guilty, in the recorder's court of the city of Atlanta, of violating a certain municipal ordinance, and sentence imposed on him therefor. He took the case by certiorari to the superior court, where, upon the hearing, the certiorari was overruled. Thereupon he sued out a writ of error to this court. Our learned Brother Lumpkin, who presided in the superior court, rendered an opinion in the case, which comes up in the record, and which is as follows:

"This case presents a contest of strength between 'Prof.' Fitts and a municipal ordinance of the city of Atlanta. The two are diametrically opposed to each other, and one must yield. There is no halfway ground. If the ordinance was a legal and valid ordinance, Prof. Fitts' conduct was illegal. If the professor is right, the ordinance is illegal. The ordinance is contained in the Municipal Code of 1899, and reads as follows: 'Sec. 1841. The president, chairman, or other offi-

cer, or committee of men, or any persons who desire or intend to call a public meeting of the citizens of Atlanta, for political purposes, shall notify the mayor, or chief of police, of such desire or intent, and of the time and place of meeting, before said meeting is called, and upon failure to do so, upon conviction thereof shall be fined not exceeding fifty dollars and cost, or be imprisoned in the calaboose of the city not exceeding thirty days, in the discretion of the recorder's court; and upon receiving such notice it shall be the duty of the mayor or chief of police to attend such meeting with a sufficient police force to preserve peace and order: provided, it shall not be lawful to hold any such meeting in any of the public streets of the city of Atlanta without the consent of the mayor and council, or the mayor and chairman of the board of police commissioners of the city of Atlanta; and any person calling or holding any public meeting, in any of the streets of the city of Atlanta, without such consent, shall, upon conviction thereof in the recorder's court of said city, be fined in a sum not exceeding one hundred dollars, or imprisoned not exceeding thirty days, in the discretion of the court.' The plaintiff in certiorari appears to have made two or three speeches on the streets of Atlanta under permit or consent from the mayor and chairman of the board of police commissioners, but his permit was withdrawn. Afterwards he determined to speak on the streets either with or without a permit or consent, and, failing to obtain one, he proceeded in defiance of the ordinance and in spite of it. Handbills were issued and scattered, of which the following is a copy: 'Great Sensation! Testing a City Ordinance. Free Street Lecture on Socialism by Prof. J. L. Fitts of South Carolina. Monday, August 17th, 8 p. m., corner of Broad and Marietta streets. Prof. Fitts has been refused a permit. He will speak under the right guaranteed by the 1st Amendment to the United States Constitution, which was proposed by Jefferson and approved by Washington. If interrupted, the case will be carried to the United States Supreme Court. Shall we, who built the streets, be deprived of their use for lawfully assembling to discuss our condition and needs? Come and see. Be early and get a good place. Don't Block Sidewalks or Streets. The Committee.' The petition states that this was admitted in evidence over objection, on the ground that there was no evidence that said Fitts had it printed or circulated, and it was irrelevant; but there is no assignment of error on any such grounds, nor does the mayor verify this statement in his answer to the writ of certiorari. The answer states that, 'as part of its evidence, the city introduced the poster which Fitts scattered over the city, as set forth in paragraph 10 of the writ of certiorari.' Having gathered his crowd in a public street in the very heart of the

business portion of the city, he proceeded to make his test of the ordinance, and speak without any permit or consent. At the appointed time, among those who answered his invitation were members of the police force; and, as he had announced a desire to make a test of the law, they accommodated him by arresting him when he refused to desist from speaking on the street; and on his trial in the recorder's court, the mayor, presiding, adjudged him guilty. He brings the case to this court by writ of certiorari. The assignments of error are numerous, but the leading ground of his attack upon the ordinance is, in substance, that the Constitution of the United States and of the state guaranty freedom of speech, and that under this guaranty he had a constitutional right to hold meetings and make speeches in the streets of Atlanta, and the ordinance which prevented his doing so without a permit or consent of the municipal officers was invalid. In several respects the answer of the mayor to the writ of certiorari does not agree with the petition, and, not being traversed, it must control. The petition is only taken as correct where verified by the answer. *Childs v. Moran*, 114 Ga. 320, 40 S. E. 271. For instance, the answer contains the following: 'On the night of the arrest of Fitts the permit had been withdrawn, but Fitts spoke in defiance of the authorities of the city, and went out into Marietta street, gathered a crowd around him, and began his speech. The sidewalk was not blocked, but the crowd gathered around Fitts in the street. The language used by Fitts was not obscene or vulgar, but on the night of his arrest he had no permit to speak, issued either from the mayor or any one else. He took a box, and placed same out upon the roadway, and, standing thereon, undertook to gather a crowd around him, and undertook to make a speech.' In the evidence of the chief of police occurred the following: 'The sidewalk was not blocked, but people had gathered around Fitts out in the street. The people in the street, of course, obstructed the street where they stood.' Another witness states that: 'The language of Fitts was not obscene, but was that calculated to arouse strife and discord and cause revolution. He represented the socialists, and seemed to be trying to convert the people to his way of thinking by a text [attacks] upon the government, legislature, capital, etc.' Further on in the answer it is stated that: 'The people gathered around him out in the street, and when they undertook to arrest Fitts a number of his sympathizers became very much excited, and it was necessary to arrest them in order to disperse the assembly.'

'The primary object of streets is for public passage. They should be kept open and unobstructed for that purpose. If damage accrues to passers by reason of improperly allowing them to be used for other purposes, the city may become liable. The streets of

the city are peculiarly within the police control for the purpose of preserving and protecting their use by the public as thoroughfares. A man has many constitutional and legal rights which he cannot lawfully exercise in the streets of a city. Thus, every citizen has a right to lawfully acquire and hold personal property; but he has no right, constitutional or otherwise, to insist on storing his possessions in the street. Every man has the inalienable right to sleep and eat (if he has the edibles), but he has no constitutional right to make his bed or set his table in the street. Every man has not only the right to, but he should, bathe and cleanse himself, and change his raiment, if he has a change. This is a duty imposed by his individual constitution, if not by that of his country. But there is no constitutional right on his part to perform his ablutions or exercise the most necessary demands of his nature in the public streets. At proper times and in proper places one may make loud noises, or shoot a gun, or test his lung power vocally to a considerable extent, without offending against any law; but there is no right, inherent or constitutional, to make vociferous outcries or practice gunnery in the street. If Prof. Fitts' idea of constitutional law were correct, I see no reason why every citizen should not claim a right to use the public streets for the exercise of his trade, calling, or profession, which may be much more essential to his welfare and that of the public than speechmaking by the plaintiff in certiorari, however eloquent, and regardless of the soundness or unsoundness of his argument.

"If the Constitution, state or federal, guarantees to Prof. Fitts the right to make public speeches on the streets of Atlanta, why does it not also guaranty the same right to every lecturer who may not desire to hire a hall, and to every showman who wishes to exhibit on the highway, or to every mechanic, artisan, merchant, or other citizen the right to ply his lawful vocation in the public thoroughfare? The constitutional right to exercise one's lawful vocation is quite as sacred, and often more important, than the right to make speeches; but the exercise of either right must yield to the municipal power properly exercised over the streets for the primary objects for which they were established. If every one who has some constitutional right has also the constitutional right to exercise it in the streets of a city regardless of municipal regulations, these thoroughfares may soon become a gathering place of a numerous clan rivaling those adjuncts of modern exhibitions which, since the term was used during the Columbian Exposition at Chicago in 1893, have come to be distinguished by the name of 'Midway Plaisance.' The right of the public in regard to the streets is to use them for passage as public highways, provided they are used lawfully for that purpose. But even the right of

passage is subject to reasonable legislative regulations for the general good. Thus, idling and loitering in the public streets has generally been prohibited, and no one has yet doubted the constitutionality of such legislation.

"In the handbill above referred to, the question is asked, 'Shall we, who built the streets, be deprived of their use for lawfully assembling to discuss our conditions and needs?' Who comprise the 'committee' signing this handbill, or whether Prof. Fitts was a part of it or all of it, does not appear. But as it is shown that he was from another state, and, so far as disclosed, neither a citizen, taxpayer, property owner, nor resident of Atlanta, it is not quite clear how this question has any relevancy, or how he was one of the 'we' who built the streets of the city or how he derived any peculiar right to use them as a forum or lecture hall because they have cost the municipality or the taxpayers or the abutting property owners money to pave or repair or keep in order for public travel. I fear that Prof. Fitts has confused in his mind the constitutional right of freedom of speech with an imaginary, though nonexistent, right to hold public meetings and make speeches in the public streets regardless of municipal law or regulations. It is true that under an ordinance prohibiting speaking on the streets without a permit, and a charge that he violated such ordinance, the defendant could not be convicted of the offense of obstructing the streets arising under another ordinance, although he might be guilty of both offenses; but in considering the reasonableness or propriety of the ordinance on the subject of speaking on the public streets, and the necessity of police regulation and control of that subject, the liability to cause obstructions in the streets interfering with public passage and causing disorder is a matter for consideration. Neither the prohibition placed on Congress by the first amendment of the Constitution of the United States, whereby it was declared that 'Congress shall make no law abridging the freedom of speech,' nor the provision of the Constitution of this state which declares that no law shall be passed curtailing or restraining the liberty of speech, confers any constitutional right to gather crowds and make public orations in the streets of a city regardless of the municipal control over them.

"If, then, the plaintiff in certiorari (the defendant in the recorder's court) had no absolute or constitutional right to use the public streets of Atlanta as a place to gather an audience and speak, is the ordinance void on the ground that it makes an arbitrary discrimination in favor of some against others, because it requires a permit or consent to be obtained, and prohibits holding public meetings on the streets without one? Under the general powers usually conferred on cities, or what is sometimes spoken of as the 'general welfare clause' in municipal char-

ters, the corporate authorities could pass reasonable regulations for the preservation and keeping of their streets open and unobstructed for travel and preventing disorder upon them. Not content with this general power, the city of Atlanta obtained an amendment to its charter in 1893, which contains the following language: "The mayor and general council of said city of Atlanta is empowered to provide by ordinance, for the regulation of public meetings and public speaking in the streets of said city of Atlanta by preventing the obstruction of the streets of said city or the gathering of disorderly crowds in said streets." City Code of 1899, 48. The ordinance quoted above does not, on its face, make any discrimination, or say that certain persons, or persons of certain classes, might speak on the streets and certain others should not do so. It says that none shall do so without a permit or consent from certain officers. By its own terms it is not discriminative. Is it invalid because it requires a permit or consent before any person shall be allowed to speak on the streets, or because it provides for the granting of such permit by the mayor and chairman of the board of police commissioners? Counsel for plaintiff in certiorari have cited but one case on this subject—that of *Yick Wo v. Hopkins*, 118 U. S. 356-374, 6 Sup. Ct. 1064, 1065, 30 L. Ed. 220. In that case an ordinance was passed which contained the following provision: "Section 1. It shall be unlawful, from and after the passage of this ordinance, for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city or county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Other sections of the ordinance prohibited the erection or maintaining of any scaffolding on any building without obtaining written permission of the board of supervisors, and provided punishment for a violation of the ordinance. Yick Wo and others were imprisoned for violating this ordinance. The case arose on the application for a writ of habeas corpus. On the return of the writ and the hearing then had the evidence plainly showed that the great majority of the laundries in the city were operated by Chinamen in wooden buildings; that the board of supervisors arbitrarily refused to consent for them to continue to do business in these wooden buildings, although a similar right was granted to Caucasians. Yick Wo showed that he had a city license which had not expired; that he had been engaged in the laundry business in the same premises and building for twenty-two years previously; that he had a license from the board of fire wardens, which showed that they had inspected the premises, and found all proper arrangements for carrying on the business; that the stove, washing and drying apparatus, etc., were in good condition, and their use not dangerous

to the surrounding property from fire; and that all proper precautions had been taken to comply with the provisions of the ordinance in respect to the fire limits and making regulations concerning the erecting and use of buildings in the city; and also that he had a certificate from the health officer showing that the premises had been inspected by him, and found to be sufficiently and properly drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. Under the facts disclosed, the Supreme Court of the United States held that the ordinance and its administration were evidently intended to discriminate against the Chinese on account of their race, and that it was an arbitrary effort to drive them out of business in favor of their Caucasian rivals. The following extract from the opinion of Mr. Justice Matthews will serve to indicate the real basis of the decision: "It appears that both petitioners have complied with every requisite deemed by the law or the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others, who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which petitioners belonged, and which, in the eye of the law, is not justified." That imprisonment under an ordinance, the object of which was to drive out of business and prevent from exercising a legitimate and useful calling a number of persons, merely because they were Chinese, in the interest of competitors of another race, was illegal, presents a very different question from that involved in the present case; nor does the ruling that, although the ordinance involved may have been fair and impartial in appearance, yet, if it was administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances material to their rights, imprisonment so brought about was illegal, control the present case. Here no business or useful occupation, established or to be established, was involved. The right of a man to ply his trade or business occupying property owned or rented by him, by which he serves the public and earns an honest livelihood, is very different

from the alleged right contended for in this case to hold meetings and make public speeches in the public streets of the city. The municipal authorities did not prohibit Prof. Fitts from speaking altogether, but prohibited him from holding public meetings and speaking in the streets without a permit or consent, and he was convicted when he did so with the express purpose of violating the municipal ordinance and asserting an alleged right which he did not have. One who gathers a crowd in a public street under the invitation expressed in a handbill, announces an intention to violate and test a police regulation, mounts a box, and insists on speaking, though requested to desist by the authorities, can hardly claim to be in the same category with those who pursue lawful and useful occupations, and who desire to use property owned or rented by them in the conduct of their legitimate business.

"In *Massachusetts v. Plaisted*, 148 Mass. 875, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566, a rule was passed by the board of police forbidding singing or playing or performing on instruments in the streets without the license of the board of police. A member of the Salvation Army, playing on a musical instrument, contested the rule, and the case was carried to the Supreme Court. In the decision it was held that 'it is not an unconstitutional delegation of power for the Legislature to authorize a city council to empower the city board of police to make rules and regulations with reference to itinerant musicians'; and that the constitutional right of freedom of worship did not prevent the adoption of reasonable rules for the use of the streets. In the case of *City of Centralia v. Smith*, 77 S. W. 488 (Court of Appeals of Kansas City), it was held that a city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is within the police power of the city. 'A city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is not void as a delegation of legislative power to the mayor.' * * * Without discussing this fully, it may be said that, of course, if the statute itself were unconstitutional, or the administration of the law were in excess of the authority, or in violation of the Constitution, the ruling might be otherwise. See, also, *Kansas City v. Martin* (Mo. Sup.) 9 Mun. Corp. Cas. 882, 68 S. W. 1087; *Kennedy v. Mayor* (R. I.) 9 Mun. Corp. Cas. 871, 53 Atl. 317; *Broadbent v. Revere* (Mass.) 10 Mun. Corp. Cas. 452, 66 N. E. 607.

"There was nothing on the face of this ordinance to stamp it as unconstitutional. When a case of capricious, malicious, or arbitrary action arises, the courts will deal with it as the law requires; but I do not think that this is one of them. The answer of the mayor to the writ of certiorari shows that there was ample room for the legitimate exercise of discretion in refusing a permit to

the plaintiff in certiorari; and the manner in which he proceeded to get up his crowd in the street, and the disorder which the answer of the mayor shows followed when the police sought to cause him to desist, indicate that there may have been good grounds for the way in which the discretion was exercised. While he may have been guilty of no actual acts of disorder himself, yet the gathering of the crowd in the street for the express purpose of violating the municipal ordinance, the practical dare to the municipal authorities to interfere with him, and the disorder occurring when they did so, as well as the other evidence in the case, indicate that the exercise of the discretion on the part of the mayor and chairman of the board in refusing the permit was not so arbitrary or capricious as to warrant a finding that either the ordinance or the administration of it was unconstitutional. In *Montross v. State*, 72 Ga. 261 (5), 53 Am. Rep. 840, it is said: 'Every person is presumed to intend the natural and legal consequence of his conduct; and where the agent of a newspaper, knowing of the law of this state against circulating obscene literature, violated it for the express purpose of making a test case or of vindicating the character of his paper, and to insure a prosecution sought the chief of police, and gave him copies of the paper, he cannot complain that he succeeded in obtaining a prosecution, or that the court, in its charge, did him injustice as to the intent with which he committed the act, although the result of his experiment was different from that which he anticipated.' In the present case not only were the handbills referred to scattered, but the plaintiff in certiorari gave written notice to the mayor of his intention to speak on the streets of Atlanta, in spite of the fact that he had no permit or consent. I hold that no constitutional right of the plaintiff in certiorari has been violated.

"There was no error in refusing the motion for a continuance under the facts set out in the mayor's answer. Nor was there any error on the part of the mayor in holding that he was not disqualified to preside, under the statements in the answer. The ordinance was not void for any of the reasons assigned, nor was the sentence so excessive as to be illegal under the facts of the case. *Whitten v. State*, 47 Ga. 297. Nor does the answer of the mayor verify the statements of the plaintiff as to the sentence. *Childs v. Moran*, 114 Ga. 320 (2), 40 S. E. 271.

"The assignment of error in regard to the admission of evidence concerning the former speeches and conduct of the plaintiff in certiorari might be disregarded on the ground that it is too vague and general, and lacking in specification. But if it be considered that he sought to attack the conduct of the mayor and the chairman of the board of police commissioners on the ground that in denying him a permit they acted arbitrarily and ca-

preciously, it was legitimate to show his previous conduct and language, and the circumstances under which the municipal authorities exercised the authority vested in them.

"Upon the whole case I am of opinion that the certiorari should be overruled, and the judgment of the mayor allowed to stand; and an order will be entered accordingly."

In our opinion, the reasoning and authorities cited in the foregoing opinion clearly establish the conclusions therein stated, and the certiorari was properly overruled.

Judgment affirmed. All the Justices concurring.

(122 Ga. 80)

McEARCHERN & CO. v. EDMONDSON et al.
(Supreme Court of Georgia. Feb. 1, 1905.)

PARTIES—ACTION BY USER—NONSUIT—ACTION FOR DAMAGES—AMENDMENT.

1. The rule in actions *ex contractu* by which the name of the original plaintiff may be stricken, and the cause allowed to proceed in the name of the user, if the latter has a legal right to maintain the suit (*Wilson v. Church*, 56 Ga. 554), does not apply to actions *ex delicto*. *Willis v. Burch*, 42 S. E. 718, 116 Ga. 375.

2. This being an action in tort by M. & Co., for the use of E. & M., and there being no proof that the original plaintiffs had been damaged, the court properly granted a nonsuit.

3. There was no error in refusing to permit an amendment striking the name of M. & Co., and substituting the names of E. & M. as plaintiffs.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; B. G. Mitchell, Judge.

Action by McEarchern & Co., for use, etc., against W. A. Edmondson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

L. W. Branch, for plaintiff in error. S. S. Bennet and W. S. Humphreys, for defendants in error.

LAMAR, J. Judgment affirmed. All the Justices concur.

(121 Ga. 794)

CITY OF ALBANY v. CAMERON & BARKLEY CO.

(Supreme Court of Georgia. Jan. 28, 1905.)

PLEADING—AMENDMENT—NEW CAUSE OF ACTION—MUNICIPAL CORPORATIONS—CONTRACT OF GUARANTY.

1. The character of an action is determined by the facts recited in the petition, and the nature of the relief prayed, and not by the particular phraseology employed by the pleader; and, where a petition sets out substantially a cause of action of a given kind, a new and distinct cause of action is not added by an amendment striking out words which inaccurately describe the transaction declared on.

2. A contractor was under contract with the city of Albany to bore for it an artesian well. In order to obtain materials necessary to the completion of his contract, he requested the municipal authorities to pay to a dealer in such materials a portion of the amount that would be due him on the completion of his contract, up to a certain amount. This sum was

in payment for materials already bought, but not paid for, as well as for materials subsequently to be purchased. The city agreed to do this, and so notified the dealer, who furnished the materials on the faith of this agreement. There was no obligation on the part of the city to pay any money unless the contract was fulfilled, and it was distinctly understood that the money to be paid was only a part of that which would be due to the contractor. *Held*, that the agreement of the city was not a contract of guaranty or suretyship, and was not in contravention of article 7, § 6, par. 1, of the Constitution of Georgia (Civ. Code 1895, § 5891), and that a demurrer to a petition containing such allegations was properly overruled.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by the Cameron & Barkley Company against the city of Albany. From an order overruling the demurrer to the petition, defendant brings error. Affirmed.

D. F. Crossland, for plaintiff in error. Wooten & Hofmayer, for defendant in error.

CANDLER, J. This case comes up on exceptions to the overruling of a demurrer to the plaintiff's petition, and to the allowance of an amendment over the objection of the defendant that it set up a new and distinct cause of action. The petition makes substantially the following case: Joyce had contracted to bore an artesian well for the city of Albany, and, as an incident to the fulfillment of his contract, had become indebted to the Cameron & Barkley Company, a South Carolina corporation, on account of material used in the well. After having bored several hundred feet without obtaining a flow of water, it became necessary to change the casing, as that being used was too large to permit of further penetration of the soil, and the contract between the city and Joyce was amended accordingly. Joyce then sought to obtain further supplies from the Cameron & Barkley Company, but that company refused to furnish him any more material unless the city of Albany would agree to protect it against loss on the material that it had already furnished Joyce, as well as on whatever other material he might obtain from it to be used in the construction of the well. Joyce then communicated with the city authorities in writing as follows: "The Cameron & Barkley Company, of Charleston, S. C., furnished me with a lot of 10" drive pipe now in the well in your city; and as I am negotiating with them for the purchase of 7% well casing necessary to complete the well, and in order to secure them for a balance still due them on the 10" pipe, as well as for the 7% casing I now need, I wish to make the following arrangement with you in reference to payments which you have for [me] in the future. The amount that I will owe them, including this old balance, as well as for the casing to be ordered, will not be less than \$1,500; and I desire that on all future payments that you have for me on account of this well, that you will make over

to them half of said amounts; for instance, when the next payment becomes due, you may settle with me for 65%, whatever that amounts to, and send them half of it. In other words, you are to protect them to the extent of \$1,500 for material they are to furnish, provided, of course, that I fulfill my agreement with you, and that said amounts are coming to me. Please write them to the above extent and under the above condition." This communication was submitted to the city council, and, from a certified copy of an extract from the minutes of that body attached to the petition, it appears that on motion it was "agreed to, provided the pipe weighed not less than 20 lbs. to foot, and the clerk instructed to notify the Cameron & Barkley Co." The plaintiff was duly notified of the action of the city authorities, and, upon the faith of that action, furnished Joyce with materials as ordered, until he became indebted to it in a sum stated in the petition. Joyce has completed his contract, having obtained a flowing well, and the city has paid him \$4,806.74, leaving a balance due of \$1,443.26—more than enough to pay the amount due the plaintiff. Joyce is insolvent, a bankrupt, and a nonresident; and the plaintiff sues the city to recover the purchase price of the materials ordered by him, and used in the construction of the well.

In one paragraph of the petition it was alleged that the city, "wishing to have the aforesaid well completed, and knowing that said Joyce was unable to purchase the aforesaid material without its guaranty, agreed to the terms of the communication from said Joyce," etc. The amendment, the allowance of which is assigned as error, substituted for the word "guaranty" the words "agreement hereinafter stated"; the objection being that the amendment changed the suit from one on a guaranty to one based on an undertaking by the city to be bound by an assignment to the plaintiff by Joyce of certain amounts thereafter to become due him. The demurrer was upon the grounds (1) that the petition set forth no cause of action; and (2, 3) that the suit was one upon a contract of guaranty, which was illegal, void, ultra vires, and in contravention of article 7, § 6, par. 1, of the Constitution of Georgia (Civ. Code 1895, § 5891).

If, in reality, the agreement relied upon by the plaintiff as the basis of a recovery was not a contract of guaranty, the mere incidental use of that word in describing the transaction would not make the petition a suit upon such a contract, and the allowance of the amendment was not erroneous. In other words, the transaction speaks for itself, regardless of the terminology employed by the pleader; and as he is not bound in his petition to classify his action (*McNorrill v. Daniel*, 121 Ga. —, 48 S. E. 681), he will be allowed to amend his pleading in order to correct any looseness of phraseology that it may contain. And we are decidedly of

the opinion that the contract declared on was not one of suretyship or guaranty, but was merely an agreement on the part of the city to be bound by an assignment by Joyce of money that might afterwards become due him. A guaranty is an obligation to pay the debt of another on consideration of a benefit flowing to the guarantor. 6 Enc. Dig. 811, citing Civ. Code 1895, § 2966; *Manry v. Waxelbaum*, 108 Ga. 17, 33 S. E. 701. Except incidentally, there was no obligation on the part of the city in this case to pay the plaintiff any debt due it by Joyce. Until Joyce fulfilled his contract, and the city became indebted to him, it could under no circumstances become liable to the plaintiff. It undertook to pay not a dollar in addition to the sum for which it would be bound in any event. It merely agreed, with the consent of the contractor, and at his request, to divert a part of the amount which it would be due him upon the fulfillment of his contract, and pay it to the plaintiff. We cannot see that it makes any difference that the sum sued for was made up partly of money that Joyce already owed the plaintiff at the time the agreement was made by the city, and partly of an indebtedness that arose subsequently thereto. We know of no legal obstacle to prevent a municipal corporation from consenting to an assignment by a contractor with whom it has business relations of money that will eventually be due him by the city; and when, on the faith of such consent, money is advanced or property furnished to the contractor, the city is, in law and good conscience, bound to see that the money is returned, or the property paid for, within the amount assigned. The demurrer to the petition was properly overruled.

Judgment affirmed. All the Justices concur.

(121 Ga. 841)

ALLEN v. TAYLOR.

(Supreme Court of Georgia. Jan. 30, 1905.)

COVENANT OF WARRANTY—CONSTRUCTION—DEMURRER TO PETITION—NEW TRIAL.

1. In an action on a warranty contained in a deed, it is not a good ground of demurrer that "it appears affirmatively in plaintiff's said petition that the title to the property embraced in the deed from defendant to plaintiff's grantor has been adjudicated adversely to plaintiff upon the ground and theory that it was conveyed by the wife of [a brother of defendant] to this defendant, and by defendant to plaintiff's grantor, in payment of a debt due by said [brother of defendant] to plaintiff's grantor. * * * and was therefore void in law as against said wife"; the defendant claiming that by reason of these facts the plaintiff is estopped to sue on the warranty in the deed.

2. A general warranty of title in a deed "includes in itself covenants of a right to sell," and "covers defects in the title, though known to the purchaser at the time of taking the deed." Civ. Code 1895, §§ 3614, 3615; *Miller v. Desverges*, 75 Ga. 407; *Godwin v. Maxwell*, 106 Ga. 194, 32 S. E. 114; *Foute v. Elder*, 109 Ga. 718, 35 S. E. 118; *McCall v. Wilkes*, 121 Ga. —, 49 S. E. 722.

3. The first grant of a new trial will not be disturbed, unless the verdict was demanded by the evidence, or there has been an abuse of discretion by the trial judge. The record in this case discloses neither alternative.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by M. J. Taylor, executrix, against Lee Allen. From an order granting a new trial, defendant brings error. Affirmed.

Shepp & Sheppard, for plaintiff in error. Lane & Maynard and W. P. Wallis, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(122 Ga. 32)

STAFFORD v. WILSON.

(Supreme Court of Georgia. Jan. 30, 1905.)

JUSTICE OF THE PEACE—PAYMENT OF COSTS—
DISMISSAL—CERTIORARI—UNSWORN
PLEA—FINAL JUDGMENT.

1. Where a case is appealed to a jury in a justice's court, the payment of the costs which accrued on the first trial is a matter between the magistrate and the appellant, and does not concern the opposite party. Where the magistrate refuses to dismiss the appeal because such costs have not been paid, this amounts to a waiver of his right to have the costs paid in advance, and the appellee has no right to complain of the refusal to dismiss the appeal. *Gibson v. Cook*, 43 S. E. 72, 116 Ga. 817.

2. Where, in a suit in a justice's court upon an open account, which was proved by the affidavit of the plaintiff, the defendant's answer had not been verified by affidavit, the judge of the superior court properly held upon certiorari that it was error for the magistrate, over the objection of the plaintiff, to allow the defendant to introduce evidence in support of such unsworn plea. Civ. Code 1895, § 4130.

3. Inasmuch, however, as such plea may be amended by swearing to it (*Barnes v. Coker*, 37 S. E. 104, 112 Ga. 187), it was error for the judge of the superior court upon certiorari to enter up final judgment for the plaintiff. The case should have been remanded for retrial in the justice's court.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by J. C. Wilson against I. S. Stafford. From a judgment for plaintiff on certiorari, defendant brings error. Reversed.

Wilcox & Johnson, for plaintiff in error. J. R. Walker, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(122 Ga. 38)

FRANK & CO. v. HORKAN.

(Supreme Court of Georgia. Jan. 30, 1905.)

COURTS—ADJOURNMENT—DEATH OF ATTORNEY
—PLEADING—FILING ANSWER—
APPEAL—REVIEW.

1. The death of a prominent member of the bar shortly before the time for convening a term of a court governed by the same laws and rules of pleading, practice, and procedure as the superior court is not such cause as will legally authorize the judge in vacation to adjourn the

term of the court. Civ. Code 1895, §§ 4342-4344; *Hoye v. State*, 39 Ga. 718.

2. Where a judge in vacation passes an illegal order adjourning the next term of court, and, in accordance with such order, that term was not held at the regular time, in a case in which such term was the appearance term the defendant may file his plea or answer as late as the following term of the court, or at any time prior thereto. *Bowden v. Hatcher*, 9 S. E. 724, 83 Ga. 78.

3. Where the May term of the court was the appearance term of the case, but was illegally adjourned until June, at which time the defendant filed his answer, the next regular term of the court being in August, such answer is in time. It was therefore erroneous for the court, several terms later, to strike such answer as having been filed too late, and the court properly corrected this error when, on the same day, defendant was allowed to refile his answer.

4. Questions not referred to in the brief for the plaintiff in error will be treated as abandoned.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. H. Griffin, Judge.

Action by Frank & Co. against G. A. Horkan. From the judgment both parties bring error. Affirmed on main bill of exceptions. Cross-bill dismissed.

Dessau, Harris & Harris, for plaintiffs. John D. Pope and Shipp & Kline, for defendant.

SIMMONS, C. J. Judgment on main bill of exceptions affirmed; cross-bill dismissed. All the Justices concur.

(122 Ga. 28)

McDERMID v. JUDGE.

(Supreme Court of Georgia. Jan. 30, 1905.)

APPEAL FROM COUNTY COURT—BOND—DEFECTS
—AMENDMENT.

1. A bond given for the purpose of appealing a case from the county court to the superior court recited that the appellant "brings G. D. Lovett, and tenders him as security, and they, the said [appellant] as principal, and Gordon Alderman as security, hereby acknowledge themselves bound to the plaintiff * * * for the eventual condemnation money in said case." The bond was signed by the appellant as principal and by Lovett as security, but was not signed by Alderman. Held, that this was a good appeal bond, and Lovett was bound thereon as security, although the name of Alderman appeared in the face of the bond as acknowledging himself bound as security, and was not signed to the bond. Even if this were not so, the bond was amendable, the defect being a mere irregularity. It was therefore error to dismiss the appeal. *Kimbrough v. Pitts*, 63 Ga. 496; *Hendrix v. Mason*, 70 Ga. 523; *Anthanissen v. Brunswick Co.*, 17 S. E. 951, 92 Ga. 409.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by T. A. Judge, Jr., by his next friend, against E. J. McDermid. Judgment for plaintiff. Defendant brings error. Reversed.

Alexander & Gary, for plaintiff in error. Bule & Knight, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concur.

(122 Ga. 49)

QUILLIAN v. JOHNSON et al.

(Supreme Court of Georgia. Feb. 1, 1905.)

EXECUTORS AND ADMINISTRATORS—ACTIONS—PARTIES—ABATEMENT—AMENDMENT OF PLEA—LIFE INSURANCE—WAGERING CONTRACT.

1. Though a suit may have been brought by one of two executors against his coexecutor and another alleged to be jointly interested with him in defeating a valid demand of the estate represented by the plaintiff, yet, if it appears from the facts brought out at the trial that the executor named as a defendant really has no personal interest in the outcome of the litigation, he may, upon the death of the plaintiff after the case has come to this court for review, be substituted in his stead as the party entitled to represent the interests of his testator's estate.

2. Where such a suit is brought, the executor alleged to have personal interests inimical to those of the estate should be named as a party defendant in his individual capacity, as he cannot properly be joined as a party plaintiff in his representative capacity.

3. Notwithstanding a defendant may file a plea in abatement at the first term, he cannot, by way of amendment to the plea at the trial term, set up new and distinct grounds why the action should abate, unless the plaintiff has so amended his pleadings as for the first time to make available the matters of defense sought to be urged by an amendment to the defendant's plea.

4. A mistake made in alleging the date on which an instrument was executed may ordinarily be cured by appropriate amendment.

5. Irrespective of whether the holder of a policy of insurance on his own life may legally sell and assign the policy to one having no insurable interest in his life, the policy holder is certainly not at liberty to make the policy the subject-matter of a purely wagering and speculative contract between himself and a person having no interest therein.

6. By express statute in this state, money paid or property delivered up in pursuance of a gaming contract may be recovered from the winner by the loser, if suit therefor be instituted within six months after the loss.

7. The verdict which the court directed the jury to return was demanded under the law and the undisputed evidence, regardless of testimony admitted over the objection of the complaining party; and the testimony which he offered, but which was rejected by the court, was not such as would have authorized any other result.

(Syllabus by the Court.)

Error from Superior Court, Clarke County; W. M. Henry, Judge.

Action by one Toll and others against D. D. Quillian. Judgment for plaintiff, and both parties bring error. On the death of Toll, L. M. Johnson was substituted. Affirmed on main bill of exceptions, and reversed on cross-bill.

Lumpkin & Burnett and F. A. Quillian, for Quillian. S. H. Sibley, Jno. C. Hart, and G. C. Thomas, for Johnson.

EVANS, J. On April 15, 1902, the Mutual Benefit Life Insurance Company issued to Grigsby E. Thomas, Jr., a policy on his life for \$10,000, payable at his death to his executors, administrators, or assigns. On February 11, 1903, Thomas executed a written assignment of the policy, reciting that for value received he assigned all his interest therein to D. D. Quillian, subject to any indebtedness

thereon to the company; and on April 27th the secretary of the company indorsed upon this instrument the company's recognition of this assignment of the policy. Thomas died on the date last mentioned, and Quillian subsequently prepared and submitted to the insurance company proofs of death. Neither the policy nor the written assignment thereof was delivered by Thomas to Quillian, but both were placed in the hands of L. M. Johnson, a local agent of the company, in pursuance of the terms of a contemporaneous writing executed by Quillian, of which the following is a copy: "Athens, Ga., February 11th, 1903. Know all men by these presents that whereas Grigsby E. Thomas, Jr., has a policy of insurance on his life, No. 326,547 in the Mutual Benefit Life Insurance Company of Newark, New Jersey, and a quarterly premium thereon, amounting to \$151.52, due January 15th, with 30 days grace allowed by the Company, and whereas the said Thomas has requested Dr. D. D. Quillian to pay said premium for him, in case he does not do so by February 15, 1903, and for valuable considerations has assigned said policy to said Quillian: Now this agreement witnesseth that I, the said Quillian, in the considerations aforesaid, agree to pay said premium on said policy on or before February 15th, 1903, and agree that L. M. Johnson shall hold said assignment for 90 days, and that said Thomas has the privilege of repaying said premium within said specified time; then the assignment is to be returned to him. In the event he fails to pay the said premium within the 90 days, then the policy and the assignment is left to said Quillian, to do as he deems best with it. Should the said Thomas die within the ninety days specified, the said Quillian agrees to pay the minor children of the said Thomas, to-wit: Grigsby E. Thomas, IV, and Marie Virginia Thomas: the sum of \$1,000.00 each out of the proceeds of said policy, and further agrees to pay L. M. Johnson the amount due him by said Thomas. Promissory notes given therefor by said Thomas. [Signed] D. D. Quillian. Witness: L. M. Johnson." There was, in point of fact, no consideration for the assignment of the policy other than the promise of Quillian to pay the past-due quarterly premium, which he afterwards fulfilled, and his agreement to pay out of the proceeds of the policy, in the event of the death of Thomas within the 90-day period, \$1,000 each to the children named, and his outstanding indebtedness to Johnson, evidenced by promissory notes, amounting to something like \$1,300. After Thomas died, Quillian did, on May 7, 1903, pay to Johnson the amount due on these notes. During the last illness of Thomas a futile attempt was made by some of his friends to see Quillian and redeem the policy; and after his death, but still within the ninety-day period named in the above-quoted writing, an effort was made by I. H. Toll, as executor of Thomas, to procure a

surrender of the policy by paying Quillian the amount of the quarterly premium he had advanced and such other demands as he might have against the estate of Thomas. Quillian declined to treat with Toll, saying he had purchased the policy from Thomas, and, under the terms of sale agreed on between them, the policy belonged to him (Quillian), and the estate of Thomas had no interest therein.

On May 8, 1903, the widow of Thomas, in behalf of herself and as next friend for two minor children, joined with Toll, his executor, in a petition to the superior court of Clark county, the purpose of which was to prevent Quillian from collecting the proceeds of the policy from the insurance company, and to invoke a decision of the court as to what interest, if any, Quillian had in the policy or its proceeds. The company and two of its agents, Angier and Johnson, were made co-parties defendant with Quillian, the plaintiffs alleging that the company was about to pay the proceeds of the policy to Quillian through these agents, and praying that it and its agents be enjoined from carrying this purpose into effect. The insurance company, after the court had granted the restraining order prayed for, filed an answer in which it offered to pay the amount due on the policy into the registry of the court, to be paid out under its direction to the party entitled thereto, and in which it asked to be discharged upon so doing. By consent of the parties at interest, the insurance company paid this amount over to a banking institution, to be held by it to await the final decree of the court, and an order was taken dismissing the company and its agents as parties defendant. Later, L. M. Johnson was made a party defendant in his individual capacity, and the names of Mrs. Thomas and her children were stricken from the petition, so that the action proceeded in the name of Toll, executor, as sole plaintiff, against Quillian and Johnson. Quillian alone filed pleadings in resistance of the action. A trial was had on the merits, and after the conclusion of the evidence the court directed a verdict as to what disposition should be made of the fund in controversy as between the plaintiff and Quillian, and a judgment in accordance with this verdict was duly entered. Quillian thereupon sued out a bill of exceptions to this court, wherein he complains of the direction of this verdict, and assigns error upon various rulings made by the court during the progress of the trial. The plaintiff below then sued out a cross-bill of exceptions, making complaint of a ruling adverse to him. On the call of the case in this court, his death was suggested of record, and counsel for Quillian asked that an order be passed making the coexecutor of Toll a party in his stead, his coexecutor being L. M. Johnson, who was named as such in the will of Thomas and who had duly qualified. Counsel representing Mrs. Thomas and her

minor children appeared and objected to this substitution, on the ground that Johnson was an adverse party in the court below, and his interests were inimical to those of the estate of Thomas, and for this reason counsel asked that Mrs. Thomas, in her own behalf and as next friend of her minor children, be made a party in lieu of Toll, the deceased executor. Upon the question thus presented this court reserved its decision, and counsel for the parties at interest were permitted to argue the case on its merits.

1. The logical party to represent the estate of Thomas in this court is his surviving executor, L. M. Johnson, provided he is in a position where he can, in justice to himself and to that estate, undertake to do so. Upon examination of the brief of the evidence, we find that, before this suit was instituted, Quillian had paid to Johnson the entire amount due on the promissory notes he held against Thomas, and that Johnson is not liable thereon as an indorser, having merely marked the notes "Paid," and surrendered the same to Quillian. Indeed, Quillian testified that there had been a final settlement between himself and Johnson touching the latter's interest in the proceeds of the policy, and that he no longer had any interest whatever in the policy or in the result of this litigation. Johnson did not defend the action, nor, so far as appears, take any active part in the proceedings, other than to appear as a witness. He suffers no personal liability under the judgment rendered, gets no benefit therefrom, nor would he be benefited were it to be set aside. The interest of the estate is that this judgment be affirmed; and, in the event of its affirmance, the litigation will be at an end, and Johnson, in his capacity as surviving executor, will be entitled to receive the fund which, under that judgment, was awarded to Toll, his deceased coexecutor, who was the plaintiff below. Such being the truth of the matter, as disclosed by the record before us, we see no reason why Johnson is disqualified from performing his full duty as executor, relatively to this litigation, and we have accordingly passed an order making him, in that capacity, a party defendant to the main bill of exceptions and a party plaintiff to the cross-bill, in lieu of Toll, who occupied a similar relation to the case at the time it reached this court.

2. At the appearance term of the case, Quillian filed a plea in abatement, therein alleging that L. M. Johnson was a coexecutor of the plaintiff Toll, and, as such, a necessary party plaintiff to the case. This plea was stricken on demurrer, after an amendment had been allowed to the plaintiff's petition, in which amendment the plaintiff charged that Johnson was jointly interested with Quillian, and was acting in concert with him, in claiming the proceeds of the policy under the assignment thereof made by Thomas to Quillian. In view of this contention the trial judge rightly ruled that, because of per-

sonal interest, Johnson was not a proper plaintiff as a coexecutor, but was properly made a codefendant in his individual capacity. See *McLendon v. Woodward*, 25 Ga. 252; *Sheehan v. Kennelly*, 32 Ga. 145; *Lamar v. Lamar*, 118 Ga. 691, 45 S. E. 498.

3. At the trial term Quillian offered an amendment to his plea in abatement, whereby he sought for the first time to attack the judgment of the court of ordinary appointing Toll one of the executors of the Thomas estate; the contention being that Toll was a nonresident of Georgia, that he had no such interest in the estate as would authorize his appointment as executor, and that these facts appeared on the face of the record in the ordinary's court, and its judgment was therefore a mere nullity. The plaintiff urged the objection that this amendment came too late, being offered at the second term of the case. The court overruled this objection, but, on demurrer, dismissed the amended plea on the ground that the proceedings in the court of ordinary were regular on their face, and that its judgment was not open to collateral attack. A plea in abatement is essentially a dilatory plea, and must therefore be filed, if at all, at the first term. Civ. Code 1895, § 5058. Entirely new and distinct grounds for abating an action cannot, of course be set up at the trial term under the guise of an amendment to a plea in abatement filed in due time; a party cannot accomplish by indirection what the law declares it is not his privilege to do at all. But counsel for Quillian insist that, as the plaintiff was allowed to amend his petition at the trial term, the petition was thereby opened to either demur or plea at that term. Civ. Code 1895, § 5068. This position is not well taken, however, as that section declares that an "immaterial amendment does not so open the petition" to new and distinct defenses, and this court has held that an amendment which does not so change a plaintiff's petition as for the first time to make a particular defense available is not to be regarded "material," within the meaning of the section just cited. *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731; *So. Bell Tel. Co. v. Parker*, 119 Ga. 721 (4), 47 S. E. 194. It is true that Quillian demurred to the original petition on the ground that it did not distinctly allege in what capacity Toll brought suit, and the plaintiff without invoking any ruling of the court as to this point, voluntarily amended his petition so as to relieve the matter of all doubt. But this amendment was really needless and useless, for the petition, as originally framed, in terms alleged that Toll was "a duly qualified executor of the will of Grigsby E. Thomas, Jr.," lately deceased. It follows that the amendment to the plea in abatement was improperly allowed. Error is assigned in the cross-bill of exceptions upon its allowance, while in the main bill complaint is made that the court subsequently struck the plea on demurrer. The decision

made on the question presented by the cross-bill necessarily controls the question raised by the main bill, so that the latter question need not be specifically dealt with. *Monroe v. Lippman Bros.*, 115 Ga. 164, 41 S. E. 717.

4. In describing the policy of insurance which was the subject-matter of controversy, the plaintiff alleged that it was issued to Thomas in 1901. In point of fact, the policy was dated April 15, 1902. When it was offered in evidence by the plaintiff (it having theretofore been in the custody of the defendants), counsel for Quillian objected to its admission on the ground that it was not the paper referred to in plaintiff's petition. The plaintiff thereupon offered to amend his pleadings by alleging the correct date on which the policy was issued, but Quillian objected to the proposed amendment on the ground that the policy offered in evidence "was a different contract of insurance from that originally sued on," and on the further ground that the plaintiff "was seeking to set forth a new and distinct cause of action." The presiding judge very properly treated these objections as trivial, and permitted the plaintiff to amend his petition and then introduce the policy. The policy being otherwise sufficiently described in the original petition, it was not necessary that the plaintiff should allege the date on which it was issued; and any mistake which he may have made in setting forth its date could be cured by appropriate amendment, either by way of striking from his petition an incorrect statement as to the time when Thomas procured the policy, or by inserting the correct date in lieu of that stated. The policy was not "declared on," but its retention by the defendants under a pretended claim of right was alleged by way of inducement to show the plaintiff's right to the relief for which he prayed.

5. The case turns upon the interpretation to be given the written agreement, set out in full in the foregoing statement of facts, whereby Quillian undertook, upon the conditions therein stated, to advance to Thomas the money with which to pay a past-due quarterly premium on the policy. This agreement and the assignment of the policy were executed contemporaneously, and are to be regarded as evidencing the contract between the respective parties, inasmuch as the written agreement, signed by Quillian, discloses upon what terms the assignment of the policy, signed by Thomas, was executed and delivered to Johnson. It is conceded that Quillian had no insurable interest in the life of Thomas at the time this contract was entered into. The former, however, insists that as the policy was taken out by Thomas on his own life, in which he undoubtedly had an insurable interest, the policy itself did not evidence any wagering contract, and that Thomas had a right to assign it to whomsoever he saw fit, by way of gift or in pursuance of a contract of sale or pledge. In

support of this position, the cases of *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350, and *Ancient Order United Workmen v. Brown*, 112 Ga. 545, 37 S. E. 890, are cited and relied on. The decision in neither of these cases was rendered by a full bench. As to the correctness of the doctrine on which these decisions were based, the writer is not committed, nor does he wish to be understood as now expressing any opinion on the subject. Suffice it to say that it does not follow, from the recognition given of that doctrine, that one who holds a policy of insurance on his own life has any legal right to make it the subject-matter of a wagering contract with another person, whether such person has or has not an insurable interest in his life. See *Exchange Bank v. Loh*, 104 Ga. 446, 81 S. E. 459, 44 L. R. A. 372; *Morris v. Georgia Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506. The court below held that the agreement between Quillian and Thomas was a wagering or speculative contract, pure and simple, and could not for that reason be enforced at the instance of the former. This was, we think, the correct view of the matter, whether the writing be construed by itself or in connection with the oral evidence submitted at the trial, which left the intention of the parties free from all doubt. If Thomas did not die within the 90-day period, he could, but was not bound, to redeem or repurchase the policy by paying to Quillian the amount advanced to pay the quarterly premium. If Thomas elected to redeem on these terms, and actually did so, Quillian would make nothing, but would lose interest on the money advanced by him. If Thomas lived, but declined to redeem, Quillian would lose the amount advanced and interest thereon, while Thomas would forfeit all interest in the policy, if the premiums thereafter falling due were not paid. The "stake" which Thomas put up was the policy; the "stake" put up by Quillian was \$151.52 in cash. These stakes were placed in the hands of Johnson; he was, in gambling parlance, the "stakeholder." The uncertain event was the death of Thomas. He bet he would live, while Quillian bet he would die within the time limited without redeeming the policy. Each day which passed lessened the chances of Quillian to win. So long as Thomas delayed taking steps to redeem his stake, he from day to day deliberately took the chance of losing it forever. This stake was of value at the time it was placed in the hands of the stakeholder. It is true that the policy had to be kept in life by the payment of a past-due premium, but it was not for that reason valueless. Had the subject-matter of the game of chance been a horse owned by Thomas, it also would have had to be fed; and if Quillian had agreed to feed it for 90 days, on condition that the animal was to be his if Thomas died within that period without redeeming it by paying its board, the transac-

tion would be neither more nor less than a wager, if the value of the horse was out of all proportion to its feed bill. The game actually played was for high stakes. By risking \$151.52, Quillian "stood to win" an amount in the neighborhood of \$6,700, after settling with Johnson and paying \$1,000 each to two of Thomas' children. By accepting and getting the benefit of this stake of \$151.52 in ready cash, Thomas "stood to win" for his estate more than \$9,800, if he played the game well, and, anticipating his death in time, redeemed the policy before he died within the 90-day period. On the other hand, both "stood to lose."

We cannot differentiate the agreement into which they entered from an ordinary election bet, which certainly comes under the definition of a wagering contract. *McLennan v. Whiddon*, 120 Ga. 666, 48 S. E. 201. Election bets are often ingeniously contrived, and more or less cloaked under written agreements touching some perfectly legitimate subject-matter of contract, the real design of them being to make the reciprocal obligations of the contracting parties dependent on the uncertain event of the success or defeat of some popular candidate for office. See collation of cases under the head "Gaming" in Century Edition of American Digest, vol. 24, pp. 1538, 1539, 1543, 1544. In other instances the contract is made dependent on the uncertainty of one of the contracting parties marrying on or before a specified date. *Id.* 1538, citing *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586, and *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151. Such agreements have uniformly been held to be mere wagers. In the present case the uncertain event was the death of one of the contracting parties; and the agreement was in no sense a legitimate contract of insurance, but a purely speculative and wagering contract.

6. On the argument here, counsel for the plaintiff in error (Quillian) insisted that, even were this true, the verdict returned under the direction of the court should not be permitted to stand, inasmuch as the parties to this illegal contract were in *pari delicto*; Toll, the complaining executor, stood in the shoes of Thomas, and therefore the court could not lend its aid to either of the parties really interested in the distribution of the proceeds of the policy, but should have left them as it found them. We recognize the correctness of the proposition that, as a general rule, neither a court of law nor a court of equity can lend its aid in enforcing an illegal contract or in distributing the fruits thereof. *Garrison v. Burns*, 98 Ga. 762, 28 S. E. 471; *Exchange Bank v. Loh*, 104 Ga. 446 (3), 31 S. E. 459, 44 L. R. A. 372. However, by express statute in this state (Civ. Code 1895, § 3671), "money paid or property delivered up" in pursuance of a gaming contract "may be recovered back from the winner by the loser, if he shall sue for the same

in six months after the loss." Thus, money or property lost in betting on a horse race may be recovered, if suit therefor be instituted within the statutory period. *Dyer v. Benson*, 69 Ga. 609; *Doyle v. McIntyre*, 71 Ga. 673. And money posted as a wager on the result of an election may be recovered from the stakeholder if, after notice that the bet has been withdrawn, he nevertheless pays it over to the winner without the assent of the retracting party. *McLennan v. Whiddon*, 120 Ga. 666, 48 S. E. 201. So, also, may money be recovered from an agent by a principal who placed the money in the agent's hands for the illegal purpose of playing the game of "futures." *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98. In the case now under consideration it is apparent that Thomas, had he lived, could, by proper legal proceedings, have compelled Johnson, the stakeholder, to surrender to him the insurance policy posted in his hands as a stake, or, in the event Johnson had delivered the policy to Quillian, the policy could have been recovered from him. And it is equally apparent that, had Quillian collected the insurance money after the death of Thomas, his executor, Toll, could have compelled Quillian to account to him therefor, in an action at law brought within six months after Thomas died. Instead of instituting such an action, Toll, as executor, at once brought an equitable proceeding to prevent Quillian from collecting the insurance money, alleging that, if he were permitted to collect the money, he might make way with it, and it could not be recovered from him. Toll asserted claim to the policy itself, as the property which had been staked by Thomas, and resorted to a court having equity jurisdiction in order that this claim might not be defeated by a payment of the proceeds of the policy by the insurance company to the winner, Quillian. In other words, Toll relied on his statutory right to recover the property posted and lost by Thomas on the bet he made that he would not die before redeeming his policy, and the suit brought was essentially of statutory parentage, though clothed with the frills of equitable pleadings.

7. It only remains to inquire whether or not the trial court did, as contended by counsel for Quillian, undertake to enforce the terms of the illegal contract and distribute the fruits thereof. The fund in controversy did not arise from the illegal agreement, but was the proceeds of a valid policy of insurance on the life of Thomas. It was kept in life by the payment, in behalf of Thomas, of the past-due quarterly premium; Quillian paid over to Johnson, as the agent of Thomas, the money with which to pay this premium; and the money so advanced by Quillian was parted with by him under the terms of the illegal agreement between him and Thomas. But the money was received by the insurance company as the money of Thomas, which it in fact was at the time the

premium was paid; and, though it came from an illegal source, this fact did not operate to vitiate the policy. The insurance company could not successfully so contend, nor can Quillian. He can only insist that he paid over the money on a wager, and has a statutory right to sue and recover the same from Thomas' executor. The court gave him credit for this amount, as though he had brought suit and established his statutory right to recover it. The court also credited him with the aggregate amount he had paid to Johnson on the promissory notes he held against Thomas, the consideration of which was money which Johnson had advanced to Thomas to enable him to keep up with the recurring premiums falling due on the insurance policy. Quillian's purpose in paying off these notes was to comply with the terms of his illegal contract. The court, however, did not allow him credit therefor on the idea that he had to this extent performed his obligations under that contract, but upon the purely equitable theory that these notes represented a valid demand against the estate of Thomas which Quillian had discharged, and though the notes had not been indorsed to him, still he was the equitable owner of them, and was subrogated to all the rights of the payee, Johnson. Thus, Quillian received out of the proceeds of the policy payment of every legal demand he had against the estate represented by the plaintiff. That the court did not undertake to enforce the terms of the illegal contract is evidenced by the further fact that two of the nominated beneficiaries thereunder ("Grigsby E. Thomas, IV, and Marie Virginia Thomas," the minor children of the plaintiff's testator) were entirely ignored, and Quillian was not called on to pay either of them anything. In fact, the court directed the jury to find that the entire fund remaining after the credits to Quillian were allowed should "be paid over to the petitioner, as the executor of the estate of G. E. Thomas, Jr." To this estate it belongs, and is subject to the claims of its creditors and to those of the beneficiaries under the will of the plaintiff's testator. The verdict directed by the court was strictly in accord with the written law, with equity, and with good conscience.

We have not overlooked certain assignments of error touching the admission and rejection of testimony. That admitted over the objection of Quillian related to a conversation between a witness and Thomas, before his death, with respect to his right to redeem the policy; while that rejected was offered by Quillian for the purpose of showing that he did not make a loan to Thomas of the money advanced to pay the overdue premium, but that Thomas sold the policy to him on the conditions named in the written agreement between them. Irrespective of the testimony admitted over the objection of Quillian, a verdict such as that directed

by the court was demanded, and the admission of the testimony rejected could not have altered the inevitable result reached. Indeed, as has already been stated, the case turned on the construction to be given the written agreement evidencing the transaction.

Judgment on main bill of exceptions affirmed; on cross-bill, reversed.

(122 Ga. 80)

PATRICK v. COBB.

(Supreme Court of Georgia. Feb. 1, 1905.)

LANDLORD AND TENANT—PROCEEDING TO EJECT—AMENDMENT—COUNTER AFFIDAVIT.

1. An issue made by the filing of a counter affidavit to a summary proceeding to eject a tenant, under Civ. Code 1895, § 4813 et seq., is tenancy or no tenancy, and the question of the plaintiff's title is not involved.

2. While an equitable amendment might be allowed in such a proceeding, it must relate to matters which are germane to this issue.

3. It follows that a counter affidavit setting up that the deed under which the plaintiff claims to derive title from the defendant is void, and praying for a cancellation of the same, is not allowable.

4. Agency cannot be established by the declarations of the alleged agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 40.]

5. The evidence not being sufficient to establish the relation of landlord and tenant between the plaintiff and the defendant, it was error to refuse a new trial.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by M. H. Cobb against Margaret Patrick. Judgment for plaintiff, and defendant brings error. Reversed.

W. E. Thomas and C. L. Smith, for plaintiff in error. Wilcox & Johnson, for defendant in error.

COBB, J. This was a proceeding, under Civ. Code 1895, § 4813 et seq., to eject a tenant. The defendant filed a counter affidavit, and offered an amendment alleging that the plaintiff claimed title under a sheriff's deed purporting to sell the defendant's property, and that the same was void, and praying for a cancellation of the deed. This amendment was disallowed, and the defendant excepted pendente lite. The jury returned a verdict in favor of the plaintiff, and the defendant assigns error upon the refusal to allow the amendment to her counter affidavit and upon the refusal to grant her motion for a new trial.

The issue in a proceeding of the character here involved is tenancy or no tenancy, and under our system equitable amendments may be allowed to the pleadings of either party if such amendments set forth facts proper to be considered in the determination of this issue. But, the proceeding being statutory, the defendant cannot by counter affidavit inject into the case an issue which is not ger-

mane to that involved in the proceeding. *Johnson v. Stancliff*, 113 Ga. 886, 39 S. E. 296. The cases of *Ford v. Holloway*, 112 Ga. 851, 38 S. E. 373, and *Wilkins v. Gibson*, 113 Ga. 31, 58, 38 S. E. 374, 84 Am. St. Rep. 204, were claim cases, and the equitable amendments related to matters which were germane to the issue of subject or not subject, which is the only issue in a statutory claim proceeding. There was no error in disallowing the amendment.

The burden was upon the plaintiff to establish the existence of the tenancy. Unless this was done, he was not entitled to pursue the remedy which he was seeking. *Henry v. Perry*, 110 Ga. 630, 36 S. E. 87, and citations. The only evidence offered to establish the relation of landlord and tenant between the parties was the declaration of a son of the defendant who it is claimed was her agent, and the only evidence of his agency consisted of his own declarations. The court erred in admitting evidence of these declarations, and should have granted a new trial on this ground as well as on the ground that the verdict was without competent evidence to support it.

Judgment reversed. All the Justices concur.

(122 Ga. 61)

COUNCIL v. TEAL.

(Supreme Court of Georgia. Feb. 1, 1905.)

CONTRACT—PERFORMANCE—ACTION FOR BREACH—EVIDENCE—EXCLUSION—OFFER TO SHOW—INSTRUCTIONS.

1. In the absence of a stipulation to the contrary, one who obligates himself by written contract to bore an artesian well for another is at liberty to fulfill his engagement through workmen over whom he places a superintendent to direct how the work shall be done, and is under no obligation to himself perform any of the labor or to give his personal attention to the work.

2. Where the contractor signs the contract in his own name as an individual, he may properly bring suit thereon against the other party to compel payment for the work done, notwithstanding the contractor may have been in partnership with a third person who superintended the boring of the well, and who, under a private understanding between them, was to share in the profits realized from the undertaking.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Partnership, § 363.]

3. Though the boring of the well was continued after water had been reached, the party for whom it was being drilled cannot complain that work was not then stopped at his request and the water tested, when he deferred to the opinion of the superintendent that the supply was insufficient, and permitted him, without further objection, to carry on the work; and this is true notwithstanding a sufficient supply of water was subsequently obtained at the same depth by boring another well at a point but a short distance away.

4. When error is assigned on the refusal of a trial court to allow a witness to be interrogated touching a given subject, it is incumbent on the excepting party to disclose what facts he sought to elicit from the witness, in order that it may appear whether the testimony rejected was relevant to the issue and would have been beneficial to the party offering the same.

5. When a jury fails to reach a verdict because one of the jurors is wedded to his own opinion concerning the law of the case and refuses to apply to the facts thereof the law as given in charge by the court, it is proper for the trial judge, on being advised as to why the jury are unable to agree, to instruct the jury that they are bound by their oaths as jurors to take the law from the court and from no other source.

(a) For no reason assigned by the plaintiff in error did the court err in the instructions given the jury upon this subject.

6. The evidence warranted the finding in favor of the prevailing party.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by H. R. Teal against M. B. Council. Judgment for plaintiff, and both parties bring error. Judgment on main bill of exceptions affirmed, and cross-bill of exceptions dismissed.

Williams & Harper and Allen Fort & Son, for M. B. Council. E. A. Hawkins, for H. R. Teal.

EVANS, J. On August 30, 1900, H. R. Teal and M. B. Council entered into a written contract under the terms of which the former was to drill an artesian well on the farm of the latter, commencing with casing $4\frac{1}{2}$ inches in diameter, and finishing with casing as large as practicable, the work to be commenced as near the 1st of October as practicable, and to be pushed to completion as fast as practical. It was stipulated in this contract that Teal did not guaranty the well "to flow above the surface," but was to be paid "one dollar per foot for all the depth of well drilled," and that Council was to furnish the necessary casing, and was to board three men while doing the work. The well was commenced and partially completed under this contract. On July 3, 1901, Teal instituted an action against Council, alleging that, after the well had been drilled to a depth of 451 feet, the defendant declined to furnish any more casing, and plaintiff was in consequence compelled to abandon the work; that defendant was indebted to him in the sum of \$451 under the contract rate of \$1 per foot for all the depth of well drilled, and also in the sum of \$5.80 for certain material furnished at defendant's request, which amounts the defendant refused to pay. An answer was filed by Council, in which he admitted the execution of the written contract, a copy of which was attached to the plaintiff's petition, but asserted that the writing did not set forth the entire contract, and that he had not committed the alleged breach thereof, nor was he indebted to the plaintiff in any amount save as to the item of \$5.80 for material furnished. The defendant also filed a special plea, wherein he averred that the plaintiff had himself in various particulars violated the contract, that the well had not been drilled in a skillful or workmanlike manner, was totally worthless, and that the

plaintiff's failure to perform his obligations under the contract had endangered him (the defendant) in the sum of \$1,000. A portion of this plea was, on demurrer by the plaintiff, stricken by the court, and the defendant filed exceptions pendente lite to its judgment. Like exceptions were filed by the plaintiff to the refusal of the court to strike other portions of the defendant's plea. The case was then tried on its merits, and resulted in a verdict for the plaintiff, whereupon the defendant made a motion for a new trial, which was overruled. He sued out a bill of exceptions, in which he assigns error on striking part of his special plea, as well as upon the judgment overruling his motion for a new trial. The plaintiff, in a cross-bill of exceptions, complains of the refusal of the court to strike other portions of this plea.

1. The defendant stated in his plea that he "expected and understood" that the plaintiff would give his personal attention to the boring of the well, and that one inducement for making the contract was the reputation of the plaintiff in regard to boring artesian wells; but the plaintiff, instead of giving personal attention to the matter, turned the same over to one Brewer, who was of a disagreeable and arbitrary disposition, and from whom defendant could get no satisfaction in regard to the progress of the work. The court very properly struck this allegation. The defendant did not undertake to aver that the plaintiff had agreed to give personal attention to the work, nor to have it done by an agent whose disposition was irreproachable, and from whom the defendant "could get satisfaction" as to the progress made. The written contract sued on certainly does not so stipulate. The present case does not fall within the rule stated in *Tifton, etc., Ry. Co. v. Bedgood*, 118 Ga. 945, 43 S. E. 257, that "contract rights coupled with liabilities, or involving a relation of personal confidence between the parties, cannot be transferred to a third person by one of the parties to the contract without the assent of the other." Our Code provides that "whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act." Civ. Code 1895, § 2999. To contract to drill an artesian well does not involve any personal trust, any more than to contract to dig a ditch or to erect a building; and, in the absence of a stipulation to the contrary, the contractor may perform his contract obligations through agents, being accountable, of course, for the manner in which they prosecute the work. The "personal trusts" referred to in the above-cited section of our Code are those arising out of a fiduciary relation, such as the relation between principal and agent, and the like; and that section has no application to the contractual relation existing between the parties to an agreement under the terms of which one of them

obligates himself to accomplish a given task, not alone or in person, but through workmen in his employ. The written contract declared on in the present case on its face negatives the idea that Teal was to himself perform the labor incident to the boring of the well, and contains no stipulation that he was to personally superintend the work. This being true, Council had no ground on which to base his expectation and understanding that Teal would give his personal attention to the boring of the well. Civ. Code 1895, § 3724.

Other allegations in the defendant's plea were stricken by the court, and exception was taken to its action in so doing; but, in the brief and argument filed in behalf of the plaintiff in error, no insistence is made that the court committed error in striking these allegations, and the assignments of error touching them are therefore to be treated as having been abandoned.

2. After the plaintiff had announced closed, the defendant made a motion for a nonsuit on the ground that, "if a case was made out at all and any one was entitled to recover, it was the firm of H. R. Teal, composed of H. R. Teal and M. N. Brewer, and not H. R. Teal in his individual capacity." The contention of the defendant was that the testimony disclosed that, at the time the written contract was executed, Teal and Brewer were partners, and that Brewer was jointly interested with Teal in the fruits of that contract. There was no assignment to Brewer of any interest in the contract, and, it having been executed in the name of Teal as an individual, the suit thereon was properly brought in his name. Relatively to Council, the firm of which Brewer and Teal were members was an entire stranger to the contract, and in undertaking to carry out its terms Brewer acted merely as the agent of Teal, notwithstanding any private understanding between him and Teal that they, as partners, should share the profits realized. The trial judge rightly declined to grant a nonsuit, and very properly instructed the jury as to the relation Brewer bore to Council and Teal while engaged in carrying on the work as the representative of Teal.

3. Complaint is made in the motion for a new trial of the refusal of the court to permit the defendant to testify that "since Brewer had left defendant's place he had another well bored near and in close proximity to the hole bored by Brewer, and that he had an abundant supply of water at the same depth at which he told Brewer to stop." This testimony was offered in support of the defendant's plea of "unskillful management on the part of plaintiff." The evidence discloses that, when "the hole bored by Brewer" had reached a depth of some 200 feet, water had been struck, and the defendant had requested him "to stop and test it," saying he was satisfied that was the water he wanted, but that Brewer had

peremptorily replied that defendant "didn't know anything about it," while he (Brewer) "knew all about it." The evidence further shows, however, that the defendant waived the point by deferring to Brewer's judgment in the matter, furnishing additional casing called for by him, and permitting him to continue the boring. This being so, the defendant can take no advantage from the fact that he "tried to get Brewer to stop and test" the water reached. Furthermore, the defendant did not offer to show that this water came from the same stream which had been struck when the well subsequently bored reached a depth of 200 feet. The testimony rejected would not have warranted the inference that such was the truth of the matter, for it is a fact quite universally known that underground streams of water, varying in volume and wholly independent of each other, may exist in close proximity to one another at a given depth beneath the surface.

4. Error is also assigned on the refusal of the court to "allow defendant to show by" certain named witnesses "what a well was." The motion for a new trial does not disclose what facts the defendant expected to elicit from these witnesses, so we are unable to determine the relevancy of the testimony rejected, or whether it would have been beneficial or otherwise to the defendant. Such an indefinite assignment of error cannot be considered. *Allen v. Kessler*, 120 Ga. 319, 47 S. E. 900.

5. After the jury had retired to make a verdict and had deliberated over the case for about four hours, they sent a request to the court to be recharged as to certain questions of law, with which request the court complied. One of the jurors, who had at one time practiced law, "attempted to argue the matter with the court," saying he knew something of the law. He was suppressed. The jury again retired, but were unable during the ensuing night to agree on a verdict. On the following morning the court sent for the jury, and was advised by the foreman that they stood 11 to 1, and that it was still a question of law that was troubling the jury. On inquiry, the court ascertained that the trouble related to the same matters as to which the jury had been recharged on the night preceding, and, believing one of the jurors was still applying his own legal opinion instead of accepting the law from the court, the presiding judge in positive terms informed the jury that they were bound by their oaths to get the law from the court and from no other source whatever, as they were merely judges of the facts and had nothing to do with the law. Complaint is made that the court so instructed the jury of its own motion, without any request from the jury or from counsel on either side. This complaint is devoid of merit.

It further appears that, after the jury had

been instructed as above stated, the foreman asked if the jury had "anything to do with the equity of the case," and that the trial judge replied: "I have charged you as plainly as I know how, as the English words will make it, that you have nothing to do whatever with the law except what I tell you is the law." In the motion for a new trial it is asserted that the court erred in the part it took in so replying to the foreman, "same being contrary to law." This general complaint presents no question on which we can intelligently pass, no reason being assigned by the complaining party as to why he characterizes the action taken by the court as being contrary to law. *Roberts v. Keeler*, 111 Ga. 181, 36 S. E. 617; *Turner v. Alexander*, 112 Ga. 820, 38 S. E. 35. We can only in like general terms reply that for no reason pointed out and insisted on by the plaintiff in error did the court commit any error prejudicial to him.

6. As to the general grounds of the motion, in which the verdict is assailed as being contrary to the evidence and without evidence to support it, suffice it to say that the finding of the jury was fully warranted.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed. All the Justices concur.

(122 Ga. 70)

SAUSSY & HUXFORD v. WEEKS.

(Supreme Court of Georgia. Feb. 1, 1905.)

NONNEGOTIABLE NOTE—ACTION—INDORSER—GUARANTOR—VENUE.

1. A., the payee of a nonnegotiable promissory note, sued B. and C., who resided in different counties, in the county of the residence of B. The petition alleged that B. was maker, and C. indorser. On the back of the note the name of C. was signed in blank. A demurrer was filed, averring that C. was not an indorser, but a guarantor, and could not be sued on the note in the county of B.'s residence. *Held* that, under the allegations of the petition, C. was an indorser, and suable in the same action with B. in the county of the latter's residence, but that the averment in the petition would not preclude C. from pleading and proving that, according to the intention and agreement of the parties, his relation to the paper was not that of indorser.

(Syllabus by the Court.)

Error from City Court of Moultrie; *W. S. Humphreys*, Judge.

Action by J. S. Weeks against Saussy & Huxford. Judgment for plaintiff, and defendants bring error. Affirmed.

Saussy & Saussy, for plaintiffs in error. Shipp & Kline, for defendant in error.

COBB, J. Weeks, the payee in a nonnegotiable note payable at the Citizens' Bank, brought a petition in the city court of Moultrie, alleging that Davis & Hatchett, a partnership composed of persons residing in Colquitt county, as makers, and Saussy & Huxford, a partnership composed of persons not residing in Colquitt county, as indorsers,

were indebted to him in a stated sum. Davis & Hatchett appear as makers on the note, and the name of the partnership, Saussy & Huxford, appears in blank upon the back of the paper. A demurrer to the petition was filed, averring that the relation of Saussy & Huxford to the paper, on the face thereof, was that of guarantors, and that, as such, they were not suable in the same action with the makers, in the county of the residence of the latter. The demurrer was overruled, and Saussy & Huxford excepted.

Where one who is neither maker nor payee of a nonnegotiable promissory note writes his name on the back of the note, either before or after delivery to the payee, he becomes liable as indorser, guarantor, maker, or surety, according to the intention and agreement of the parties at the time he signs the paper. See 7 Cyc. 673, 674. The decisions are by no means uniform, and some draw a distinction between cases where the signature is placed on the note before and after delivery, but we think the rule above stated the correct one. It seems to grow out of the principle of the decision in *Josey v. Rushin*, 109 Ga. 319, 34 S. E. 558, 77 Am. St. Rep. 377, where it was held that the payee of a nonnegotiable promissory note does not become liable as indorser merely by writing his name on the back of it, but that proof may be made of the actual agreement under which the signature was placed on the note. See, also, in this connection, *National Bank v. Leonard*, 91 Ga. 805, 18 S. E. 82. The decision in *Cochran v. Strong*, 44 Ga. 636, has been cited by some of the law writers as authority for the proposition that, where the payee in a nonnegotiable contract signs a written assignment on the back of the note, he becomes liable neither as indorser nor guarantor, and cannot be sued in the same action with the maker. That was a decision by two judges, and the proposition just stated was announced in the syllabus; but, in the opinion subsequently written, Judge Montgomery expresses doubt as to the correctness of the proposition announced in the syllabus, and cites authorities as supporting a contrary view. The rule as above announced does not differ materially from the rule which prevails in cases of negotiable instruments. In both the real relation of the person whose signature is placed in blank on the back of the instrument is governed by the intention and agreement of the parties. See *Benson v. Warehouse Co.*, 99 Ga. 303, 25 S. E. 645; *Booth v. Huff*, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98; *Atkinson v. Bennett*, 103 Ga. 508, 30 S. E. 599. In the present case the petition alleges distinctly that Saussy & Huxford were indorsers, and this is, in effect, an allegation that they placed their names upon the back of the note under an agreement and with the intention to become bound in that capacity. If they are indorsers, they can be sued jointly with the mak-

ers in the county of the latter's residence. It is immaterial whether the note was payable at a chartered bank or not, for no question is raised by the demurrer as to protest and notice. If the true relation of the plaintiffs in error is not as alleged in the petition, they can plead and prove it at the trial.

Judgment affirmed. All the Justices concur.

(122 Ga. 8)

BRINSON v. EXLEY.

(Supreme Court of Georgia. Jan. 30, 1905.)

AGENCY—INSTRUCTIONS—ACTION FOR DECEIT.

1. Under the peculiar facts of the present case the charge to the effect that in determining the question of agency the jury should look to all the past conduct of the defendant was misleading and confusing in its tendency.

2. The fact that the defendant assumed to act as the agent of the plaintiff, if in fact there was no agency, would not entitle the plaintiff to recover in an action of deceit.

3. In an action of deceit based entirely upon the contention that the relation of principal and agent existed between the plaintiff and the defendant, it was error to charge the jury that, if there were confidential relations between the parties other than that of principal and agent, and the defendant violated the confidence reposed in him to the damage of the plaintiff, the latter would be entitled to recover.

4. While we are not prepared to hold that it was erroneous, as an expression of opinion, for the court, in stating the contentions of the parties, to charge that "the plaintiff * * * has sued * * * to recover damages on account of loss he sustained by the deceitful conduct of his agent, the defendant," the language used was not as guarded as it should have been.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by F. A. Exley against Simeon Brinson. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Hawes and A. G. Powell, for plaintiff in error. Donalson & Donalson, for defendant in error.

CANDLER, J. Exley lived in Effingham county, and owned a lot of land in Decatur county. Brinson had formerly been his agent to look after the land and return it for taxes, and according to the allegations of the petition his agency continued until the time of the transaction out of which this suit arose. Exley alleges that Brinson, as his agent, was offered \$500 for the land; that he concealed the fact of this offer from him, and by false and deceitful representations as to the value of the land persuaded him to sell it to one Smith for \$200; and that Smith immediately afterwards sold it for \$750, dividing with Brinson the profit thereby derived. He further alleges that the sale to Smith, which was induced by Brinson, was part of a fraudulent scheme to persuade him to sell the land at far less than its real value, so that it might be resold at a large profit; and he sues Brinson as his agent for \$550,

the difference between the amount Smith received for the land and what he paid for it. In his answer Brinson denies that he was ever the agent of Exley, except to return the land for taxes, and avers that this was done merely as a matter of accommodation. He avers that he wrote to Exley, and asked him what he would take for the land, and that Exley replied that he would sell it to him or anybody else for \$200; that, acting upon this letter, he bargained the lot of land to Smith for \$200, subject to the approval of Exley; and that thereupon Exley voluntarily made a deed to the land to Smith. He denies that he made any false representations to Exley, or that he received any benefit whatever from the transaction. On the vital question of agency the evidence at the trial was somewhat in conflict, as was also the case in regard to other issues involved. The jury found for the plaintiff the full amount sued for. The defendant moved for a new trial, which was refused, and he excepted.

1. Error is assigned upon the following charge of the court: "In determining the question as to whether he was the agent, look to the testimony, to all of his past conduct of the defendant Mr. Brinson, as to what communications passed between them—between the plaintiff and the defendant—that has been put in evidence here before you." In view of the evidence introduced on the trial, and of the peculiar circumstances of this case, we are of the opinion that this charge, if not erroneous, was at least confusing in its tendency. Brinson admitted having formerly acted as agent for Exley, but contended that whatever agency once existed had terminated several years before the sale of this land, and that in this particular transaction he was in no sense Exley's agent. If this evidence was to be believed, it is clear that the jury would not be authorized to consider "all of the past conduct of the defendant" in determining whether he was at the time under investigation the agent of the plaintiff.

2. Complaint is likewise made of the following charge: "He should act in the matter in perfect good faith towards that principal, if he was his agent; and it would make no difference whether he was the general agent of Exley for a long time ago, or whether he assumed at the time of the sale this relation. If he assumed to act as his agent at the time the sale was gotten up, he would be just as much his agent as if he had been his agent all the time." The gist of an action like the present is the confidential relation of principal and agent. The right of action rests upon the confidence which a principal is bound to repose in his agent in regard to matters peculiarly within the knowledge of the agent, and not known to the principal. If, therefore, one assumes to act as the agent of another when he is not in fact his agent, the other cannot hold him

liable in an action of deceit, for there is absent that essential element of confidence abused. For this reason the charge just quoted is also error.

3. The court further erroneously charged the jury that they might look to the evidence to see if, regardless of the question of agency, such confidential relations had been established between the parties as led Exley to trust Brinson in regard to the land, and Brinson had violated that confidence to the damage of Exley, and that, if they so found, their verdict should be for the plaintiff. The plaintiff's petition was grounded upon the theory that Brinson was his agent, and ipso facto bound to divulge any information that he might possess in regard to the subject-matter of the agency. There were no allegations that any confidential relations existed between the parties other than was brought about by the alleged agency, and it was error to give to the jury a charge not warranted by the pleadings.

4. The court charged the jury as follows: "Gentlemen of the jury, the plaintiff, Mr. Exley, has sued Mr. Brinson to recover damages on account of loss he sustained by the deceitful conduct of his agent, the defendant, S. Brinson." It is alleged that this charge was erroneous, as containing an expression of opinion as to the two vital questions at issue, viz., agency and deceit. It is apparent that the judge was merely stating the contentions of the parties in giving this charge; and, while this statement was somewhat unhappily expressed, we are not prepared to say that it was sufficiently so to require the grant of a new trial.

The remaining grounds of the motion for a new trial complain of various charges of the court, and of the failure to charge certain legal principles which it is contended were pertinent. While some of the language used in the charges complained of was not altogether apt, we are not prepared to say that any of the grounds except those already noted disclose error of sufficient importance to require the grant of a new trial. There does not appear to have been any written request to charge, the failure to give which is alleged to have been error, and therefore such "failure" will not be held error.

Judgment reversed. All the Justices concur.

(121 Ga. 588)

WHIDBY v. STATE.

(Supreme Court of Georgia. Jan. 26, 1905.)

INCEST—ACCOMPLICE—INSTRUCTIONS— COERCION—EVIDENCE.

1. A woman who consents to an act of sexual intercourse which is incestuous is an accomplice of the man. This rule is not varied where some coercion is used by the man, but not of a character to make the case one of rape.

2. Accordingly, on the trial of one indicted for incestuous adultery, it was error to charge as follows: "If you should find that the will of the party was coerced to that extent where

she did not consent, if it did not amount to sufficient force to make it rape, then it is for you to say whether or not she was an accomplice." This charge is also confusing in its tendency, for, if the will of the woman was "coerced to that extent where she did not consent," the case is necessarily one of rape.

3. It is also error, on the trial of such a case, to admit evidence that the accused had frequently administered to the daughter with whom he is charged to have committed incestuous adultery severe whippings with a cowhide, there being nothing in the evidence to connect these whippings with the offense for which the accused is being tried, and their natural tendency being to prejudice the jury against him.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

J. E. Whidby was convicted of incestuous adultery, and brings error. Reversed.

Z. Bass, J. H. Martin, and Warren Grice, for plaintiff in error. J. F. De Lacy and E. D. Graham, Sols. Gen., for the State.

CANDLER, J. The accused was tried upon an indictment charging him with incestuous adultery with his daughter, and was convicted. He moved for a new trial, which was refused, and he excepted.

1. 2. An act of sexual intercourse must necessarily be either with or without the consent of the female. If it is accomplished forcibly, and without her consent, the act is rape. If it be with her consent, even though some coercion be used to procure that consent, and the intercourse is illegal, the crime is adultery or fornication, as the case may be. *Mathews v. State*, 101 Ga. 547, 29 S. E. 424; *Taylor v. State*, 110 Ga. 151, 35 S. E. 161 (6). If the latter, and it is incestuous in character, the woman is an accomplice of the man. *Solomon v. State*, 113 Ga. 192, 38 S. E. 332; *Yother v. State*, 120 Ga. 204, 47 S. E. 555. The law recognizes no intermediate degree of force in the accomplishment of an illegal act of sexual intercourse which is sufficient to accomplish the act contrary to the consent of the female, and yet not constitute the crime of rape. For these reasons the charge referred to in the second headnote was erroneous. The peculiar vice of the charge lay in the fact that in this case there was considerable doubt as to whether the case made by the state was one of incestuous adultery or of rape. One of the witnesses, a sister of the woman who it was claimed was a party to the various acts of incestuous adultery, gave evidence which would warrant a conviction of that crime; but, if the woman herself is to be believed, she was the victim of a series of acts of rape covering a period of several years, and the accused should have been acquitted of the offense with which he was charged.

3. It was also error to admit evidence that the accused had repeatedly administered severe whippings to his daughter with a cowhide. The witness who gave this testimony testified that she did not know why the

whippings were given, and there was nothing to connect them in any way with the acts of sexual intercourse with which the accused is charged. Such evidence could only have a tendency to prejudice the jury against the accused as an inhuman father, regardless of the facts as to the crime with which he was charged.

The motion for a new trial contains numerous other grounds. Some of them disclose inaccuracies in the charge and in the rulings of the trial judge, but no error requiring the grant of a new trial.

Judgment reversed. All the Justices concur.

(122 Ga. 72)

ARNOLD et al. v. LIMEBURGER.

(Supreme Court of Georgia. Feb. 1, 1905.)

HUSBAND AND WIFE—HUSBAND'S RIGHTS IN WIFE'S PROPERTY—REDUCTION TO POSSESSION—PRESCRIPTION—DISABILITY TO SUE—BURDEN OF PROOF.

1. Prior to the Code of 1863 the marital rights of a husband did not attach to real estate either owned by the wife at the time of the marriage, or acquired by her during coverture, unless she was in possession of the same, or it was reduced to possession by the husband during coverture.

2. Even if the Code of 1863 changed the rule as to property owned at the time of the marriage, it was still necessary, under that Code, before his marital rights would attach, for the husband to reduce to possession property acquired by the wife during coverture.

3. The wife's possession during coverture was the possession of the husband.

4. The right acquired by a husband under a marriage solemnized before the passage of the married woman's act of 1866 (Laws 1866, p. 146) to reduce to possession property of the wife owned at the time of the marriage, or acquired during coverture prior to the passage of that act, was not affected thereby.

5. The interest of an heir at law in an undistributed estate was a mere chose in action, and the fact that a woman who was an heir at law lived with other heirs upon lands of the estate both before and after her marriage did not constitute such possession of any interest in the lands, as that the marital rights of the husband would attach thereto.

6. A female who held a reversionary interest in land, subject to an estate in dower, and who, both before and after her marriage, lived upon the land with the dowress, was not so in possession of the land as that the marital rights of her husband attached thereto during the existence of the dower estate, nor after the termination of that estate, when the reversionary interest was not reduced to possession by him.

7. A deed by a husband, executed after the passage of the married woman's act of 1866 (Laws 1866, p. 146), which purported to convey land to which he claimed his marital rights had attached before the passage of that act, is good, as color of title, notwithstanding that at the time of the conveyance he had not reduced the property to possession.

8. The fraud necessary to defeat prescription is moral fraud.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 491.]

9. Where one purchased property in which dower had been assigned, and obtained a conveyance signed by the dowress, by one of the heirs at law, and by the husbands of two heirs at law, who claimed the right to dispose of the land in the exercise of their marital rights, the

conveyance purporting to convey the fee in the property, and the purchaser resided with the dowress upon the land at the date of the deed, and continued to reside thereupon after the termination of the dower estate, and the wives had notice before the termination of the dower estate of the existence of the conveyance by their husbands, and that the purchaser, after the death of the dowress, was claiming the exclusive ownership of the property, prescription began to run in favor of the purchaser from the date of the death of the dowress against whatever rights the wives may have had in the land, growing out of the failure of the husbands to reduce the same to possession during coverture; and, if such possession continued for seven or more years, the purchaser had a good prescriptive title against the wives and persons claiming under them, if they were laboring under no disability during that period.

10. The burden of proving disability to sue rests upon the person who alleges it, and, in the absence of evidence to the contrary, it will be presumed that the person was laboring under no disability.

11. When, in an action to recover land, the plaintiff's evidence shows a prima facie right to recover, and the evidence of the defendant shows seven years' adverse possession under color of title prior to the beginning of the suit, the burden of proving the existence of a disability to sue, and its continuance for such a length of time as to defeat prescription, rests upon the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by W. F. Arnold and others against W. J. Limeburger. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

On May 18, 1903, W. F. Arnold, F. M. Parrish, and Barney Arnold filed a petition for partition against W. J. Limeburger. The property described was two lots of land. It was alleged that W. F. Arnold was the owner of a seven-eighths of one-fourth undivided interest, F. M. Parrish the owner of a one-fourth undivided interest, and Barney Arnold the owner of a one-eighth of one-fourth undivided interest, and that the defendant was the owner of the remaining one-half undivided interest. Notice of intention to apply for partition had been served on the 25th day of April. The defendant filed an answer, in which he denied that the plaintiffs had any interest in the land, and alleged that he was the sole owner of the same. The answer did not set forth upon what this claim of sole ownership was based, but there was no demurrer. At the trial the undisputed facts were as follows: Joshua Limeburger died in possession of the land in controversy May 13, 1848. He left surviving him a widow, Salomy Limeburger, and seven children, to wit, Washington, the defendant, Woodbury, Louvinia Seletie, Marion, Jasper, and Newton. The land was assigned to the widow about 1850 as dower. The record not disclosing the exact date Louvinia married Arnold in 1849, but it does not appear distinctly whether the marriage took place before or after dower was assigned. Seletie married Parrish in 1857. At the date of these marriages these two daugh-

ters were living with their mother on the land in controversy. Mrs. Arnold, after her marriage, moved away from the place, in 1850 or 1851, and never afterwards lived on the land. Mrs. Parrish moved away from the place in 1858, but returned and lived with her mother from 1862 to 1865; her husband, after his return from the army, living on the place with her during the latter part of the year last mentioned. Jasper, Newton, and Marion died during the Civil War, in 1862, 1863, and 1864, respectively, without issue. On April 1, 1871, C. W. Arnold the husband of Louvinia, and Wiley Parrish, the husband of Seletie, Woodbury Limeburger, and Salomy, widow of Joshua Limeburger, joined in a deed conveying the land in fee simple to W. J. Limeburger, the defendant, for an expressed consideration of \$1,800. At the time this deed was executed the defendant was living upon the land with his mother, the tenant in dower, and he has continuously lived upon the land from that date until the present time. Mrs. Arnold and Mrs. Parrish were not parties to this deed, but it appears that they knew of the execution of the deed either at the time or shortly thereafter. The widow of Joshua Limeburger died on December 31, 1886. Mrs. Arnold died September 1, 1888, and Mrs. Parrish is still living. Arnold is dead, but the record does not disclose the date of his death. The case was presented upon the theory that he died before his wife. Mrs. Arnold left, surviving her, eight children, and seven are still in life; the plaintiffs W. F. and Barney Arnold being among that number. Barney Arnold claims a one-eighth interest in the property as an heir of his mother. W. F. Arnold claims a seven-eighths interest—one-eighth as an heir of his mother, five-eighths under conveyances from other children, and one-eighth under a conveyance from James M. Dees and others, who are the children of a deceased daughter of Mrs. Arnold. It appears that Mrs. Dees was the oldest child, but it does not appear when she was born or when she died. One of the Dees children is about 22, another about 24, and the third about 28; one witness stating that each of the three children has been 21 some time. F. M. Parrish claims under a deed from Mrs. Parrish. The deeds under which W. F. Arnold and F. M. Parrish claim were all executed in 1903. The court directed a verdict for the defendant, and the plaintiffs excepted.

G. A. Whitaker, for plaintiffs in error.
W. H. Griffin and Wilcox & Johnson, for defendant in error.

COBB, J. 1-6. The land in controversy was a part of the estate of the father of Mrs. Arnold and Mrs. Parrish. Their husbands had no interest therein except such as they acquired by virtue of their marital rights. The contest is between those claiming under the husbands and those claiming

under the wives. The death of the father and the consummation of the marriages occurred before the Code was adopted. Upon the death of the father, each of the daughters became entitled to a one-seventh interest in his estate. Upon the death of the three brothers, each of them became entitled to a further interest in the property as heirs of their brothers. As one of the brothers died before the Code was adopted, and the other two after, the case, so far as it relates to the interest acquired from the father and one of the brothers, is to be determined by the law as it existed prior to the adoption of the Code, and as to the interest acquired from the other two brothers, as laid down in the Code. Prior to the adoption of the Code, the law of Georgia was that, so far as the marital rights of a husband were concerned, realty and personalty were upon the same footing, and that title to property of either class which was in possession of the wife at the time of the marriage immediately vested in the husband; but if the wife was not in possession, the marital rights of the husband did not attach, as against the wife's right of survivorship, and as against her heirs in case of her death, unless the husband had reduced the property to possession during his lifetime if she survived him, and during her lifetime if he survived her.

Under the Code of 1863 it seems that real estate owned by the wife at the time of the marriage vested immediately in the husband, without reference to possession, but property acquired by the wife during coverture did not vest in the husband until reduced to possession by him. Code 1863, §§ 1701, 1702. It has been held that the husband's right to reduce to possession the property of the wife which had been acquired by her prior to 1868 was not affected by the passage of the married woman's act of that year, and that this right might be exercised thereafter. *Archer v. Guill*, 67 Ga. 195; *Grote v. Pace*, 71 Ga. 231 (2); *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211 (5). It will therefore be seen that, to determine the question whether the husbands had a right to convey the property in 1871, depended upon whether they had reduced to possession the interests of their wives in the property which they attempted to convey; the old law in reference to real estate owned by the wife at the time of the marriage, and the Code in reference to property acquired during coverture, each providing that the husband's right to convey the wife's property was dependent upon whether he had reduced it to possession. If the wife was at the time of the marriage in possession of the property, or if she acquired possession at any time during coverture, or if property which was acquired during coverture came into her possession, or property of either class came during coverture into the possession of the husband, then the same

was reduced to possession, within the meaning of the law, and the husband had a right to convey it. Both Mrs. Arnold and Mrs. Parrish were prior to their marriages actually upon the land, living with their mother, between the time of the death of their father and the time that dower was set apart; but this did not, in law, place them in possession of any interest in the land, their interest being simply a share in an undistributed estate. *Hooper v. Howell*, 50 Ga. 165; *Sterling v. Sims*, 72 Ga. 51. After the dower was set apart they were also upon the land, living with their mother; but they were not then in possession of any interest in the land, because the possession was in the mother as tenant in dower, and their actual presence upon the land would not put them in possession of the reversion, which could be reduced to possession only after the termination of the dower estate. So that under no view of the case could their presence upon the land, either before or after dower was set apart, be treated, in law, as a possession of any interest in the land. If the reversion had been sold during the existence of the dower estate, the right to the proceeds of the sale would have been a chose in action surviving to the wife, in the event her husband died before reducing the proceeds to possession. *Sterling v. Sims*, 72 Ga. 51. The widow of Joshua Limeburger did not die until 1886, and the right of the daughters to take possession of their interests in the land did not accrue until that date. The record not disclosing anything which would establish a possession by the wives at the time of their marriages, or a possession acquired during coverture, the husbands had no right to convey the land in right of their wives in 1871, when the deed relied upon by the defendant was executed. *Hudgins v. Chupp*, 103 Ga. 484, 30 S. E. 801. In the elaborate opinion by Mr. Justice Little in the case just cited there will be found many of the cases decided by this court relating to this subject. In addition to those cases, see *Sayre v. Flournoy*, 3 Ga. 541; *Rogers v. Cunningham*, 51 Ga. 40. In *Smith v. Atwood*, 14 Ga. 402 (7), the court seems to have overlooked the act of 1785 which declared that the husband's marital rights should attach to land only under the same circumstances as they would attach to personal property; that is, only in the event the husband reduced the land to possession.

7-9. The defendant claims that, even if he acquired no title under the deed of 1871, that deed is good as color of title, and that, having been in possession for seven years thereunder, he has a perfect prescriptive title. While the deed was executed in 1871, the prescription would not commence to run until December 31, 1886, when the tenant in dower died. See *Buswell on Lim. & Adv. Pos.* § 273. The defendant was in possession with his mother at the time the deed was

made. He acquired under that deed the dower estate, and, having remained in possession after the death of his mother, claiming under the deed of 1871, of which Mrs. Parrish and Mrs. Arnold had notice, this was sufficient to put them on notice that he was asserting an adverse claim against them; and, although they were co-tenants from the date of their mother's death, he was in adverse possession of the land. There is nothing in the record to authorize an inference that there was any fraud connected with the transaction resulting in the deed of 1871. The fraud required to defeat prescription is moral fraud. *Street v. Collier*, 118 Ga. 470, 45 S. E. 294 (5). And there is no suggestion in the record of fraud of this character. At the date the suit was brought the defendant had been in possession for more than seven years after the death of his mother, and therefore prescription had ripened in his favor against all persons claiming under his two sisters who were not laboring under a disability to sue. It is clear, therefore, that the defendant has a good prescriptive title as against all the interests in the land claimed by the plaintiffs, unless the interest of the Dees children is saved by their disability.

10-11. The widow of Joshua Limeburger died in 1886, and Mrs. Arnold died in 1888. Consequently at the time of Mrs. Arnold's death prescription had run against her for about two years. *Civ. Code* 1895, § 3780, provides that if disability to sue arises after the right of action accrues, and is not voluntary on the part of the person claiming it, the limitation shall cease to operate during its continuance. While this section is in the article relating to limitations of actions on contracts, it has been applied to an action for land; and it has been held that, after prescription began to run against a feme sole, her voluntary marriage would not exempt her from the operation of the statute. *Sparks v. Roberts*, 65 Ga. 571.

The general rule seems to be that, when prescription once begins to run against a person, his subsequent disability will not suspend or defeat the prescription. 19 *Am. & Eng. Enc. Law* (2d Ed.) 224 et seq. There are some rulings that where prescription has once begun to run, and before the period of prescription is complete the estate is cast upon an infant, the disability of the infant will suspend the prescription, but the weight of authority seems to be against this view. See *Buswell on Lim. & Adv. Pos.* § 108, note 2. Mrs. Arnold at no time labored under a disability, and the prescription began to run against her. If the minority of her heirs did not suspend or defeat the prescription, then the prescriptive title of the defendant became perfect upon the expiration of seven years from the date of the death of the tenant in dower. If the general rule above referred to is still the law of this state, then the only change made by the section of the Code

above cited is to suspend the prescription in favor of one whose disability is not "voluntarily caused or undertaken," and it would seem that the disability referred to in this section would be the disability of a person against whom prescription has once begun to run, and not the disability of a successor. However, upon this question we now make no authoritative ruling, as, under the view of the case which will now be presented, the direction of a verdict for the defendant was proper. It does not appear when Mrs. Dees was born, or when she died. The two years which elapsed between Mrs. Limeburger's death and that of Mrs. Arnold would, in any event, count against Mrs. Dees and those claiming under her. Hence, if Mrs. Dees, before her death, was *sui juris* for a time which, added to the period just above mentioned, would make the seven-years prescription, then her children would be barred of a recovery, and the defendant would acquire a good title as against them and those claiming under them. Or if the Dees children were laboring under no disability for a time which, added to the two years and whatever time elapsed between Mrs. Arnold's death and that of Mrs. Dees (assuming the latter to have been *sui juris*), would make the seven-years prescription, then the children would also be barred.

There is no evidence in the record from which this matter can be definitely determined. The case therefore turns on the question upon whom the burden of proof rested. It has been held that, where a party relies on prescription, he must show that the land was owned for the requisite period by persons free from legal disability. *City of Austin v. Hall*, 93 Tex. 591, 57 S. W. 563. See, also, *Saunders v. Simpson*, 97 Tenn. 382, 37 S. W. 195. On the other hand, it has been held that the burden is on the party relying upon disability to prove it, and that, where there is no evidence on the subject, absence of disability will be presumed. *Palmer v. Wright*, 58 Ind. 486; *Fankboner v. Corder*, 127 Ind. 164, 28 N. E. 766. See, also, 22 Am. & Eng. Enc. Law (2d Ed.) 1212.

Proof of paper title to land makes out a *prima facie* case for the plaintiff. Proof by the defendant of adverse possession for seven years in good faith under color of title rebuts this *prima facie* case. If the plaintiff belongs to a class against which prescription would not run for the time in question, it is incumbent upon him to prove it. The general rule is that seven years' adverse possession under color perfects the title. The exception is as to persons laboring under a disability for some reason to sue for and recover the land during the seven years. The defendant makes out his defense by proving the general rule, and the burden is upon the plaintiff to prove that he is within the exception. No exception is to be presumed. It must be shown by affirmative proof. This is, in our opinion, the correct rule. Applying

it to the present case, it will be presumed that Mrs. Dees was laboring under no disability in her lifetime. But there is no presumption as to how long she lived, or that she lived a sufficient length of time after her mother's death for prescription to ripen against her. The plaintiffs relied on disability. They should therefore have shown either that Mrs. Dees was within some of the exceptions, or that she died before prescription ripened, and that her children have not been of age a sufficient length of time since her death for prescription to ripen against them. Having failed to offer such proof, their case falls as to the interest of the Dees children, as well as to the interests of Mrs. Parrish and the children of Mrs. Arnold who conveyed their interests to the plaintiff W. F. Arnold. The plaintiffs' right to recover depended on the strength of their own title, and, having failed to introduce sufficient evidence to overcome the case made out by the defendant, there was no error in directing a verdict in favor of the defendant.

Judgment affirmed. All the Justices concur.

(122 Ga. 47)

SEABOARD & R. R. CO. et al. v. AMBROSE.

(Supreme Court of Georgia. Feb. 1, 1905.)

RAILROADS—EMBANKMENTS—NUISANCE—LIABILITY OF LESSEE—NOTICE TO ABATE.

1. Where one railroad company erected a dam amounting to a nuisance on the land of another, and subsequently leased the railroad to other companies, and the evidence is conflicting as to whether the lessees increased the height of the dam, it was error to charge, in a suit against the lessees, that if the lessees maintained the dam they would be liable for damages, and "they were not required to have notice to abate before action for damages" was brought against them.

2. When this case was here before, the judgment granting a nonsuit was reversed, not on the ground that notice was not essential to make the lessees liable, but on the ground that there was evidence from which the jury could have found that the defendants had originally built the dam and had subsequently increased its height, and could under these circumstances be found liable even without notice.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by T. L. Ambrose against the Seaboard & Roanoke Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

See 41 S. E. 566.

Erwin & Erwin, T. M. Peeples, and N. L. Hutchins, Jr., for plaintiffs in error. N. L. Hutchins, O. Brown, and C. H. Brand, for defendant in error.

SIMMONS, C. J. Suit for damages was brought by Ambrose against the Seaboard & Roanoke Railroad Company and the Raleigh & Gaston Railway Company, lessees of the Georgia, Carolina & Northern Railway Company. Petitioner claimed that the defend-

ants had erected a dam across a stream on his land without his consent, and that by reason of the maintenance of this dam his land was injured and his crops destroyed. He prayed damages for the injury to the land and for the destruction of the crops. On the trial of the case the petitioner's evidence tended to show that the dam had been erected by the defendants, or that, even if originally erected by their lessor, it had been increased in height by defendants since the date of the lease, increasing the damage to petitioner's property. The evidence of the defendants tended to show that the dam had been erected by the lessor company before defendants went in under the lease, and had not been raised or increased in height since that time.

1. The trial judge charged the jury as follows: "I charge you further, if you believe from the evidence that the Georgia, Carolina & Northern Railway Company placed a dam in a creek at a point on plaintiff's land (not on the right of way) without the permission of the plaintiff, that the company committed a trespass for which it would be liable to the plaintiff in damages. If you further believe that the defendants, the Seaboard & Roanoke Railway Company and others, lessees of the Georgia, Carolina & Northern Railroad, after taking possession of said railroad, used said dam and maintained it without the consent of the plaintiff, they would be likewise liable for any damages committed, and they were not required to have notice to abate before action for damages occasioned by such trespass is brought against them." In the motion for new trial the defendants complained of this charge. The complaint is, we think, well founded. Where the alienee of property on which is situated a nuisance does anything to increase the nuisance, he may be sued without notice to abate. This the judge charged the jury was the law. The further instruction above set forth is not sound. If the alienee of such property has done nothing to increase the nuisance which was erected by his alienor, then he is not liable to suit until after he has received notice to abate and has failed to comply with the same. *Middlebrooks v. Mayne*, 96 Ga. 449, 23 S. E. 398. The evidence in this case was conflicting upon the vital question as to whether the defendants had merely maintained the dam as they received it from their lessors, or had themselves built or increased it. The erroneous charge of the court was therefore calculated to hurt them. Counsel for the defendant in error contended that the charge was harmless, because the record showed that the defendants had been given notice to abate the nuisance and had failed to comply. The only evidence of notice to the defendants is found in the plaintiff's evidence to the effect that he told an employé of the company that he ought not to maintain the dam; that the employé replied that he had to do it; that from

this employé plaintiff got the name of St. John, and wrote him. It does not appear that "St. John" ever received the letter, or that it was sent by mail. Nor does the record show who St. John was, or what connection he had with the defendants—whether he was president or director, or not connected with them at all. The employé to whom plaintiff made his objection was the person who was in charge of the water tank at the dam, but it does not definitely appear at what time the objection was made to him. Whether notice to an employé whose business it is to attend to a pumping station would be a sufficient notice is a question not made by the present record.

2. The trial judge, in his order refusing a new trial, stated that he did so because of the former decision of this court in the same case (115 Ga. 475, 41 S. E. 566), stating that a judgment granting a nonsuit on the ground that there had been no notice given had been reversed. The reversal of the judgment when the case was here before was not because this court deemed notice unnecessary where the lessees had merely maintained the nuisance as it had been turned over to them, but because there was evidence from which the jury could have found that the defendants had originally built the dam, or that they had increased its height after taking possession under the lease, and that these issues ought to have been submitted to the jury. No express ruling was made upon any general question of law, and there was certainly no intention to change a well-established legal principle, one which appears in our Civil Code of 1895 (section 3862).

Judgment reversed. All the Justices concur.

(122 Ga. 67)

FARMERS' & TRADERS' NAT. BANK OF COVINGTON, KY., v. ALLEN-HOLMES CO.

(Supreme Court of Georgia. Feb. 1, 1905.)

WRONGFUL ATTACHMENT—ACTION FOR TRESPASS—DAMAGES.

1. One is liable in an action of trespass for causing an attachment against a debtor to be levied on a consignment of goods in the custody of a common carrier, the title to which was in a third person, to whom a bill of lading covering the shipment had previously been duly assigned by such debtor; and, if the property so levied on was brought to sale under the attachment proceedings, such third person would be entitled to recover damages for such unlawful seizure and sale.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. S. Humphreys, Judge.

Action by the Farmers' & Traders' National Bank of Covington, Ky., against the Allen-Holmes Company. Judgment for defendant. Plaintiff brings error. Reversed.

The Farmers' & Traders' National Bank of Covington, Ky., brought an action against

the Allen-Holmes Company, a partnership, alleging that firm was indebted to it in the sum of \$686.66, principal, and interest thereon, because of the following facts. On or about the 1st of January, 1902, the Allen-Holmes Company ordered a car load of corn from Henry Helle & Sons, to be paid for on delivery; and, in compliance with the order, Henry Helle & Sons shipped to the Allen-Holmes Company a car load of corn, retaining the bill of lading issued therefor, which was attached to a sight draft drawn in favor of plaintiff for the value of the corn. In due course of trade the plaintiff discounted this draft drawn on the Allen-Holmes Company by Henry Helle & Sons, and acquired possession of the bill of lading attached thereto, which was pledged as security for the sum advanced. When the car of corn arrived at Moultrie, its destination, the Allen-Holmes Company declined to accept the same, and on or about April 2, 1902, had issued from the city court of Moultrie an attachment against Henry Helle & Sons for an alleged indebtedness of \$545.15, and had the attachment levied by the sheriff on the car of corn, which was subsequently sold by him by virtue of said attachment. By reason of the transfer and assignment of the bill of lading as aforesaid, the corn was the property of plaintiff. It was, on the date it was ordered, of the value of \$686.66, which amount plaintiff would have received, had the defendant accepted the shipment, and not have levied said attachment. Any judgment that may have been entered in the attachment proceeding was illegal and void, because (1) the car load of corn levied on was not the property of the defendant in attachment, but was the property of plaintiff; and (2) the defendant in attachment had no legal notice or service of the pending attachment, did not enter an appearance in that proceeding, and made no waiver of notice thereof. The defendant demurred generally to the plaintiff's petition, and it was dismissed by the trial court. To the judgment sustaining the defendant's demurrer, exception was taken by the plaintiff.

J. D. McKenzie and Shipp & Kline, for plaintiff in error. W. F. Way, for defendant in error.

EVANS, J. (after stating the facts). The refined niceties of technical pleading do not obtain in Georgia. The pleader is only required to plainly, fully, and distinctly set forth in the plaintiff's petition his "charge, ground of complaint and demand, and the names of the persons against whom process is prayed." Civ. Code 1895, § 4960. The sufficiency of the facts alleged to constitute a cause of action may be challenged by demurrer, and, when so challenged, it is the duty of the court to analyze the petition, and to ascertain if the plaintiff is legally entitled to any of the relief prayed for under the facts alleged.

It is clear that the pleader who framed the petition filed in the present case did not undertake to set forth any cause of action based on a breach of the contract made for the sale of the corn, for that contract is alleged to have been between the defendant and Henry Helle & Sons, and no privity of contract between the defendant and the plaintiff is averred or appears from the facts recited. Nor is the petition drafted on the theory that there had been a wrongful conversion of the plaintiff's property. The suit sounds in trespass, and is for an unlawful invasion of the property rights of the plaintiff.

The facts alleged in the petition amounted to an actionable trespass. An attachment against a third person was levied at the instance of the defendant upon the plaintiff's property, which was sold thereunder. The attachment was authority to the levying officer to seize the property of the defendant in attachment, but none whatever to seize the property of a third person, though the defendant in attachment had lately sold it to him. *Wilson v. Paulsen*, 57 Ga. 596. When a *fi. fa.* issues upon a general judgment, or an attachment issues in ordinary cases, the officer is simply commanded to levy and seize generally property of the defendant, and when he acts he does so at his peril. If he seizes property of a person other than the defendant, and thereby causes injury to an innocent party, he and all parties acting with him in procuring such seizure are liable as joint trespassers. *Hasslett v. Rodgers*, 107 Ga. 244, 33 S. E. 44; *McDougald v. Dougherty*, 12 Ga. 613; *Holton v. Taylor*, 80 Ga. 508, 6 S. E. 15.

The title to the corn was alleged to be in the plaintiff at the time of the levy of the attachment. Helle & Sons had parted with title thereto when that firm transferred the bill of lading to the plaintiff bank. The bill of lading issued by the carrier was assignable, and passed title to the corn into the bank. Civ. Code 1895, § 3554; *Commercial Bank v. Armsby Co.*, 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443. After the assignment of this bill of lading, the bank had constructive possession of the car load of corn which had been delivered to the carrier for transportation. See *Central Georgia Co. v. Exchange Bank*, 101 Ga. 353, 28 S. E. 863. Under the very terms of the contract of shipment, the carrier obligated itself to transport the car and hold it subject to the orders of the holder of the bill of lading, whether such holder was the party to whom the bill of lading was originally issued or his assignee. So, at the time the car arrived at its destination, the railroad company's possession of the corn was that of the plaintiff bank, and, as bailee, the company would have been liable to the bank if it had delivered the goods to the consignee without a due surrender to it of the bill of lading held by the bank. *Hobbs v. Chicago Pack-*

ing Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320. While the corn was thus in the constructive possession of the bank, though in the physical custody of the carrier, the defendant caused an attachment against Helle & Sons to be levied on it, and it was seized and sold under the attachment proceedings. This unlawful invasion of the plaintiff's right of property gave it a cause of action, and if, as alleged, the property was wholly lost because of the illegal levy and sale, the plaintiff would be entitled to recover at least the actual value of the corn. This was alleged to be the price which the defendant agreed to pay Helle & Sons on delivery at destination.

It follows from what is said above that the plaintiff's petition was good as against a general demurrer, and the trial court erred in dismissing the action.

Judgment reversed. All the Justices concur.

(122 Ga. 82)

ATLANTA, K. & N. RY. CO. v. GARDNER.
(Supreme Court of Georgia. Feb. 1, 1905.)

RAILROADS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—MORTALITY TABLES—EARNING CAPACITY—EVIDENCE—COMPLAINTS OF PAIN—HARMLESS ERROR.

1. A separate count in a petition claiming damages for negligence, which alleged in general terms that the defendant was guilty of negligence, should have been stricken on special demurrer setting up that it failed to set forth the particulars in which the defendant was negligent, unless the defect therein was cured by amendment.

2. On the trial of an action brought by a minor for permanent personal injuries, when no evidence was submitted in reference to the earning capacity of the plaintiff prior to the injuries, there was no measure of damages for such injuries except the enlightened consciences of impartial jurors, guided by the facts and circumstances of the particular case. A charge to this effect was not inapplicable in the present case.

3. There was no expression of opinion upon the facts of the case in charging the jury that "the duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence." Nor was this charge erroneous because the court failed, in the same connection, to charge that if the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, there could be no recovery.

4. In a suit for damages for personal injuries alleged to have been sustained in consequence of the negligence of the defendant, the law of contributory negligence was not involved, if the person injured did not fail to exercise ordinary care for his safety before the negligence of the defendant was either apparent or should have been apprehended by him, and could not after that time have avoided the consequences of such negligence by the exercise of ordinary care.

5. On the trial of such an action against a railway company, a charge that "failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should be reasonably apprehended would not preclude a recovery, but would authorize a jury to diminish the damages in pro-

portion to the fault of the person injured," did not properly present to the jury the imperative requirement of the Civil Code of 1895 (section 2322) in reference to the diminution of the plaintiff's damages in such a case.

6. As Civ. Code 1895, §§ 2322, 3830, involve separate and distinct defenses to cases of this character, a rule applicable to one of them alone should not be given in immediate connection with the other, without appropriate explanation. We will not say, however, that the charge complained of on this ground was necessarily so confusing to the jury as to be cause for a new trial.

7. Under the pleadings and the evidence in this case, it was erroneous not to charge the principle that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could not recover, although the court was not requested to so charge by the defendant.

8. The court should not only state the contention of a party to the jury, but should also state the law applicable to such contention.

9. Charging the principle laid down in Civ. Code 1895, § 2322, that "no person shall recover damages of a railroad company for injury to him or his property" where the same "is caused by his own negligence," is not equivalent to charging the principle, contained in section 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."

10. "On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money."

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 487.]

11. On the trial of such an action, complaints made by the plaintiff to her attending physician of pains in designated portions of her body were not admissible in evidence in her favor, unless made under such circumstances as to be equivalent to spontaneous and involuntary exclamations or outcries, groans, convulsive movements, and other physical manifestations of present pain and suffering.

12. Though a question propounded to a witness was irrelevant and objected to upon this ground, yet if the answer thereto was not unfavorable to the objecting party, or stated only an admissible fact, the overruling of the objection to the question was not cause for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pickens County; Geo. F. Gober, Judge.

Action by Ruth Gardner, by her next friend, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Ruth Gardner, aged 17 years, by her next friend, Hiram L. Gardner, brought suit in Pickens county against the Atlanta, Knoxville & Northern Railway Company for \$15,000, as damages resulting from physical injuries alleged to have been sustained by her in consequence of the negligence of the defendant company. The petition alleged that she "was driving a buggy," and "her route involved crossing over the defendant's railroad track upon a public crossing known as 'Whitfield's Crossing,' in Pickens county;" that she "drove said buggy, in the exercise

of due care, towards said crossing, and just as she was crossing over the defendant's tracks, and just as she had cleared the tracks, a freight train of the defendant dashed upon the crossing, negligently and recklessly frightening the horse, and causing him to plunge back, and so close was the train to the vehicle that some portion of the train near the front end of it caught the buggy and horse, tore the buggy to pieces, killed the horse, and threw [her] to the ground and greatly and permanently injured her." The petition further alleged that "defendant negligently failed to blow the whistle upon approaching said crossing for a distance of 400 yards, and negligently failed to check and keep checking upon approaching said crossing, so as to be able to stop in time should any person or thing be upon the crossing; and defendant negligently failed to whistle at all or to check at all, and negligently failed to keep a lookout ahead, and was negligently running said train at a speed of about 40 miles per hour, and negligently failed to exercise any sort of care in approaching said crossing." The sixth paragraph of the petition was as follows: "And for further cause of action, and by way of an additional count, plaintiff says that on the 27th day of May, 1902, at Whitfield's crossing in said county, she was injured by the running of the cars, locomotives, and other machinery of the defendant company, and the defendant failed to exercise all ordinary and reasonable care and diligence." The seventh paragraph set forth the extent and character of her physical injuries, her pain and suffering consequent thereon; that she "was a minor and an orphan, and was studying to perfect herself in the art of music, and said injuries have so disabled her that she has been unable to pursue her studies at all, and has, further, been unable to perform any kind of labor or service, either domestic or of any other character"; that "she was able to and did perform divers domestic services about the house, in the way of housekeeping and the like"; that "she was also able to sew, and assisted in sewing, and would shortly have so perfected herself in music as to be able to teach"; that "her services were of the value of \$15 to \$20 per month, and these have been destroyed for all the future"; that "her capacity to labor and earn money is totally destroyed"; that "doctor's and medical bills are \$250"; and that "for each and all of the foregoing items of damage plaintiff sues." The defendant demurred, both generally and specially, to the plaintiff's petition. The court overruled the demurrers, to which ruling the defendant filed exceptions pendente lite. After demurring, the defendant answered the petition, admitting that it was a corporation, and that the occurrence complained of happened in Pickens county, but denying all the other material allegations of the petition. Upon the trial

the jury rendered a verdict in favor of the plaintiff for the sum of \$5,000. There was a motion for a new trial, which was overruled, and the defendant excepted, assigning error upon the exceptions pendente lite and upon the overruling of the motion for a new trial.

Smith, Hammond & Smith, W. T. Day, and Clay & Blair, for plaintiff in error. Arnold & Arnold, F. C. Tate, and Geo. L. Bell, for defendant in error.

FISH, P. J. (after stating the facts). 1. The only demurrer insisted upon in the brief and written argument of counsel for the plaintiff in error is the special demurrer to the sixth paragraph of the petition. This demurrer was upon the ground that this paragraph set forth only the conclusion of the pleader, "without alleging wherein defendant failed to exercise all ordinary and reasonable care and diligence." This demurrer should have been sustained, and this paragraph of the petition stricken. As will be seen from the above statement of facts, this paragraph began as follows: "And for further cause of action, and by way of an additional count, plaintiff says," etc.; so it is clear that this was an entirely separate and distinct count. "A count in a petition against a railway company, claiming damages for negligence, which alleges in general terms that the defendant was guilty of negligence, should be stricken on special demurrer setting up that the petition fails to set forth the particulars in which the defendant was negligent, unless the defect in the petition is cured by amendment." *Central Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956, and cit. Whether in the present case the refusal of the trial judge to sustain the special demurrer to this count of the petition would have been sufficient ground for reversing the judgment below need not be determined, as a new trial should have been granted upon certain other grounds in the motion therefor.

2. One ground of the motion for a new trial complains of the following charge of the court: "Where a minor has suffered a permanent injury, and such minor is too young to have selected an avocation or to begin to illustrate her earning capacity, in such cases there is no measure as to the amount of damages, where such minor is entitled to recover therefor, except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case." The errors assigned are: "(1) That this charge was inapplicable. (2) This charge (without qualification) gave the jury an incorrect rule as to the measure for damages sought by plaintiff for lost time, lost capacity, lost earnings, doctor's bills, and permanent injuries. These were matters for computation under other rules, and not to be left to the consciences of jurors, however

impartial." This charge was not inapplicable to the facts of the case, as shown by the evidence before the jury, and, under those facts, there was no measure of damages except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the case. The petition did not allege that the plaintiff was earning any income at the time that she was injured, nor that she had ever earned any, nor did the plaintiff undertake to sustain by evidence the allegations of the petition as to her earning capacity at the time she was injured. The plaintiff introduced no evidence whatever upon this subject, nor upon the subject of expenses incident to her injuries. As her case went before the jury, she was seeking to recover alone for pain and suffering and permanent injuries, without undertaking to furnish the jury by evidence with any standard from which to calculate the amount of diminution in her earning capacity. She did not rely upon loss of established earning capacity, for she did not offer to prove that she ever had any. The proof showed that she was 17 years old at the time she received the injuries complained of. So the charge excepted to was applicable to the facts of the case, and the legal principle charged was in accordance with the decision of this court in *Western & Atlantic Railroad Company v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320 (4). There it was held: "For a personal injury to a child nine years of age, including deprivation of a member, the law furnishes no measure of damages other than the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case. Amongst the results of the injury to be considered are pain and suffering, disfigurement and mutilation of person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority." In that case Chief Justice Bleckley said: "A brief but excellent model of a charge upon the measure of damages, where the subject of the injury was a child, will be found in *Davis v. The Central Railroad*, 60 Ga. 329." The charge here referred to and commended was as follows: "There is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of the injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages where the party shows that the law authorizes it. But the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received."

3. Complaint was made in the motion for a new trial of the following charge of the court: "The duty resting by law upon all persons to exercise ordinary care to avoid

the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence. Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should be reasonably apprehended, would not preclude a recovery, but would authorize a jury to diminish the damages in proportion to the fault of the person injured." While in the motion for a new trial there are several assignments of error upon this charge, the argument here by counsel for the plaintiff in error has taken a wider range than seems to be authorized by any of these exceptions. One point which has been much stressed is that the court erred in charging that the duty to exercise ordinary care to avoid the consequences of another's negligence does not arise "until the danger is impending"; it being contended, with much force, that the duty arises whenever such negligence is discovered, and that no danger may be impending to the discoverer at such time, and may never be if he then exercises ordinary care for his own safety. But none of the assignments of error upon this charge, in the motion for a new trial, presents the question here indicated. We will say, however, in passing, that the language of the court which has been thus criticised in the argument of counsel was, as we have seen, followed and qualified by the words, "or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence." We do not think that there is any merit in the exception that this charge, "without qualification or further explanation, was calculated to mislead the jury, and was an expression of opinion that the danger was not impending, and should not have been apprehended by the plaintiff, at the time she was injured." There was no expression of opinion involved in the charge, and we do not see how the jury could have been misled into believing that there was. The failure of the court to distinctly charge the principle that the plaintiff could not recover if she could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, did not make the charge here excepted to erroneous. The failure to give this principle in charge at all has been properly excepted to in another ground of the motion, which we will hereinafter consider.

4. Another exception to this charge is based upon the second sentence thereof, quoted above. This exception is: "The jury should not have been restricted to the want of ordinary care on the part of the plaintiff before the negligence of the defendant became apparent or should have been apprehended. They should have been instructed that any negligence on her part contributing to her injury would require that the recovery in her favor be diminished in proportion to the

amount of default attributable to her." The sentence of the charge here excepted to follows the second headnote in *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 308, 54 L. R. A. 802, being in almost its very language. If the plaintiff did not fail to exercise ordinary care before the negligence of the defendant was existing and was apparent or should have been reasonably apprehended by her, and after that time could have avoided the consequences to herself of the defendant's negligence by the exercise of ordinary care, she was not entitled to recover at all. On the other hand, if, after she knew or ought to have apprehended the existence of the defendant's negligence, she could not by the exercise of ordinary care have avoided its consequences, then she did not by her own negligence contribute to the injuries which she sustained, and her damages should not have been diminished at all. The law of contributory negligence is not applicable to a case in which the facts show that the person injured did not fail to exercise ordinary care before the negligence of the defendant was either apparent or should have been apprehended by him, and could not after that time have avoided the consequences of such negligence by the exercise of ordinary care. This we understand to be the doctrine laid down in *Western & Atlantic Railroad Company v. Ferguson*, supra, where Mr. Justice Cobb, speaking for the court, said: "From the expressions used and rulings made in the cases cited (and there are many others where similar expressions are used and similar rulings made), the rule of force with reference to the subject under investigation seems to be well settled, and may be thus stated: The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing and is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases—that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when as an ordinarily prudent person it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be observed under like circumstances by an ordinarily prudent person—such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages 'in proportion to the amount of default attributable to' the person injured."

5. Another exception to this charge is that "the charge gives the jury permission to re-

duce the verdict for plaintiff's want of care, but does not instruct them that it shall be done," and that "the jury should have been instructed that any fault on the part of the plaintiff would require that the damages be diminished by the jury in proportion to the amount of default attributable to her." We think this exception is well taken. The Civil Code of 1895 (section 2322) provides: "If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." It is contended by counsel for defendant in error that the word "authorize," as used by the court in the expression "but would authorize the jury to diminish the damages," etc., is equivalent to "require," and, therefore, that this exception is not sound. This very question was raised in *Georgia Railroad v. Pittman*, 73 Ga. 325, and it was there held that: "Although the court charged that, if the officers of the railroad and the deceased were both at fault, the jury 'would be authorized to make such reasonable deduction,' yet where, in the same connection, he charged the rule of contributory negligence in the language of the statute, that 'the damages shall be diminished by the jury,' there was no error which requires a new trial." In the opinion Chief Justice Jackson said: "The error alleged in the twelfth ground struck us with some force during the argument, but on examination of the whole charge it disappears." Then, after stating that the point was that the court "merely authorized the jury to do what the statute made imperative upon them," and showing that the full charge did "tell the jury what the law is, a few paragraphs before this excepted to," he concludes that as the court gave the law, "its imperative requirement, as their authority, the plaintiff in error was not hurt by the language excepted to." The question came up again in *Krogg v. Atlanta & West Point Railroad Company*, 77 Ga. 202, 4 Am. St. Rep. 77, and it was held that "while in one part of the charge the judge erroneously stated that the jury would be authorized to reduce the damages if they saw proper, yet in other portions of the charge this inaccuracy was corrected, and no harm resulted from it." Judge Blandford, who delivered the opinion, said: "It is further contended that the court below committed manifest error in instructing the jury that they 'would be authorized to reduce the damages,' etc., if they see proper. We think this charge is objectionable, in that it turns the jury loose to do as they pleased, and we think the court should hold them well in hand; but we held in *Georgia Railroad v. Pittman*, 73 Ga. 325, that such a charge as this was cured by other portions of the charge, in which the court confined the jury to their duty as to their finding. Immediately after the charge complained of follow two

charges by the court, the same being requests of the defendants' counsel, and these requests corrected the looseness of the charge complained of; so we think no harm resulted from the charge." It will be seen that in each of these cases a charge of the court similar to the one now under review was held to be erroneous, but that the error contained therein was harmless when such instruction was modified and explained by other portions of the charge wherein the law contained in the statute was correctly given to the jury. In the present case the trial judge failed to give the jury any other instruction whatever upon this particular subject, and so this particular instruction went before them without modification or explanation. As said by Judge Hopkins, in the *Law of Personal Injuries*, § 208, "The section [2322] is imperative, and the court should hold the jury to it." The jury were not held to it by the charge in the present case, as they might well have believed that, while they were authorized to diminish the plaintiff's damages in proportion to her negligence, they were not required to do so.

6. The court charged the jury that "no person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence." This principle is laid down in this exact language in *Civ. Code* 1895, § 2322. The court then immediately gave the instruction, which we have been considering, relative to the duty to exercise ordinary care to avoid the consequences of another's negligence. One ground of the motion for a new trial is that it was error for the court to give these different rules of law in connection with each other, without further explanation. While the court failed to charge the jury the principle contained in *Civ. Code* 1895, § 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself of the defendant's negligence, he is not entitled to recover," what the court did charge in reference to the time when the duty to exercise such care to avoid the consequences of the negligence of another arises was applicable only to the last-quoted section of the *Civil Code*. It has been frequently held that sections 2322 and 3830 involve separate and distinct defenses to cases of this character. For this reason, it has also been repeatedly held that to charge them in immediate connection with each other, without any explanation of their different meanings, is error. *Savannah, Florida & Western Ry. Co. v. Hatcher*, 118 Ga. 273, 45 S. E. 239, and cases cited. If the two sections should not be charged in immediate connection, without proper explanation, it follows that a principle which is applicable to only one of them should not, without appropriate explanation, be given in charge in immediate connection with the other. We will not say, however, that the charge complained of was

for this reason necessarily so confusing as to be cause for a new trial.

7. Another ground of the motion for a new trial is that the court erred in failing to charge the jury that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could not recover. Under the evidence in this case, the court should have given this principle of law in charge to the jury, and this ground of the motion alone was sufficient to require the grant of a new trial. Upon proof of the injury by the running of the defendant's locomotives and cars, a presumption of negligence arose against the company, and this presumption was not removed, because the company failed to show that its agents had "exercised all ordinary and reasonable care and diligence." It failed to show that it had complied with the statutory requirements applicable to railroad trains approaching public crossings. Consequently, as the case went before the jury, the defendant was bound to be liable to the plaintiff to some extent, unless the evidence disclosed that the plaintiff, by the exercise of ordinary care, could have avoided the consequences to herself of the negligence of the defendant. As the defendant contended that it was not liable at all, and relied, as it was obliged to do under such circumstances, upon the theory that the plaintiff could have avoided the consequences of its negligence by the exercise of ordinary care, the failure of the court to charge the law upon this subject deprived the defendant of its main defense. Counsel for the defendant in error contend that this was not an issue in the case, because the defendant's answer did not set up any contributory negligence; that it did not set up either want of ordinary care on the part of the plaintiff or negligence by the plaintiff, but merely denied the allegations in the plaintiff's petition, which simply amounts to a denial of the facts as charged, and to a denial of the negligence charged against the defendant. The plaintiff alleged that she drove the buggy in which she was riding, in the exercise of due care, toward the railroad crossing where the collision occurred which caused her injuries, and the defendant denied this. So, even under the pleadings, the parties were at issue upon the question of due care by the plaintiff in driving upon the railroad crossing at the time that she did. Besides, the defendant by its plea certainly denied any liability to the plaintiff; and if the jury, from the evidence before them, could have found that, notwithstanding the negligence of the defendant, the plaintiff, by the exercise of ordinary care, could have avoided the consequences to her of such negligence, the law applicable to such a state of facts was directly involved in the case, and the court should have given it in charge to the jury. In *Atlanta Railway & Power Co. v. Gaston*, 118 Ga. 418

45 S. E. 508, it was held that where the evidence was conflicting, "but there was testimony from which the jury could have found that both parties were in the exercise of ordinary care and that the injury was the result of a casualty, it was error not to charge that the defendant could relieve itself of the statutory presumption by showing that neither party was to blame and that the damage was the result of a pure accident." In the opinion, Mr. Justice Lamar said: "But the mutual criminations and re-criminations are not necessarily exhaustive of the substantial issues raised by the evidence, and as to which the jury must be instructed. Here it could have found that neither was to blame, and, that being true, it was requisite to charge what would be the result of such a finding. The failure to so charge deprived the company of the benefit of a substantial defense." Of course, there is no merit in the contention that the failure of the defendant to submit to the court a written request to charge the legal principle involved in this ground of the motion disposes of the ground. "Where the judge gives in charge substantially the law governing the case, if more specific instructions on any point are desired, they should be asked; but the law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence, whether requested or not, or whether the attention of the court be called thereto or not; otherwise the verdict will be set aside." *Central Railroad v. Harris*, 76 Ga. 501, and cases cited; *Strickland v. State*, 98 Ga. 84, 25 S. E. 908; *Chattanooga R. Co. v. Volla*, 113 Ga. 361, 38 S. E. 819.

8. The able and ingenious counsel for the defendant in error seeks to show that the court did give the principle in question in charge to the jury, when, in the beginning of his instructions, he stated to the jury the respective contentions of the parties. It is one thing to state what a party contends, and another and a very different thing to state the law applicable to such contention. To state to the jury, as the court did, that the defendant contended that it had not "been guilty of any neglect, and that if the plaintiff was hurt it was done under such circumstances that the plaintiff, by the exercise of ordinary care and diligence, could have avoided any injury, if in fact she was injured, and that therefore the defendant [was] not liable," was far from being equivalent to charging the law laid down in Civ. Code 1895, § 3830.

9. Nor can we agree with counsel that the charging of the principle laid down in section 2322, that "no person shall recover damage of a railroad company for injury to him or his property where the same is done by his consent, or is caused by his own negligence," was equivalent to charging the principle contained in section 3830. This has been expressly ruled by this court. In

Central Railroad v. Harris, supra, which was a suit by a wife for the homicide of her husband, it was held "that the defendant was entitled to have submitted to the jury both the question whether the plaintiff's husband caused the injury solely by his own negligence, and also whether, by the use of ordinary care, he could have avoided the consequences to himself caused by the defendant's negligence." In the opinion (page 508, 76 Ga.) Chief Justice Jackson said: "The railroad company had two defenses in this case, either of which would bar any recovery by the plaintiff. One is that the plaintiff's husband caused the killing by his own negligence; the other is that the plaintiff's husband could have avoided the consequence of the company's negligence by ordinary care. The first is found in section 3034 of the Code [now section 2322]; the last in section 2972 [now section 3830]. The two defenses are not the same. They are not identical." He then points out the difference between the two. This ruling was followed, at the same term of the court, in *Central Railroad v. Thompson*, 76 Ga. 770 (9). The difference between these two sections of the Code had been previously pointed out and discussed in the concurring opinion of Justices Jackson and Blandford in *Savannah, Florida & Western Ry. Co. v. Stewart*, 71 Ga. 429, where they held (page 447, 71 Ga.) that "the two sections ought not to be construed as the same, but in pari materia as separate defenses." We have seen that even to charge these separate sections of the Civil Code in immediate connection with each other, and without explanation as to their different meanings, is erroneous.

10. Complaint is made in the motion for a new trial of a lengthy excerpt from the charge of the court in reference to the Carlisle Mortality Table, which was introduced in evidence by the plaintiff; the assignment of error being that "this charge was not authorized by the facts in evidence, and that it was calculated to mislead the jury." Under the decision of this court in *Macon, Dublin & Savannah Railroad Co. v. Moore*, 99 Ga. 229, 25 S. E. 460, instructions in reference to the mortality table and its use by the jury were erroneous. It was there held: "On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money." See, also, *Chicago, Burlington & Quincy R. Co. v. Johnson*, 36 Ill. App. 564. In the present case, as we have seen, the plaintiff did not even undertake to show the value of her services or her capacity to earn money.

11. Complaint was also made in the motion of the refusal of the court to exclude, as hearsay, certain testimony of Dr. Earn-

est, a physician who attended and treated the plaintiff, and whose depositions were taken and introduced in her behalf. The testimony in question was that the plaintiff "complained of backache and pains in her hips," and also of other physical ailments, and his statement that the evidence of some inflammatory trouble having existed consisted in the presence of some adhesions and some deposits in the broad ligaments, "and in the history given me by the patient herself of her having suffered certain pains for a considerable period past"—the quoted words being the testimony objected to. The witness had not been called in by the plaintiff to examine her for the purpose of qualifying himself to testify as a witness in her behalf, nor was he called in after suit brought, but he attended, examined, and treated her, as his patient, some months before the suit was instituted. We have devoted considerable time and investigation to the question here presented, and have examined a great number of cases in which, in one form or another, the question of the admissibility of statements of this character, made by one person to another, has been presented and determined. We find that practically all of the courts in which the question has arisen hold that statements of present pain and suffering, made before suit brought, by a patient to his physician who has been called in solely for the purpose of examining, advising, and treating him, may be given in evidence by such physician, when called as an expert witness, as part of the facts upon which he bases his opinion as to the nature and extent of the patient's injuries or disease. As to the admissibility of statements of past pains or sensations, made by a patient to his physician, there is a decided conflict in the rulings of the courts, some holding that such statements are inadmissible, while others hold that it is admissible for the physician to testify to them when giving his opinion as an expert to the jury. The weight of outside authority, however, seems to be that statements or narratives of past pains and symptoms made by a patient to his physician are inadmissible. Some of the courts, impressed with the danger of opening the door of evidence for the admission of hearsay testimony, particularly in cases in which the hearsay statement may be of a self-serving nature, hold that statements of the above character, even when made by a patient to his physician, are not admissible if made after suit brought by the patient for his injuries. Others hold that they are not admissible if made to a physician or surgeon called for the sole purpose of qualifying himself to testify, as an expert, in behalf of the plaintiff in an action for damages. A few recognize no such distinction, but hold that the fact that the statements were made under such circumstances does not render them inadmissible, but is merely a circum-

stance to be taken into consideration by the jury in weighing the effect of such statements and the opinion of the expert based in part thereon. While we feel some hesitancy in laying down a rule in this state which will run counter to what seems to be the rule generally, if not universally, accepted elsewhere, we have reached the conclusion that there is no sound reason for making any exception in cases of this character to the rule which excludes hearsay testimony. In *Atlanta Street Railway Company v. Walker*, 93 Ga. 462, 21 S. E. 48, this court held that "since the change in the law allowing parties to testify in their own behalf," it is not "competent for a plaintiff, suing for physical injuries, to prove by his wife that subsequently to their infliction he frequently complained to her of pains and hurts resulting therefrom, and stated that he suffered a great deal." In that case the complaints were of present pain and suffering. In the opinion, Chief Justice Bleckley said: "The plaintiff's wife was permitted to testify to his complaints made in her hearing. She said, he complained of his side a great deal; and, being told to state all his complaints, she said his head hurt him, and his side and leg; he suffered a great deal. Such evidence as this, by a witness other than the wife of a party, was competent and admissible so long as the law excluded parties from being witnesses in their own behalf, but now that they are by statute competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the *res gestae* of the injury. The ground on which such evidence was formerly deemed competent was the ground of necessity. That necessity no longer exists. The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate. This ruling was followed in *Savannah R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622. This is eminently sound reasoning, and applies as well in a case in which the complaints are made to the complaining person's physician as in a case in which they are made by a husband to his wife. The decision in *Feagin v. Beasley*, 23 Ga. 17, which was a suit for breach of warranty of the soundness of a negro slave sold by the defendant to the plaintiff, that the representations of the negro as to his symptoms, made during his medical examination, were admissible, was made at a time when the negro, being a slave, was not competent to testify against a free white person (*Grady v. State*, 11 Ga. 253), and his representations to the physician and others were admissible upon the ground of necessity, to which Judge Bleckley refers.

The distinction between statements of

pain and suffering made to a physician and such statements made to any other person, so far as admissibility in evidence is concerned, has been rejected by a number of courts, including the Supreme Court of the United States, which held that: "The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person." *Northern Pacific Railroad Co. v. Urlin*, 158 U. S. 271, 275, 15 Sup. Ct. 840, 39 L. Ed. 977. In that case the statements in question were made by the plaintiff at various times to physicians who subsequently testified in his behalf, but, as seen above, the court refused to recognize a distinction, so far as admissibility in evidence was concerned, between statements made to medical attendants and similar statements made to any one else. So it is said, in *Greenleaf on Evidence*, that "the representation by a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but if made to any other person, they are not on that account rejected." 1 Gr. Ev. (16th Ed.) § 162b. In this last edition of this work the editor thereof explains that statements of this character are not received as original evidence, but as exceptions to the hearsay rule; and, in his additions to the original text, he speaks of the limitation of the admissibility of such statements to those made to an attending physician as "unsound upon precedent, principle, and policy," and cites the following cases, in which such limitation has been repudiated: *Northern Pacific R. Co. v. Urlin*, supra; *Hancock Co. v. Leggett*, 115 Ind. 547, 18 S. E. 53; *Chicago R. Co. v. Spilker*, 134 Ind. 392, 33 N. E. 280, 34 N. E. 218; *Louisville R. Co. v. Miller*, 141 Ind. 533, 559, 37 N. E. 343; *Cleveland R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Baltimore R. Co. v. Rambo*, 59 Fed. 75, 8 C. C. A. 6, 16 U. S. App. 277; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Brown v. Mt. Holly*, 69 Vt. 364, 38 Atl. 69. In the case of *Rowell v. City of Lowell*, 11 Gray (Mass.) 420, decided when that eminent jurist Chief Justice Shaw was at the head of the Supreme Court of Massachusetts, not only was no such distinction made, but it was held that, "in an action to recover for personal injuries, a surgeon who attended and prescribed for the plaintiff once, three months after the accident, and examined the injuries again after the action was brought, may be allowed to testify to his opinion of the plaintiff's condition, and the lasting character of the injuries, derived

from what he saw, but not from any statements of the plaintiff." The ruling of the court below, excluding the opinion of the surgeon, formed "from the declarations of the patient" when he visited and prescribed for her before suit was brought, "as to her then state of feeling, and the examination [he then] made * * * as to the extent of the injury she was then laboring under," was affirmed. So we have eminent authority to sustain our view that, if complaints of a person of pain or other physical sensation which produce discomfort or suffering are admissible in evidence at all, there is no sound reason for distinguishing between those made to a medical attendant and those made to any one else. This being true, under the decision of this court in *Atlanta Street Railway Company v. Walker*, supra, it appears to us that the testimony now in question was inadmissible.

It is true that it was held in a later case that "exclamations or complaints made by a person undergoing physical examination by a physician with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were bona fide, is for determination by the jury under all the evidence submitted." *Broyles v. Pritchard*, 97 Ga. 643, 25 S. E. 389. But the ruling in that case was put upon the ground that "complaints of pain which are made apparently in response to manipulation of the person do not come within the rule which excludes hearsay and self-serving declarations, and it is not necessary, in order to render them admissible, that they should be made to a physician for the purpose of treatment. Such complaints are regarded as manifestations of pain, as part of the res gestæ of the pain, and are not classed with mere descriptive statements." There complaints of pain, made in response to and coincident with manipulations of the complaining person's body, were treated as being equivalent to involuntary exclamations of pain, convulsive movements of the body, flinching, or screaming when a particular portion of the body is pressed or touched, or other physical manifestations of bodily suffering. If they had not been put upon this ground, this decision would have been clearly in conflict with the one rendered in *Atlanta Street Railway Company v. Walker*, supra, and it was upon this ground that the two cases were then distinguished. There is, however, a still later decision of this court, in which the writer participated, which we have found it hard to reconcile with the case cited from 93 Ga., 21 S. E. We refer to the ruling in *Powell v. State*, 101

Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277, where it was held: "Evidence of pain and suffering by the accused on trial for murder, and who alleges in his defense that he was attacked and beaten by the deceased, is admissible, if confined to a reasonable period of time elapsing after the homicide; and exclamations or expressions indicating the existence of present pain and suffering, made by him on the same day of the homicide, whether given in the course of a medical examination or while describing his particular pain or trouble to another, are entitled to go to the jury. Such complaints may or not have probative value; but of this the jury, under the circumstances of each case, must decide." The evidence the admissibility of which was ruled upon in that case was that the accused, when seen and examined by a nonexpert at the jail on the day of the homicide, had on one side of his neck a print that looked like the print of two fingers, and that "he was complaining of being sore," that "he was just complaining of his throat being sore." It did not appear that these complaints were in the nature of involuntary exclamations, indicating pain, made in response to pressure upon the throat or otherwise; but, from the report of the testimony then in question, it merely appears that "he was just complaining of his throat being sore," and it seems to be evident that they were not made so near in point of time to the homicide as to be considered part of the *res gestae* of the encounter which resulted in the killing. So that case, but for the above-cited older, conflicting, and necessarily controlling decision, would be authority for holding that evidence as to complaints of present existing pain would be admissible, and the statement of the physician that the plaintiff complained of backache and pains in her hips would be *prima facie* admissible, such complaints apparently referring to pains existing at the time when the statements were made to the physician. But even this was not admissible under the ruling in the older case. The rest of the testimony objected to was clearly inadmissible, because it referred to statements by the plaintiff of past sensations and symptoms. It will be observed that in neither *Broyles v. Priscock* nor *Powell v. State* was any distinction made between complaints of pain and suffering made by a patient to his physician and such complaints made to any other person. In an able and instructive article on "Declarations of Pain and Suffering," in 22 *Central Law Journal*, 509, 514, the writer well says: "Nothing is better settled than the rule that, when a witness can be called by a party, that party will not be permitted to prove his unsworn declarations. That which a plaintiff can prove by his own sworn statements, being a competent witness, he is not permitted to prove by statements which are unsworn. His declarations as part of the *res gestae* of some subject of inquiry may be

proved, but otherwise they are incompetent. It is difficult to see how spoken declarations or representations of existing pain can be a part of the *res gestae* of such pain. If the pain is not an act, they are not declarations accompanying an act. Nor can we regard such descriptive statements of present pain as the natural language of such pain. The greatest sufferers seldom say they suffer for the purpose of indicating their pain. Such declarations are not admissible merely because they accompany the act of the party in submitting himself to examination, for it is the existence of the pain, of a bodily condition or sensation, not the fact that a doctor examined the person, that is the subject inquired about. This applies equally to examinations made by physicians for the purpose of treatment, or to qualify themselves to testify as expert witnesses."

12. The conductor of the train testified in behalf of the defendant that, upon approaching the crossing where the collision occurred, the engineer of the train gave two long and two short blasts of the whistle, and, upon cross-examination, he was asked the following question: "Did you blow at all the road crossings up and down the track on that occasion?" This question was objected to by the defendant, upon the ground that it was irrelevant, and the objection was overruled by the court. The witness answered, "Yes, sir," but, upon the question being repeated, he answered that he did not know. In the motion for a new trial error was assigned upon this ruling of the court. The facts with reference to the blowing or nonblowing of the whistle of the locomotive of this particular train at other crossings on that day were clearly irrelevant to the issues on trial, but the plaintiff had the right, upon cross-examination, to test the recollection of the witness as to the blowing of the whistle at other crossings. It would have been perfectly competent to have asked the witness if he remembered whether the whistle was blown at all the other crossings, or to have asked if he remembered whether it was sounded at other named crossings. While it may be that the particular question propounded was in itself objectionable, the testimony which it elicited gave the defendant no legal cause to complain of the ruling of the court. The first answer to the question was favorable to the defendant, and the fact stated in the second was merely in reference to the witness's memory.

Judgment reversed. All the Justices concur.

(121 Ga. 816)

WADE v. PEACOCK.

(Supreme Court of Georgia. Jan. 23, 1905.)

AUDITOR'S REPORT—CORRECTION—DECEDENT'S ESTATE—PRIORITIES—CLAIMS.

1. A Judge of the superior court may, in framing his decree on an auditor's report, cor-

rect any error of law apparent on the face of the report, and make his decrees conform to the law. This is so although exceptions filed to the report of the auditor have been withdrawn.

2. In the settlement of the estate of a decedent, debts due for rent take priority over liquidated demands.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 964.]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; E. J. Reagan, Judge.

Action between Maggie L. Wade, administratrix, and W. D. Peacock, guardian. From a judgment, Wade brings error. Affirmed.

W. C. Snodgrass, Theo. Titus, and S. S. Bennett, for plaintiff in error. Hammond & Hammond, for defendant in error.

CANDLER, J. Exceptions of fact to an auditor's report are for a jury in the superior court; exceptions of law are for the court. Whether, in the absence of exceptions of fact, the court can, without submitting the case to a jury, and without re-reference to the auditor, frame a decree at variance with the facts reported by the auditor, is a question not involved in this case. "When there is an error of law apparent on the face of the auditor's report wholly irrespective of the evidence on which it is based, then the court can correct that error by its judgment." *Brinson v. Wessolowsky*, 57 Ga. 143; *Anderson v. Usher*, 59 Ga. 577. It can make no difference that no exceptions of law have been filed, or, if filed, have been withdrawn. We are not aware of any law requiring a judge to make an erroneous decree, based on a palpably erroneous report of law by an auditor, merely because the party affected did not file exceptions to the report. Such a rule would subordinate the judicial powers of the court to those of the auditor. To hold that re-reference to the auditor is necessary would lead to vexatious and useless delay, for, if the error of law is apparent, why may not the judge correct it at first hand, rather than send it back to the auditor for correction? In the present case the auditor made separate findings of law and fact. Exceptions were filed by the defendant in error, but were subsequently withdrawn. The auditor found as matter of law that in the payment of the debts of a decedent a debt for rent "is an unliquidated demand, and as such takes rank as an open account," and he gave priority to a liquidated demand over such a debt. This was in plain conflict with Civ. Code 1895, § 3424, providing for the priority of debts due by a decedent. The decree framed by the court "approved and confirmed" the auditor's report, but cured the error therein by giving priority to the debt due for rent. This was an inconsistency, but not one of such importance as to require a reversal of the judgment, for the intention of the decree was apparent.

Judgment affirmed. All the Justices concur.

(121 Ga. 102)

GRIFFIN et al. v. COLLINS.

(Supreme Court of Georgia. Jan. 28, 1905.)

GUARDIAN FOR PHYSICAL INCAPACITY OF WARD — BOND — ESTOPPEL — REVOCATION OF APPOINTMENT — DISMISSAL — NOTICE OF APPLICATION — RECEIPT BY WARD — LIMITATIONS — JURY TRIAL.

1. There is no provision of law in this state for the appointment of a guardian for a person of full age solely on the ground of blindness and limited education; but where one, on his own motion, is appointed guardian of such a person, and as a condition precedent to his appointment gives bond with security for the faithful administration of the ward's estate, he and the sureties on his bond are estopped, in a suit on the bond, to deny the validity of his appointment as guardian.

2. An order of the ordinary, granting the prayer of a petition filed by one for whom a guardianship has been appointed, asking that the guardianship be revoked and the estate turned over to an attorney in fact for the ward, the operation of the order being made conditional upon the guardian's making a full settlement with the ward or her attorney in fact, is not a bar to an action by the administrator of the ward on the guardian's bond.

3. Under Civ. Code 1895, § 2567, publication for four weeks of notice of the application of a guardian for letters of dismission is necessary before the guardian can obtain a valid discharge. Consequently, where a discharge was granted without compliance with this requirement of the law, it was not a bar to a suit on the guardian's bond.

4. A receipt by a ward, acquitting the guardian in full of all claims against him, is not valid if signed before the termination of the guardianship. This is so even though the ward be at the time of sound mind.

5. The period of limitation within which suit may be brought on a guardian's bond is 20 years. This is not affected by section 2565 of the Civil Code of 1895, the effect of which is to provide that in the absence of a full exhibit of the guardian's accounts, and full knowledge by the ward of his rights, receipts in final settlement of the guardian's account will be prima facie binding upon the ward only after the lapse of four years.

6. A receipt signed by a ward, acquitting her guardian of all claims against him, does not "increase the risk" of the sureties on the guardian's bond, so as to release them from liability.

7. A suit against a guardian and the securities on his bond, seeking to recover on the bond, is an action at law; and where questions of law and fact in such a case are submitted to an auditor, and exceptions of fact are filed to the auditor's report, such exceptions should be submitted to a jury for determination.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Pope Collins, administrator, against J. M. Griffin and others. From the judgment, both parties bring error. Reversed on both bills of exceptions.

Hamilton McWhorter and James B. Park, for Griffin et al. Samuel H. Sibley, for Collins.

CANDLER, J. On October 4, 1880, James M. Griffin was appointed guardian of the estate of Harriet A. Lane, he having filed a petition to the court of ordinary of Greene county in which he alleged that Harriet A.

Lane "is blind, and of hardly any education because of said blindness; of no experience in business; and consequently, though of sound mind and of the age of thirty-nine years, utterly incapable of managing her estate." The petition concluded with a prayer that he be appointed guardian of her estate. The order of the ordinary was as follows: "Whereas, application has been made to this court by James M. Griffin, stating that Harriet A. Lane, of said county, has a considerable estate, and that owing to her blindness and limited education she is incompetent to manage her estate, and that she has no guardian; and whereas, it appears that notice of application for the issuing of a commission has been given in terms of law to inquire into the inability of the said Harriet A. Lane to manage her own business for the reasons given in the petition of said James M. Griffin, and no objection having been made: Ordered, that a commission issue in said case." The jury appointed by the ordinary found that "from blindness and limited education" she was not competent to transact her business, and recommended the appointment of a guardian. In accordance with this recommendation, it was duly ordered that Griffin be appointed guardian of the estate of Harriet A. Lane upon his giving bond in the sum of \$14,000. On October 28, 1880, such a bond was given, signed by Griffin as principal, and Joseph McWhorter and J. O. Boswell as securities. The condition of the bond was that Griffin should "well and truly maintain and clothe said Harriet A. Lane according to her circumstances, and * * * take good and lawful care of her person and property according to the laws of this state, and * * * annually make a just and true return of all his actings and doings herein unto the said ordinary, and pay over all assets that [might] remain in his hands when said guardianship [should] legally terminate." Griffin continued as guardian until October 30, 1888, when Harriet A. Lane filed in the court of ordinary of Greene county a petition reciting that he had put her on notice that he must surrender his trust at once; "and inasmuch as it is extremely difficult to get a person suitable to take charge of the property and give the bond required by law, and the probability of a frequent change in these uncertain times would make heavy expense on the corpus of the property, and feeling that she can through a competent agent manage it satisfactorily by having it invested in state bonds as soon as possible, she respectfully prays that the said guardianship be revoked, and that the property be turned over to her or her authorized agent." Attached to this petition was the written consent and recommendation of Griffin as guardian, and that of Mary L. Collins, the sister and nearest of kin to Harriet A. Lane. The ordinary ordered that the prayer of the petition be granted upon Griffin making a

full settlement with the attorney in fact of Harriet A. Lane. On January 7, 1889, the ordinary passed an order reciting that the final return of James M. Griffin, guardian of Harriet A. Lane, had remained of file the time required by law, and directing that it be allowed and admitted to record. Thereupon Griffin filed a petition setting out that his guardianship had terminated, and that he had made a full settlement with his ward, and praying for a final order discharging himself and the securities on his bond; and it was accordingly "ordered by the court that James M. Griffin be * * * discharged from said guardianship, and that Joseph O. Boswell and Joe McWhorter, his securities, * * * be released from all further liabilities on said bond as such securities." The record contains certified copies of the various returns of Griffin as guardian, and it appears that on November 5, 1888, B. F. Collins, as agent for Harriet A. Lane, and Harriet A. Lane herself, signed the following receipt: "\$6,445.88. Received of Jas. M. Griffin, my guardian, six thousand, four [hundred] and forty-five & ⁸⁸/₁₀₀ dollars, in full of all claims on him to August 5th, 1888. This is a settlement in full. November 5th, 1888." This paper was witnessed by John H. Bowles, a notary public.

Harriet A. Lane died in June, 1901, and Pope Collins, her nephew, was appointed administrator of her estate. The present suit was brought by him to the September term, 1902, of Greene superior court, against Griffin as principal, and Boswell and the executors of McWhorter as securities, on the bond heretofore mentioned. The petition alleged various acts of fraud and mismanagement on the part of Griffin as guardian, and claimed that the settlement between him and his ward by which she undertook to release him from all further liability, was void for want of capacity in her to make such a settlement. It alleged that in procuring this settlement Griffin grossly imposed upon his ward, who reposed the utmost confidence in him, and was, by reason of her bodily and mental affliction, unable to ascertain and discover the fraud that was being practiced upon her. The petitioner waived discovery, and prayed (1) that Griffin be required fully to exhibit his accounts as guardian, (2) that he fully exhibit the items of the pretended settlement, and (3) that the plaintiff have judgment on the bond in such sums as are shown to be due the estate of his decedent. The defendants filed separate answers, and demurred generally and specially. The petition was amended to meet the demurrers, and it was alleged, among other things, that the judgments of discharge granted the defendants by the ordinary were void for want of citation, service, or notice to any one preceding their rendition, and because Harriet A. Lane did not appear before the ordinary, the proceeding being entirely ex parte, and therefore null and void. Va-

rious items were set out, wherein it was claimed that Griffin, as guardian, had made erroneous and fraudulent returns, creating an indebtedness from him to his ward in sums stated. The points raised by the demurrers and the averments of the answers filed by the defendants will not be set out at this point, as they will clearly appear from the ensuing discussion of the legal questions involved in the decision of the case. The case was referred to an auditor, the substance of whose report is contained in the closing paragraph thereof, as follows: "Wherefore, in conclusion, I find the plaintiff has established by proof all the allegations in his declaration, the amendments thereto, and his replication to defendants' answers necessary to the recovery hereinbefore indicated; and that therefore he have judgment against all the defendants in the principal sum of \$2,598.35, and \$2,730.26, interest thereon at 7 per cent. per annum from the 6th day of August, 1888, to the 10th day of August, 1908, aggregating \$5,328.61." Exceptions of law and fact were filed to this report by both the plaintiff and the defendants. The court passed upon all the exceptions, both of law and fact, and declined to submit the exceptions of fact to a jury. All the exceptions were overruled, and the findings of the auditor were made the judgment of the superior court. The defendants except to the overruling of their demurrers, the refusal of the court to submit the exceptions of fact to a jury, the overruling of their exceptions of law and fact to the auditor's report, and to the decree as rendered. The plaintiff filed a cross-bill of exceptions, assigning error upon the overruling of his exceptions of law, the refusal of the court to submit the exceptions of fact to a jury, the refusal of his motion to recommend the case to the auditor for alleged errors in calculation, and the judgment finally rendered. Owing to the great number of the grounds contained in the various demurrers and exceptions of law and fact, no attempt will be made to pass upon these points separately. What follows decides, in our opinion, every material question at issue.

1. There is no provision of law in this state for the appointment of a guardian for a person *sui juris* solely on the ground of blindness and limited education. Civ. Code 1895, § 2570, enumerates the classes of persons for whom guardians may be appointed by the ordinary, as follows: "Idiots, lunatics, and insane persons, and deaf and dumb persons when incapable of managing their estates, habitual drunkards, and persons imbecile from old age or other cause, and incapable of managing their estates." According to the petition of Griffin to have himself appointed the guardian of Harriet A. Lane, the latter was "of sound mind and of the age of thirty-nine years." The fact that she was blind, of limited education, and wholly

lacking in business experience or ability, furnished no ground for the appointment of a guardian for her estate; and, had she chosen, she might at any time have disregarded the appointment made by the ordinary, and have assumed for herself the control and management of her property. But having gone into the court of ordinary and invoked its power of appointment of a guardian, having gained control of the property of this unfortunate woman through his successful efforts to have himself appointed guardian in a case where the law does not provide for the appointment of a guardian, can Griffin now be heard to deny the legality or validity of his appointment, or avoid the liability thereby voluntarily assumed? And can his bondsmen, who were charged with knowledge of the law, and who came forward to fulfill the conditions imposed by the ordinary as a prerequisite to his appointment as guardian, now escape liability on the bond by reason of the fact that the appointment was one not authorized by law? The first question is easily answered in the negative, for it is an elementary principle in the law of estoppel that a party will not be heard to deny the validity or legality of a judgment which he has invoked. A case directly in point is that of *Hines v. Mullins*, 25 Ga. 696, where it was held that a person who has been appointed guardian by a court of ordinary, and has taken possession of the property and otherwise acted as guardian, is concluded from saying, when sued as guardian, that the ward did not reside in the county of the court, and, therefore, that the court was without jurisdiction to make the appointment. See, also, *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; *American Grocery Co. v. Kennedy*, 100 Ga. 462, 28 S. E. 241; *Vaughn v. Strickland*, 108 Ga. 660 (2), 34 S. E. 192; *Gentry v. Barron*, 109 Ga. 172, 34 S. E. 349; *Brown v. State*, 109 Ga. 570, 34 S. E. 1031. As to the sureties, their liability is determined by Civ. Code 1895, § 2554, where it is provided that, even if the appointment of the guardian for any cause is declared void, they shall nevertheless be responsible on the bond for any property which may have been received by him by virtue of his appointment as guardian. It is idle, therefore, to further discuss the authority of the ordinary to appoint a guardian for Harriet A. Lane as affecting the liability of the obligors of the bond now sued on.

2, 3. The order of the ordinary granting the prayer of the petition of Harriet A. Lane that the "guardianship be revoked and the property turned over to her or her authorized agent," conditionally upon the guardian making a full settlement with her or her attorney in fact, can in no view be treated as a bar to an action against the guardian and the sureties on his bond. The only effect of this order was to terminate the guardianship and settle the relationship between guardian and ward for the future.

It settled nothing whatever as to the state of the guardian's accounts, and was no adjudication of the faithfulness of his stewardship. See, on this subject, *King v. Hughes*, 52 Ga. 600. But it is contended by counsel for Griffin and his sureties that the order of January 7, 1889, by which the former was "discharged from said guardianship" and the latter were "released from all further liability on said bond as such securities," operated as a complete bar to the present action. It appears, however, that the judgment relied on was preceded by no citation or notice of any character. This was not disputed. It was also alleged in the petition, as amended, that the order of dismissal was procured by fraud, and that in obtaining it Griffin concealed from the ordinary the true state of his accounts. Under Civ. Code 1895, § 2567, which is applicable alike to guardians of minors and of lunatics (see section 2580), letters of dismissal to a guardian may be granted only on his compliance with the conditions therein named, one of which is the publication of his application for discharge once a week for four weeks in the public gazette where the legal notices of the ordinary's office are usually published. It is clear, then, that, the legal requisites for a valid discharge not having been complied with, the order of dismissal cannot operate to bar the rights of the ward in the present suit.

4. One for whom a guardian has been appointed on the ground of lunacy is legally incapable of contracting, even though restored to sanity, until the guardianship has been dissolved. Civ. Code 1895, § 3652. If this is true as to contracts generally, a fortiori is it true as to contracts between the ward and his guardian, for the latter, by reason of his peculiar relationship to the ward, is in a position to more easily overreach and take advantage of him; and, until this relationship has been destroyed and the parties placed at arm's length, it would not be consonable to uphold a contract made between them. In the present case, the receipt given by Harriet A. Lane to Griffin was dated November 5, 1888, while the final discharge of the guardian was not granted until January 7, 1889. It was contended by counsel for the plaintiff in the court below that the receipt and settlement were void for lack of capacity in Harriet A. Lane to make them, and for fraud on the part of Griffin in concealing from her the real state of his accounts. Regardless of this, however, we are of the opinion that, even were she in all respects mentally sound, she could not, under the Code section quoted, have given a valid receipt to her guardian so long as he continued to be her guardian, and that for this reason the paper relied on was not of itself a bar to the action.

5. It is urged, however, that, after the lapse of 14 years after the receipt by the ward and the discharge by the ordinary,

the plaintiff is barred by the statute of limitations. It is argued that under Civ. Code 1895, § 2565, after four years from the date of the settlement with the ward, the latter could not reopen the account. The section referred to is as follows: "No final settlement made between the guardian and ward shall bar the ward, at any time within four years thereafter, from calling the guardian to a settlement of his accounts, unless it is made to appear that the same was made after a full exhibit of all the guardian's accounts, and with a full knowledge by the ward of all his rights." In the case of *Steadham v. Sims*, 68 Ga. 741, this section was, in effect, construed as meaning that in the absence of a full exhibit of the guardian's accounts, and full knowledge by the ward of his rights, receipts in final settlement of the guardian's account would be prima facie binding upon the ward only after the lapse of four years. This case was decided by a full bench, and is binding upon us; and any different meaning to the section that was given in the decision when that case was again before this court (74 Ga. 187) is not binding, for the reason that upon this branch of the case Chief Justice Jackson did not concur with the majority of the court. The principle announced in the earlier case strikes us as entirely sound. Ordinarily, a receipt in full settlement of an account is binding, in the absence of fraud in its procurement, from its date. It could not have been intended that in the case of wards, around whom the law throws the most jealous protection, a limitation of four years should operate to bar the right to sue the guardian for money remaining due on a fraudulent settlement. The view urged by counsel for the plaintiff in the court below seems to us to set forth accurately the true law on this subject, viz., that section 2565 was designed to create a provision in favor of the ward, and not to bar his rights. It must be borne in mind that this is a suit on the guardian's bond—a sealed instrument—and that it is not barred until after the lapse of 20 years. It is the right of the defendants to plead in bar of the action the settlement between the guardian and his ward, and after four years from the date of that settlement it will be prima facie presumed that the ward is bound thereby—a presumption identical with that created in ordinary cases from the date of settlement. The ward, however, may then show that the settlement was procured by fraud, and thus rebut the presumption in its favor arising from the lapse of the statutory period. There is no merit in the contention that this action is barred by the statute of limitations.

6. It was urged on behalf of the securities that the receipt given by Harriet A. Lane "was an act of the creditor without their knowledge or consent, which increased their risk and released them from liability."

We confess our inability to follow this line of reasoning. Granting that the receipt was given without their knowledge or consent, we are at a loss to understand by what process of logic it can be construed as increasing their risk. If it was a valid, binding act, it entirely relieved them from any risk whatever; while if it was void from fraud, it had not the slightest effect upon their obligation.

7. For reasons which will now appear, we have not discussed the evidence appearing in the record as having been admitted on the hearing before the auditor. On one point counsel for both sides are agreed, viz., that the exceptions of fact to the report of the auditor should have been submitted to a jury; and both bills of exceptions assign error upon the refusal of the court to take this action. Civ. Code 1895, § 4595, provides that, in all law cases where an auditor is appointed, exceptions of fact to his report shall be passed upon by the jury as in other issues of fact; while section 4596 provides that, in equity cases, only such exceptions of fact shall be submitted to the jury as are approved by the trial judge. The question then arises, whether the present action was one at law or in equity. In determining this question, the nature of the relief sought, rather than the form of the allegations of the petition, is important. *Steed v. Savage*, 115 Ga. 97, 41 S. E. 272; *Fowler v. Davis*, 120 Ga. 443 (3), 47 S. E. 951. The waiver of discovery by the plaintiff would indicate his intention to invoke the aid of a court of equity; but this is a matter of form, rather than substance, at least so far as the determination of the nature of the suit is concerned. The prayer for an accounting is appropriate either to an action at law or in equity. *McLaren v. Steapp*, 1 Ga. 376; *Epping v. Alken*, 71 Ga. 686. The prayer for judgment on the bond, however, fixes the suit as one at law, and for that reason we are clear that the exceptions of fact to the auditor's report should have been submitted to a jury.

In view of the fact that the proper determination of the exceptions of law filed by the plaintiff depends in great measure upon the determination of the issues of fact, which must be submitted to a jury when the case is tried again, it will not be necessary to pass upon the assignments of error in the cross-bill of exceptions upon the overruling of those exceptions of law. We will state in this connection, however, that nothing in this opinion is intended to preclude the plaintiff from again urging the same points when the case is tried again. We simply leave the matter open, to be passed upon by the trial judge in the light of the rulings announced in the foregoing.

Judgment on both bills of exceptions reversed. All the Justices concur.

(121 Ga. 822)

ALLISON v. WALL.

(Supreme Court of Georgia. Feb. 1, 1905.)

OPINION EVIDENCE—ADMISSIBILITY—CONVEYANCE OF GROWING TREES—CONSTRUCTION.

1. The admission of opinion evidence is limited to those instances where, because of the complexity of the elements involved, it is impossible for the witness to detail all of the circumstances which lead his mind to a particular conclusion; or where, because in a matter of science, special art, or particular occupation, persons inexperienced therein would be unable to reach a proper conclusion from a mere statement of the facts on which the expert based his opinion.

2. Where dates have not been specially noted, or time measured by a timepiece, it is competent for a witness to give his opinion as to how long a time elapsed between given facts.

3. It would likewise be proper to admit opinion evidence as to what would be a reasonable time for performing an unusual task or special work, where all the elements and data for making the calculation could not be detailed to the jury, or presented to them in such a way that they could themselves make the calculation.

4. But where, as in the present case, it was possible to state the data from which the jury could make a calculation, it was not admissible for an expert to testify as to what, in his opinion, would be a reasonable time for the performance of the act under consideration.

5. The evidence objected to was also properly excluded because it sought to give the opinion of the witness as to the very matter in issue, and involved the witness' opinion not only as to what could be done, but also what, as a matter of law, should have been done.

6. A conveyance, in 1891, "of all the pine trees growing and being upon 4,900 acres of land, for sawmill and turpentine purposes," included only those which were then suitable for such purposes, and not those which by growth subsequently came within the description of the original grant.

7. The charge objected to on the subject of returning and cutting was not error. Construed as a whole, and in connection with the succeeding sentence, the jury were instructed that the right could be exercised during the entire period covered by the "reasonable time," but that, after all trees suitable for sawmill purposes had been cut, the plaintiff could not return, and remove timber which was not originally suitable, but which had subsequently become so.

8. The general verdict for the defendant was equivalent to a finding that the plaintiff had not removed the timber within a reasonable time, and therefore that all the trees, whether growing or lying on the ground, reverted to the grantor.

9. The verdict was supported by the evidence. There was no error requiring the grant of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; D. M. Roberts, Judge.

Action by J. H. Allison against J. W. Wall. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Allison brought an equitable petition to enjoin Wall from cutting timber and to recover damages for timber already cut. Both the plaintiff and the defendant claimed to be in possession under a conveyance from the heirs of McMillan. The plaintiff was a subtransferee and successor in title from his father, J. R. Allison, and the question involved depended mainly upon the construc-

tion to be given to the instrument of March 12, 1891, from Archibald McMillan to John R. Allison, whereby, in consideration of \$3,000, McMillan granted, sold, and conveyed to John R. Allison "all the pine trees growing and being upon the certain tracts or parcels of land for sawmill and turpentine purposes." The land consisted of all of nine lots of 490 acres each, 100 acres of lot 161, and 390 acres of lot 162; "to have and to hold the afore-described pine trees for sawmill and turpentine purposes," with the rights and appurtenances thereto. "Also selling and conveying to said John R. Allison the right of way through and over said described lands for a tramroad, and the right to cut at any time any pine trees for cross-ties, bridge or trestle timbers to be used in building and maintaining said tramroad, and the right to cut at any time any pine trees for raft oars and binders; and the said Archibald McMillan * * * the said bargained pine trees for sawmill and turpentine purposes and right of way for a tramroad unto said John R. Allison, his heirs and assigns, forever, warrants and defends against the claims of all persons by virtue of these presents." On April 16, 1891, Allison, in consideration of \$5,969, sold to Buckley, his successors in trust, and assigns all the pine trees growing and being on the land above described for sawmill purposes. Buckley conveyed his interest to Suydam, Suydam to Gray & Bros. and Gray & Gatchell. They conveyed to the Gray Lumber Company. Subsequently the Gray Lumber Company conveyed to J. H. Allison, the plaintiff, by deeds dated April 23, 1901, and June 12, 1901. Archibald McMillan died on June 22, 1901. Soon thereafter his heirs conveyed to Dickson & Dorminey certain of the timber involved for sawmill and turpentine purposes, the same to be cut at pleasure within the period of 10 years. The defendant, Wall, is in possession by virtue of license from Dickson & Dorminey. After the property came into the possession of the Gray Lumber Company, it permitted others to cut certain timber. Their operations ceased, and thereupon the Gray Lumber Company again entered and began cutting some of the timber, but ceased operations. Under an arrangement with McMillan, J. R. Allison had been working the timber, and subsequently entered into the contract of 1891. Allison testified that he was in the turpentine business in Irwin county. This timber was used for turpentine purposes by Allison & Gasque. It ceased about three years before the trial. The plaintiff testified "that, while he did not know how much timber J. R. Allison had in connection with a certain kind of business, it amounted to a large body, and that he operated his still there continuously; does not know what time he cut and used this particular timber." He had two stills. Ten lots of land timbered like these lots would have been a pretty fair location for a small mill.

It would have been about two years' run for a small mill. There was evidence that timber was boxed during three years for turpentine purposes, and that thereafter the trees were proper to be used for sawmill purposes. There is no evidence as to the accessibility, situation, or size of J. R. Allison's turpentine tract or stills, nor how large a body of land, if any, he controlled beyond that mentioned in McMillan's lease. There was some evidence that McLeod & Co. and Linder, by permission of Gray & Co., cut trees off the property in dispute, paying an agreed price as "stumpage," and that they did not cut all of the trees suitable for sawmill purposes. There was evidence that the Gray Lumber Company owned large tracts of timber, and it was claimed that they did not abandon the timber on the McMillan tract, but expected to cut it after sawing up the lumber on another tract across the Satilla river, on which their leases were about to expire. There was a conflict in the evidence as to whether the trees left by McLeod & Co. were suitable for sawmill purposes under the conditions existing when the contract was made in 1891, it being claimed by the defendant that the timber was not suitable for such purposes, and that what was left was actually abandoned, and subsequently became available and profitable. There was evidence as to the entry on the land by Wall in 1901, and the number of cross-ties which he had cut from standing timber, and evidence that he had cut and removed logs lying on the ground at the time when he entered. Several witnesses testified that for the successful operation of a turpentine distillery it would be necessary to acquire a title to a large tract. They varied in their estimates as to what would be necessary for this purpose, and as to the amount necessary to operate a sawmill.

The plaintiff propounded to several witnesses who were experienced in the turpentine and sawmill business the following interrogatory: "What, in your opinion, would be a reasonable time for a sawmill owner to cut and remove the timber from land in the lease to which no time is limited within which to cut and remove the timber? State the reasons for such an opinion as to time for such removal." The witnesses varied as to what would be a reasonable time; some saying 12 and some 10 years. In answer to a similar question, other witnesses stated that 10 or 12, others 6 or 7, years would be a reasonable time within which to use timber for turpentine purposes, where there was no time limit in the lease; that it is very expensive to move a turpentine distillery, moving the laborers, and building suitable houses to be occupied by them; that 3 or 4 years is occupied in the actual use of the timber, and it is impracticable to break up and move a turpentine distillery oftener than 10 or 12 years, for the reasons stated. On objection by the defendant, these questions and an-

swers were excluded, and the court, in its charge, also instructed the jury that they were not to consider the opinion of any witness which may have been given in the testimony. To these rulings the plaintiff excepted.

The plaintiff also excepted to the following instructions to the jury: "(a) If you find any of the trees were cut by the defendant, and that they were pine trees, and that they were growing and being upon these tracts of land, then that must have been their condition at the time of the execution of that lease. If they were not trees at that time, and growing and being upon this land, of course they would not pass by the terms of this lease. (b) I charge you to ascertain what mill timber is; and I charge you that under this lease the parties would have no right to exercise that right but once. One of the contentions of the defendant is that the parties went upon this land, and cut off all of the mill timber, and that afterwards there was an effort to go back on it after having been there one time. The contention of the plaintiff is, while they admit that they went there to cut off some of the timber, yet they did not cut off all of it; that they did not abandon it, but intended to go back. If you find as a matter of fact that they did not go there and cut off all the timber suitable for sawmill purposes, then they would not be permitted to go back, this right can only be exercised one time. (c) If you find the dead timber lying on the ground there was converted into cross-ties, that would not come within the description there of growing trees on the land, and the plaintiff would not be permitted to recover for that class of timber."

De Lacy & Bishop, for plaintiff in error.
E. D. Graham, for defendant in error.

LAMAR, J. 1-5. In judicial investigations it frequently becomes necessary for a jury to determine what is the reasonable value of services or property. In such cases expert and opinion evidence is admissible. There is an apparent, but no real, analogy between this class of testimony and proof of reasonable time by like evidence in the present case. The distinction illustrates the reason underlying the rule. So far as reasonable value is concerned, opinion evidence is the only form of proof which can be made. At last, value is a matter of opinion. So many factors enter into its determination that it would be impossible for any witness to state them all to the jury; or, if he could, it would be impossible for them, from such evidence alone, to make the calculation. Even as to staple articles the selling price varies from day to day. It is affected by the activity or depression of business, the existence or want of competition, and the infinite and complex causes operating under the law of supply and demand. For these reasons, and be-

cause no one can tell exactly why anything will sell for a given amount, opinion evidence is admissible. In the nature of things, it is the only class of evidence that can be given; and Civ. Code 1895, § 5286, itself expressly recognizes it as proper to be received. The same principle would apply where no record of dates had been kept, or no time-piece had been used in measuring time. It would be impossible for the witness to state exactly how he judged of its lapse or duration. He could therefore give his opinion as to how long he thought it was between two acts. So, too, there might be cases in which it would be proper for opinion evidence to be introduced as to what would be a reasonable time for the performance of a given act. But in such instances its admissibility would grow out of the peculiar facts, and result from the inability of the witness to give the data or to detail the circumstances on which he based his conclusion, and also from the impossibility of persons unfamiliar with the special business of making the calculation. But in the present case there was no difficulty in the jury making the proper calculation as well as an expert, if they were furnished with the proper data. After considering all these circumstances, and the condition of the parties, and determining when the work of boxing the trees should begin, they could then easily determine how long it would take to complete that part of the enterprise. In like manner it would be for them to determine from all the circumstances what was in contemplation of the parties, or what, under all the facts, would be a reasonable time within which to begin. This having been settled, given the quantity and character of the timber, the usual number of hands, and the capacity of the mill, it would be a mere matter of arithmetic to determine how long would be required to cut the timber. To permit a witness to determine all these matters by answering what, in his opinion, was a reasonable time, would have been to allow him to usurp the functions of the jury, and to decide the very point in issue. What was a reasonable time must be determined by the facts as they existed in 1891. The condition of the parties and all of the circumstances were for consideration by the jury under instructions from the court. But it was not competent for a witness to give his opinion as to what was a reasonable time within which the trees should have been boxed and the timber cut. Such testimony involved not only calculations as to what could be done, but also, as a matter of law, as to what should be done. *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239.

6. Construing the contract, then, as it must be, according to its legal effect on the day it was executed, and not according to subsequent changes, the court properly instructed the jury that it included only timber which in 1891 was suitable for turpentine and sawmill purposes. The right to such trees, and

to such trees only, passed at that date as definitely as if each had been at that time marked and designated by the parties. If by growth others thereafter became suitable for turpentine or sawmill purposes, they did not thereby become subject to a contract which did not originally include them within its terms. *Martin v. Peddy*, 120 Ga. 1079, 48 S. E. 420 (4); *Warren v. Short*, 119 N. C. 39 (3), 25 S. E. 704.

7. When the jury, under the evidence and the charge of the court, determined what would be a reasonable time for boxing and cutting the trees, they, in legal effect, could insert that date in the contract, and thereupon it would result that J. R. Allison or his assigns would have until the last day within which to exercise the rights granted. He or they could cut all the timber the first year, or all of it the last year. He or they, during this period, could cut a part of the trees on all or a portion of the tract. During the period found by the jury to be a reasonable time, he or they could return, and box or cut the balance. But neither he nor they could at the beginning of this period cut all of the timber suitable for sawmill purposes, and then return and cut such as by growth had become suitable for sawmill timber. Such, fairly construed, was the effect of the charge assigned as error. But if there was any doubt thereon it was removed by a consideration of the succeeding sentence, wherein the court instructed the jury that "they would have had the right to have gone back, provided it was in the reasonable time that was contemplated by the agreement of parties at the execution of the lease."

8, 9. There was some evidence that the defendant cut dead timber which was lying on the ground, and complaint is made of the charge of the court that such timber did not pass by the conveyance of 1891. But the verdict in favor of the defendant shows that the jury found as a fact that a reasonable time had expired, and that the plaintiff no longer had any right to even the growing timber. If this was true, the plaintiff, of course, had no right to the dead timber, all having reverted to the grantor. So that, if the charge was incorrect, it was harmless. *McRae v. Stillwell*, 36 S. E. 938, 111 Ga. 65 (1a), 55 L. R. A. 518.

Judgment affirmed. All the Justices concur.

(121 Ga. 624)

LUQUIRE v. LEE et al.

(Supreme Court of Georgia. Jan. 28, 1905.)

EJECTMENT—PETITION — AMENDMENT—DEED—CONSTRUCTION—ESTATE CONVEYED—TRUSTEE—POWER OF SALE—MERGER—ADVERSE POSSESSION—REMAINDERMEN—FOLLOWING TRUST FUNDS.

1. Though the premises were not described in the petition with sufficient fullness, yet the description was not so indefinite but that an amendment more particularly describing the premises was allowable.

2. A grantor in 1852 conveyed land by deed to a named trustee, his heirs and assigns. The habendum clause was: "To have and to hold the said tract or parcel of land to the said [trustee], his heirs and assigns forever, upon the special confidence and trust, nevertheless, for the sole and separate use of Nancy R. Lee and her children during the natural life of or widowhood of said Nancy R. Lee; and at her death or marriage this trust to cease and the property to be equally divided between the children of said Nancy R. Lee living at her death, share and share alike; with full power to said [trustee], with the consent of said Nancy and her husband, to sell said property and invest the proceeds in other property. To have and to hold the said tract or parcel of land with all and singular the rights, members and appurtenances thereto appertaining, to the only proper use, benefit and behoof of him, the said [trustee], upon the trust aforesaid and for the use aforesaid, [his] heirs, executors, administrators and assigns, in fee simple." Mrs. Lee died in 1900, without remarriage. Held: (1) The estate created was a joint life estate in Nancy R. Lee and her children during the life of Mrs. Lee, with a fee-simple estate in remainder to the children of Nancy R. Lee who survived her; (2) that the trustee took the legal title to the life estate only; and (3) that the power of sale conferred on the trustee was a special personal trust, and one which did not pass to a successor.

3. The power of sale referred to in the preceding headnote expired with the death of the trustee. The judge of the superior court, upon petition of one of the beneficiaries, at chambers, could appoint a successor to the deceased trustee, but was without jurisdiction over the legal estate in remainder so as to confer upon the new trustee the power of sale vested by the deed in the deceased trustee.

4. Coincidence of two independent estates presently held by one and the same person or class of persons is a necessary prerequisite to merger. There can be no merger of estates until such identity of person and of present interest in point of fact exists.

5. As the trustee did not represent the estate in remainder, and there was no merger of estates, the possession of the defendant did not become adverse to the remaindermen until the death of the life tenant.

6. The estate in remainder by the terms of the deed was limited to the surviving children of Mrs. Lee. Heirs of a child who died before Mrs. Lee died took no interest in remainder under the deed.

7. The evidence was insufficient to support the equitable plea that the proceeds of the land improperly sold by the substituted trustee was invested in other land, which was conveyed to him as trustee for his wife and children, and which had been partitioned between the plaintiffs.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Thomas Lee and Sarah Sheffield against H. F. Luquire. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lane & Park, for plaintiff in error. M. G. Bayne, for defendants in error.

EVANS, J. This was an action of ejectment, brought against H. F. Luquire by Thomas Lee and Sarah Sheffield, who claimed title to the premises in dispute as remaindermen under a deed dated January 10, 1852, from Anna Jepson to Thomas P. Stubbs, trustee. This deed purported to convey to "Thomas P. Stubbs, his heirs and assigns," a certain described parcel of land in

Bibb county, containing four acres. The habendum clause was: "To have and to hold the said tract or parcel of land to the said Thomas P. Stubbs, his heirs and assigns forever, upon the special confidence and trust, nevertheless, for the sole and separate use of Nancy R. Lee and her children during the natural life of or widowhood of said Nancy R. Lee; and at her death or marriage, this trust to cease and the property to be equally divided between the children of said Nancy R. Lee living at her death, share and share alike; with full power to said Thomas P. Stubbs, with the consent of said Nancy and her husband, to sell said property and invest the proceeds in other property. To have and to hold the said tract or parcel of land with all and singular the rights, members and appurtenances thereto appertaining, to the only proper use, benefit and behoof of him, the said Thomas P. Stubbs, upon the trust aforesaid and for the use aforesaid, [his] heirs, executors, administrators and assigns, in fee simple." The deed also contained a general warranty of title "unto the said Thomas P. Stubbs, upon the use aforesaid, his heirs, executors, administrators and assigns." Nancy R. Lee died in November, 1900. The plaintiffs' action was commenced in March, 1908.

To this action the defendant interposed the following defenses: (1) Defendant, and those under whom he claims, have been in open, notorious, uninterrupted, exclusive, and adverse possession of the premises sought to be recovered for a period of 40 years, holding the same under deeds duly executed and recorded, and the defendant therefore has title by prescription. (2) On January 9, 1861, by an order passed by the judge of the superior court of the Macon circuit, William W. Lee, the husband of Nancy R. Lee, was, upon her petition, appointed trustee instead of Stubbs, the nominated trustee, who had previously died; said order of court conferring upon the substituted trustee "like powers, duties, and liabilities as were originally conferred on the said Thomas P. Stubbs in relation to the property mentioned in the deed of trust," which gave to him a power of sale for the purpose of reinvestment, with the consent of Nancy R. Lee and her husband. On April 8, 1863, William W. Lee, as trustee for his wife and children, and in execution of this power of sale, sold and conveyed the premises, with the written consent of Nancy R. Lee, to William T. Nelson, under whom the defendant claims as grantee. (3) The proceeds of this sale, amounting to \$2,500, were invested by William W. Lee, as trustee, in another tract of land in Bibb county, purchased from and conveyed by one Durin Murray on July 23, 1863, the conveyance being made to William W. Lee as trustee for his wife and her children. The sale of the trust property and the investment of the proceeds in the tract of land last referred to "was with the full knowledge of the

said Nancy R. Lee and her children," who immediately entered into possession of the land, and held, owned, and enjoyed the same, receiving the full benefit thereof as tenants in common until January 27, 1888, when, by the judgment of Bibb superior court upon the petition of Thomas Lee, one of the plaintiffs in this suit, said tract of land was partitioned, and each received his or her respective share in severalty. The plaintiffs, having thus received and enjoyed the full value and benefit of the property sold by their trustee, William W. Lee, and having in no way accounted or offered to account for the same, are now estopped from claiming the property so sold.

A trial of the case was had on the merits. After the plaintiffs announced closed, the defendant made a motion for a nonsuit. The plaintiffs thereupon amended their petition by more fully describing the premises sued for, and the court overruled the motion to nonsuit. Evidence in behalf of the defendant was then submitted, and the plaintiffs introduced testimony in rebuttal. After the conclusion of both sides had been announced, the court was asked by counsel for the plaintiffs to direct a verdict in their favor, which the court, after hearing argument, accordingly did. Exception is taken by the defendant below both to the overruling of his motion to nonsuit, to the allowance of the amendment to plaintiffs' petition, and to the judgment of the court directing a verdict against him. The questions thus presented for our determination will be briefly stated and disposed of in the discussion of the case which follows.

1. As originally framed, the plaintiffs' petition described the premises sought to be recovered as a "tract or parcel of land lying and being in the county of Bibb, and in the Godfrey district, in the suburbs of the city of Macon, and more particularly described as follows: Fronting on the New Houston Road on southwest; on north by lands claimed by Jane Jones, being $\frac{1}{4}$ acre, more or less." By way of amendment the plaintiffs alleged that this one-fourth acre was "in the shape of a triangle fronting on New Houston Road on the southwest, and on the opposite side by street name of which is unknown to plaintiffs; that said triangle is bounded on the north by lot now claimed by one Berry Hall, on which he now resides, and being a part of original lot No. 46, described in the deed from Anna Jepson to Thos. P. Stubbs, trustee, recorded in Book L, page 253, clerk's office, Bibb superior court." The defendant objected to the allowance of the amendment on the ground that "the original petition did not contain enough to amend by, and that the amendment offered set up a new and distinct cause of action, it appearing from the amendment that different property from that attempted to be described in the original petition was sought to be recovered." In support of this posi-

tion counsel for the plaintiff in error cite the cases of *Turner v. Rives*, 75 Ga. 606, and *Harwell v. Foster*, 97 Ga. 265, 22 S. E. 994, in which this court pointed out the necessity of describing premises sought to be recovered with sufficient fullness and particularity to authorize a decree being based upon the pleadings. In both of these cases, however, the right of a plaintiff to amend by perfecting an indefinite description of the property sued for was distinctly recognized. In the present case there was certainly enough in the petition to amend by, and the amendment did not, as claimed, substitute for the imperfect description of the property for which the action was originally brought a description of other and different property.

2. The estate created by the deed from Jepson to Stubbs, trustee, was a joint life estate in Mrs. Lee and her children during the life of Mrs. Lee, with a fee-simple estate in remainder to the children of Mrs. Lee who survived her. *Franke v. Berkner*, 67 Ga. 264; *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. There are many cases holding that a conveyance to one in trust for another for life, and on the death of the life tenant to her children in remainder, clothes the trustee with the legal title to the life estate, but not to the estate in remainder. *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791; *Rogers v. Pace*, 75 Ga. 436; *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866; *Bull v. Walker*, 71 Ga. 195; *Allen v. Hughes*, 106 Ga. 775, 32 S. E. 927; *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970; *Overstreet v. Sullivan*, 113 Ga. 891, 39 S. E. 431; *Tillman v. Banks*, 116 Ga. 250, 42 S. E. 517. The vesting of a power in the trustee to dispose of both the equitable estate held by him in trust and the legal estate in remainder does not confer on the trustee the title to the estate in remainder. It is competent for a grantor to confer upon a trustee of an equitable estate a power of sale over the entire fee, though the trustee may have no interest whatever in the legal estate in remainder. *Civ. Code 1895*, § 3171; *Headen v. Quillian*, 92 Ga. 220, 18 S. E. 543; *Heath v. Miller*, 117 Ga. 854, 44 S. E. 13; *Tillman v. Banks*, *supra*. The remainder estate is none the less a legal estate while the trust as to the life estate is executory, but with the limitation that the trustee may, in the exercise of the power of sale, defeat it in the particular property. The property purchased with the proceeds of the sale becomes impressed not only with the trust declared in the original deed, but the remainder estate in the substituted property does not lose its character as a legal estate. The power of sale over the entire fee, therefore, does not convert the legal estate in remainder into an equitable estate, nor clothe the trustee with title thereto. The power of sale may be personal to the trustee or it may attach to the office of trustee. If the power is personal to the trustee, it can be exercised by him only, but if the

power is incident to the office of trustee it may be executed by a successor. Generally, a "power of sale, whether a common-law or equitable power, or taking effect under the statute of uses, can be exercised only by the persons to whom it is expressly given." 2 *Perry on Trusts*, § 499. In determining the limitation of the power relatively to its exercise by the nominated trustee or a successor, the whole deed should be looked to, in order to ascertain the purpose of the grantor. If the deed had conferred upon the trustee and his successors the right to execute the power, clearly the power would have pertained to the office of trustee, and could have been exercised by the trustee for the time being. An imperative power to sell, such as a direction to sell property in any event, would impose a duty to sell on any one filling the office of trustee, and could be exercised by a substituted trustee. A discretionary power to sell can be exercised only by the trustee upon whom it is conferred. "Wherever an authority is given to trustees which is either not compulsory upon them to exercise at all, or, if compulsory, the time or manner or extent of its execution is left to be determined by the trustees; that is obviously a discretionary power, though the extent and nature of the discretion may vary in each case." *Hill on Trustees*, 485. In the deed under consideration the trustee could not sell without the consent of Nancy R. Lee and her husband; neither could Nancy R. Lee and her husband sell without Stubbs, the trustee, joining in the conveyance. The sale and reinvestment contemplated the affirmative assent of the trustee to become effectual. The grantor, if she wished to deprive the trustee of any discretion as to the sale or reinvestment, could very easily have made it his duty to sell and reinvest at the will of Mr. and Mrs. Lee, thus constituting the trustee the mere conduit of passing the legal title. The grantor's intention cannot be supplied by suggestions or matters extrinsic her written declarations; and by her solemn deed she invested the trustee with full power to sell with the consent of Mr. and Mrs. Lee—a power which the trustee necessarily had a discretion in executing. The conclusion is irresistible that the power in the deed was not incident to the office of trustee, but personal to the trustee. Even though the writer had been in doubt as to the correctness of his conclusion, this court, in *Simmons v. McKinloch*, 98 Ga. 738, 26 S. E. 88, decided: "Where a deed conveyed land to a named person in trust for a married woman for life, and at her death to her children then living 'with power in said trustee, by and with the written consent of the [life tenant], to sell said property and reinvest the same in other property, subject to the same limitations and restrictions,' the power thus created conferred upon the trustee a special personal trust, and was therefore one which did not pass to a successor." In my search

of the authorities where sales by a substituted trustee were upheld the deed or will either constituted the power of sale an incident to the office of trustee, or made provision for the exercise of the power of sale by a successor of the original trustee. *Freeman v. Prendergast*, 94 Ga. 369, 21 S. E. 837; *Henderson v. Williams*, 97 Ga. 709, 25 S. E. 395; *Baille v. Carolina Ass'n*, 100 Ga. 20, 28 S. E. 274; *Heath v. Miller*, 117 Ga. 854, 44 S. E. 13. In *Freeman v. Prendergast* the power of sale was construed to belong to the office of trustee, and not to be personal to the trustee. This construction was based on the following considerations: The power of sale was not unilateral, but matter of express covenant. The power was not personal because it extended to both trustees, "or to the survivor of them, or the executors or administrators of such survivor." The power was coupled with an interest, the trustee being clothed with the legal title and estate in the trust property, which was the entire fee; and the power of sale was imperative as to the payment of certain specified debts, and was to be executed irrespective of whether the life tenant were living or dead. None of the characteristics pointed out by the learned judge in the opinion in that case as a reason for holding the power of sale appurtenant to the office of trustees are included in the deed in the case at bar. In the deed under discussion the power was unilateral, and was not a matter of express covenant between the parties. The power was personal, as already pointed out in this opinion, and the exercise of the power was limited to Stubbs, without the addition of the words "executors or administrators," or any words of similar character or import. The power of sale was not coupled with an interest extending to the whole estate, because by the express terms of the deed the trust did not extend to the remainder estate, the language of the deed being, "at her [Mrs. Lee's] death or marriage, this trust to cease, and the property to be equally divided between said children of said Nancy R. Lee living at her death, share and share alike." The power of sale did not put an imperative duty on the trustee to sell, as was the case in the instrument involved in *Freeman v. Prendergast*. That case is therefore clearly distinguishable from the case now under consideration. In the other cases cited the instruments giving the power authorized in express terms the exercise of the power of sale by a "successor" of the nominated trustees.

3. If the power of sale was personal to Stubbs, the nominated trustee, then it expired with his death. What effect, therefore, should be given the order of the judge of the superior court appointing a new trustee, and investing him with the powers conferred on the original trustee by the deed? In the first place, the application for the order was made by Mrs. Lee. The petition recited that it was her petition, and it was signed by her.

The only reference to her children was by way of recital that they took an interest with her under the deed from Jepson to Stubbs, trustee. The prayer was for the appointment of a trustee to fill the duties of the trust to the same extent as the original trustee might or could do. The order based on this petition did not allude to the children by name or as a class, but merely named a trustee, and gave him the same powers possessed by the trustee in whose stead he was appointed. The chancellor could, at chambers, upon the petition of the beneficiaries who had arrived at discretion, appoint a trustee. Civ. Code 1895, §§ 3164, 3165. Before the Code it was not necessary to serve the minors to bind their equitable interests, and it was discretionary with the chancellor to require them to be made formal parties. *Freeman v. Prendergast*, supra. So far as the equitable interest of Mrs. Lee extended, the trustee appointed under this order of court represented that interest. And perhaps the interest of the minor children to share with their mother the rents and profits of the land during her life might also be included in the equitable estate represented by the substituted trustee. The chancellor had plenary power in vacation over the appointment of the trustee, and could authorize the sale of the equitable estate which the trustee represented. As we have pointed out, the power of sale conferred on Stubbs, the nominated trustee, was a personal one, and expired at his death. Therefore the trustee appointed in his stead would derive his power of sale not from the deed, but from the order of court. The order of court was tantamount to a decree of sale under the same limitations as contained in the deed. It affected to dispose of both the equitable estate of the life tenants and the legal estate in remainder. The chancellor had no power, at chambers, to order a sale of the legal estate of the remaindermen for the purpose of reinvestment. *Pughsley v. Pughsley*, 75 Ga. 95; *Rogers v. Pace*, Id. 436; *Taylor v. Kemp*, 86 Ga. 185, 12 S. E. 296; *McDonald v. McCall*, 91 Ga. 305, 18 S. E. 157; *Fleming v. Hughes*, 99 Ga. 450, 27 S. E. 791; *Richards v. Ry. Co.*, 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712. In the last-cited case, while it was held that in term time the superior court could authorize a trustee to sell for reinvestment both the equitable and legal estates, where all parties at interest were represented, yet it was recognized that this power did not exist in vacation. The fact that the chancellor had the power to order the sale of the trust property would not give him power to order the sale of the legal estate, although the remaindermen had a joint interest with their mother in the estate created for her life. The order of the chancellor was therefore limited to the equitable estate, and the substituted trustee did not represent the legal estate, nor had he any power under that order or otherwise to sell the estate in remain-

der. The purchaser from him acquired no interest in the remainder estate, but only title to the equitable estate represented by the trustee.

4. Another question presented for determination is whether, between the date of the trust deed and the death of Mrs. Lee, there was any merger of the interest of her children in the life estate into the remainder interest which they took under that deed. A merger of estates occurs when "two estates in the same property unite in the same person in his individual capacity, the less estate [being] merged in the greater." Civ. Code 1895, § 3106. Or where, as was held in the case of *Lowe v. Webb*, 85 Ga. 731, 11 S. E. 845, two or more persons, having, as tenants in common, a life estate in realty, acquire in common the absolute fee thereto. See, also, *Stringfellow v. Stringfellow*, 112 Ga. 494, 497, 37 S. E. 767; *Bardwell v. Edwards*, 117 Ga. 825, 45 S. E. 40. It is doubtless true that, where the entire interest in a life estate is held by a class of persons under a deed or will which does not provide for survivorship, and subsequently the estate in remainder is vested in all of the members of this class as tenants in common, by inheritance or otherwise, the life estate becomes merged, by operation of law, into the greater estate which they acquire. But there was not, for at least three good reasons, any merger of the two estates created by the trust deed now under consideration: (1) The children of Mrs. Lee did not take the entire interest in the life estate thereby created, but held it, together with her, as long as she continued in its enjoyment, and, after she parted with her interest therein by deed, owned it in common with her grantee. Accordingly, because of the ownership of a part of the life estate by a third person, the life estate could not, at any time prior to Mrs. Lee's death, merge into the estate in remainder created by the trust deed in favor of her children. In other words, the class of persons entitled to enjoy the life estate was not, in personnel, the same as the class of persons in which the estate in remainder vested. No merger could take place without, on the one hand, ignoring and depriving Mrs. Lee (or her grantee) of the interest in the life estate conferred upon her, or, on the other hand, sacrificing the interest of her children in the life estate by limiting their enjoyment of the property to their estate in remainder and postponing such enjoyment till her death. (2) To declare such a merger would defeat the object and purpose of the donor; and it is well settled that this may not be done where the donor has, by one and the same instrument, conferred upon different persons, respectively, separate and exclusive interests or estates in the property conveyed. See 1 Wash. Real Prop. (6th Ed.) § 368. Indeed, the doctrine of merger of estates is designed, primarily, for the benefit of one who acquires an interest in property

greater than that he possessed in the first instance, and will not be held to apply, against his will, to his disadvantage. *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Cole v. Grigsby* (Tex. Civ. App.) 35 S. W. 690, and authorities cited. (3) The children having an interest in the life estate were not, necessarily, those who might eventually enjoy the estate in remainder. By the very terms of the trust deed, none of the children of Mrs. Lee could take as remaindermen in the event she survived all of them and died childless. Those who survived her, and those only, were to enjoy the estate in remainder. Who they might be could not, with any degree of certainty, be ascertained before the termination of the life estate; and so long as the uncertainty existed there could be no merger of the life estate into the estate in remainder. The doctrine of merger of estates rests upon actualities, not upon mere possibilities. Coincidence of two independent estates presently held by one and the same person or class of persons is a necessary prerequisite to merger. No merger can take place until such identity of person and of present interest in point of fact exists. For instances in point, where it has been held that no merger took place despite the fact that one and the same person had different interests in property of which he was only part owner, see *Asch v. Asch*, 18 Abb. N. C. 82; *Bomar v. Mullins*, 4 Rich. Eq. 80; *Johnson v. Johnson*, 7 Allen, 196, 83 Am. Dec. 676; *Cole v. Grigsby*, supra.

5. If the trustee did not represent the remaindermen, or if there was no merger of estates, then the defendant did not acquire a prescriptive title as against the remaindermen. The suit was filed very soon after the death of the life tenant. The right of the remaindermen to sue arose upon the death of their mother. The possession of the defendant was not adverse to them until they had their cause of action.

6. Only the children of Nancy R. Lee who were in life at her death took the remainder estate. It appears that at the date of the deed Mrs. Lee had three children, and that subsequently one of these died before Mrs. Lee died, leaving heirs. The plaintiffs were the surviving children. The contention of the plaintiff in error is that, even if the plaintiffs below were entitled to recover, they could recover only a two-thirds interest, whereas the verdict was for the entire land. The heirs of the child who died prior to the death of Mrs. Lee had no interest in the remainder estate. The unambiguous terms of the trust deed expressly limited the enjoyment of the estate in remainder to surviving children.

7. The evidence upon which the defendant relied as showing that the proceeds of the sale of the trust property went into the lands conveyed by Durin Murray to William W. Lee, as trustee for his wife and children, was not sufficient to support anything more

than a bare conjecture that this was in point of fact true. The plaintiffs introduced testimony tending to show that the proceeds realized from that sale were not so invested, but that payment for the trust property was made by the purchaser in Confederate currency, which went into the hands of Mrs. Lee, and was kept by her until, shortly after the sale, the house in which she lived was destroyed by fire, together with about \$2,000, some \$300 of this amount being in coin and the rest in currency. It further appeared that she and her husband had loaned to a neighbor \$750 in Confederate currency some six or eight months before the close of the war, and that this debt had never been paid. The plaintiffs offered themselves as witnesses, and each denied knowing anything about the investment of the trust funds in the land purchased from Murray. One of the defendant's witnesses was permitted to swear (apparently without objection) that some two or three years before William W. Lee died (which was somewhere along about the year 1886) witness had a conversation with him regarding his purchase of the Murray place, and he had said he "had sold the land up this way, and bought the place he lived on; he sold this five acres in South Macon, and purchased that place he lived on"; and, during the course of the same conversation had further said that "Tom [one of the plaintiffs] had made some threats to get up a lawsuit about it, and he did not think it was right; that he already had the worth of it." It is evident from other facts appearing in the record that the land "in South Macon" to which William W. Lee referred in this conversation was the tract which he had sold as trustee under the order of court hereinbefore mentioned. But the testimony of the witness with regard to this conversation was hearsay, pure and simple, and in no way strengthened the defendant's case. "Since ordinary hearsay testimony is not only inadmissible, but wholly without probative value, its introduction without objection does not give it any weight or force whatever in establishing a fact." *Eastlick v. Ry. Co.*, 116 Ga. 48, 42 S. E. 499. The question to be determined is whether, ignoring this mere hearsay, there was sufficient competent evidence to warrant a jury in finding in favor of the defendant. *Suttles v. Sewell*, 117 Ga. 214, 216, 43 S. E. 486. We think there was not. Certainly the equitable defense set up by the defendant was meritorious, if founded on fact. *Taylor v. James*, 100 Ga. 328, 335, 34 S. E. 674, and cases cited. The burden of establishing this defense rested upon him. He signally failed to show that either of the plaintiffs had, expressly or impliedly, ratified the trustee's sale and reinvestment, or that for any reason either of them was estopped from asserting title to the premises in controversy. The defendant also failed to successfully trace the trust funds into the Murray place.

Moreover, even were the evidence such as to warrant a jury in finding that the proceeds of the trust property were invested by the trustee in that tract of land, they were not furnished by the defendant with sufficient data to enable them to find what amount in money he was entitled to receive from the plaintiffs, or either of them, as a condition precedent to their obtaining a decree for the land which he had purchased in good faith. It was necessary that the defendant should furnish this data, for the plaintiffs could be charged with such benefits only as they derived out of the purchase of the Murray place. *Bazemore v. Davis*, 55 Ga. 505 (11). The tract of land conveyed by the Jepson trust deed and sold by Lee, as trustee, to William T. Nelson, the defendant's predecessor in title, contained five acres, and of this tract the defendant had purchased but a quarter of an acre, the balance of the tract being claimed by other persons not parties to the case. It was therefore incumbent on the defendant to furthermore show what pro rata share of such benefits chargeable to the plaintiffs he was entitled to call on them to account for before they could recover the quarter of an acre he had bought. *Id.* 506 (12). No attempt appears to have been made by the defendant to meet these requirements as to proof, and, so far as this branch of the case is concerned, the court was clearly right in declining to submit the case to a jury.

The other issues raised on the trial involved only questions of law, so a verdict in favor of the plaintiffs was inevitable in the view we take of the law governing the case.

Judgment affirmed. All the Justices concur.

(121 Ga. 809)

BROWN STORE CO. v. CHATTAHOOCHEE LUMBER CO.

(Supreme Court of Georgia. Jan. 28, 1905.)

FIRE—ACTION FOR DAMAGES—PLEADING—DEFENSES—NONSUIT—INSTRUCTIONS.

1. The petition set forth a cause of action, and the court did not err in overruling the demurrers.

2. Where a suit is brought for damages for the burning of plaintiff's houses and goods, alleged to have resulted from fire communicated from a slab pit of the defendant, so built and operated as to be a nuisance and a menace to the neighborhood—the petition also alleging negligence in conducting such slab pit—there was no error in striking a plea which set up that plaintiff held his property under a conveyance from the defendant's predecessor in title, prior to which conveyance a similar slab pit at nearly the same place had been conducted by defendant's predecessor in title; that, by so purchasing the land, plaintiff had assumed the risk; and that subsequently the old slab pit was destroyed by fire, the premises afterward purchased by defendant, and the present slab pit built.

3. In a suit for damages for the destruction of houses and of the goods therein, it was not error to refuse to grant a nonsuit upon the ground that the title to the realty appeared not to be

in the plaintiff. Plaintiff was entitled to recover for the destruction of his goods and for the damage to his possession, even though he may have no interest in any injury to the freehold.

4. In the trial of a civil case, it is error to charge the jury that it is incumbent upon the plaintiff to make out his case to a moral and reasonable certainty.

5. Damages which are the natural, reasonable, and proximate result of a wrongful act are not too remote to be recovered. It is therefore error to charge that the plaintiff must show that his damage was the usual, direct, and necessary consequence of the wrongful act.

6. In a case in which the defendant is bound to use ordinary and reasonable care and diligence, it is error, since the adoption of the Code, to charge that the plaintiff cannot recover unless it appear that the defendant was grossly negligent. *Macon & Western R. Co. v. McConnell*, 31 Ga. 133, 76 Am. Dec. 685, explained.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by the Brown Store Company against the Chattahoochee Lumber Company. From the judgment, both parties bring error. Judgment on main bill of exceptions reversed; on cross-bill, affirmed.

A. G. Powell, for plaintiff. Donalson & Donalson and R. W. Fleming, for defendant.

SIMMONS, C. J. The first three headnotes require no elaboration. As to the fourth, see the case of *Supreme Conclave Knights of Damon v. Wood*, 120 Ga. 328, 47 S. E. 940. As to the fifth, see Civ. Code 1895, § 3913, and *Cheeves v. Danielly*, 80 Ga. 115, 4 S. E. 902.

As to the degree of diligence due by the defendant to the plaintiff, the court, in effect, charged that, if the slab pit was not a nuisance, then plaintiff could not recover unless it appeared that the defendant had been grossly negligent in its operation. It is clear that the defendant was bound, in such case, to exercise ordinary and reasonable care and diligence. 1 *Thompson on Negligence*, §§ 727-730; 13 *Am. & Eng. Enc. Law* (2d Ed.) 414. Failure on the part of the defendant to use this degree of care would be such negligence as to make it liable for damages thereby done to plaintiffs. Under our Civil Code of 1895 (section 2898), the absence of ordinary diligence is termed "ordinary neglect," while (section 2900) gross neglect is defined as "the want of that care which every man of common sense, how inattentive soever he may be, takes of his own property." The court's charge was evidently based upon what was said in the opinion in *Macon & Western R. Co. v. McConnell*, 31 Ga. 133, 76 Am. Dec. 685. An examination of the questions made in that case, and of the charge there under review, convinces us that the term "gross negligence" was used by Judge Lyon to mean simply a want of ordinary care. The court approved the charge of Judge Bull, in which appeared the following: "They are not responsible for accidents happening from the exercise of these rights, unless these accidents result from the gross negligence or carelessness of the employees or agents of the

road, and the plaintiff must prove that the injury complained of did result from such culpable neglect or carelessness. The amount of diligence required is just so much as an ordinarily prudent man would use in his own affairs." This part of the charge was not excepted to, but it is evident that in it "gross negligence" was used to denote merely a want of ordinary care. This is especially clear when we compare the opinion in *Macon & Western R. Co. v. Davis*, 13 Ga. 68, in which Judge Nisbet used the term in the same way, saying: "They are bound to reasonable care and diligence, and will be liable for gross neglect. In cases arising under this rule, the question is left to the jury, whether, with reference to the caution which a man of ordinary prudence would observe, the defendant has been guilty of gross negligence." There is some authority outside of this state for so using the term, and the cases just discussed were both decided before our Code went into effect. Since the adoption of the Code, the terms "ordinary neglect" and "gross neglect" have in this state a definite meaning, and, in a case in which the defendant is bound to use ordinary diligence, it is error, as against the plaintiff, for the court to charge that the defendant is liable for gross negligence only. *Southern Mut. Ins. Co. v. Hudson*, 113 Ga. 434, 38 S. E. 964 (2). Judgment on main bill of exceptions reversed; on cross-bill, affirmed. All the Justices concur.

(70 S. C. 286)

MOORE v. DEAN.

(Supreme Court of South Carolina. Nov. 29, 1904.)

APPEAL—REVIEW—INSUFFICIENT CASE.

1. Where, on appeal from the judgment of the circuit court affirming a judgment of a magistrate, the case does not show on what ground the magistrate based his judgment, nor the exceptions on appeal to the circuit court, nor on what ground the circuit court based its judgment, the decision of the circuit court will not be reviewed.

Appeal from Common Pleas Circuit Court of Spartanburg County; Dantzler, Judge.

Action by Annie Moore against George R. Dean in magistrate's court. From a judgment for defendant in circuit court, sustaining the judgment of the magistrate, plaintiff appeals. Affirmed.

Evans & Finley, for appellant. D. A. Hydrick, for respondent.

JONES, J. The appeal in this case is from the judgment of the circuit court, affirming the judgment of the magistrate's court in an action of claim and delivery for three cases, resulting in favor of the defendant. The exceptions are as follows:

"First. In that the circuit judge erred in affirming the magistrate's ruling by allowing the introduction of the records, showing a previous trial between the same parties bas-

ed upon said mortgage; it appearing by the evidence that the plaintiff had paid or offered to pay an additional amount of \$16 on the mortgage, which plaintiff claimed fully paid off and discharged the same after the former judgment was rendered, whereupon he would be entitled to plead payment in full of his claim and delivery, and would not be bound by any previous judgment.

"Second. In that the circuit judge erred in affirming the ruling of the magistrate, who sustained the demurrer of the defendant, and held that the plaintiff was estopped from recovering in this action by reason of the judgment and execution introduced in a former claim and delivery proceedings between the same parties; the error being that the facts were not the same as in the former suit, as the plaintiff had tendered payment in full of the balance due on the mortgage under which the former suit was tried.

"Third. In that the circuit judge erred in allowing the introduction of oral testimony for the purpose of showing that the written contract between Sam Moore and the defendant was a laborer's contract, and not a rental contract, in that it varied the terms of a written contract.

"Fourth. In that the circuit judge erred in holding that the contract introduced was a laborer's contract, and not a rental contract, as the terms of the contract, and the evidence bearing thereon, clearly established a rental contract, and not a laborer's contract.

"Fifth. In that the circuit judge erred in holding that the proceeds of the mortgaged property coming into the hands of the mortgagee could be applied to the payment of an open account, and not credited on the mortgage, when there are other parties interested in the mortgaged property, even by the direct consent of the mortgageor; the error being in allowing the credit on the open account of the proceeds of the mortgaged property.

"Sixth. In that the circuit judge erred in holding that the proceeds of the mortgaged property coming into the hands of the mortgagee or his agent could be applied to the payment of an open account, and not credited on the mortgage; the error being that the law applies credit of the proceeds of mortgaged property when it comes into the hands of the mortgagee to the mortgage, without any direction whatever from the mortgageor.

"Seventh. In that the circuit judge erred in finding that, from the whole testimony, the chattel mortgage had not been fully paid off and discharged by the proceeds from the sale of the crops which were covered by the mortgage, which proceeds were delivered to the mortgagee or his agent, and amounted to more than the mortgage, together with interest and costs; the error being in the failure of the court to apply the payment on the mortgage instead of on an open account."

The record does not show upon what grounds the magistrate based his judgment,

except that the testimony is set out; nor does it show what exceptions were taken on appeal from the magistrate, nor upon what grounds the circuit court based its judgment. As the court has no jurisdiction to review the findings of fact by the circuit court in a case of this kind, and as it does not appear that the circuit court ruled as indicated in the exceptions, we are not in a position to consider if that court committed error of law. The circuit court's judgment, so far as we know, may have been based upon its view of the testimony.

The judgment of the circuit court is affirmed.

(70 S. C. 344)

DE HIHNS v. FREE et al.

(Supreme Court of South Carolina. Dec. 6, 1904.)

RESULTING TRUST—PAROL EVIDENCE—PLEADING—AMENDMENT—SPECIFIC PERFORMANCE.

1. Where a lease and agreement between plaintiff and the parties under whom defendant claims as heir at law show a relation to the property inconsistent with the resulting trust, defendant cannot assail the same by parol evidence in conflict therewith.

2. Evidence in support of irrelevant allegations allowed to remain in a pleading is properly excluded.

3. It is not an abuse of discretion to refuse to allow an answer to be amended during trial by pleading the statute of limitations.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 693.]

4. An agreement that on the termination of a lease by the death of a tenant the land should be equally divided among the heirs of the deceased tenant and her husband, providing certain conditions in the lease should be first complied with, among which was the payment to the plaintiff of a certain sum paid by him to secure certain property, with interest, is a contract to convey the premises on the performance of certain conditions precedent; and an action thereon is in the nature of an action for specific performance, and not in foreclosure of a mortgage.

Appeal from Common Pleas Circuit Court of Fairfield County; Allen J. Green, Special Judge.

Action by George L. De Hihns against George W. Free and others. Decree for plaintiff, and defendants appeal. Affirmed.

The circuit decree is as follows (omitting former order of sale):

"This action came on to be heard before me at special November term, 1903, of the court of common pleas for Fairfield county. Issues out of the cause were docketed on calendar 1. The case was reached late in the afternoon. Counsel for defendants then stated that the original order submitting the issues was not in court, but a copy was, and they would use the copy for the present, and bring in the original in the morning. There appearing no objection to this course, a jury was impaneled, and the trial proceeded. Pending the introduction of plaintiff's testimony, the court adjourned for the night. Upon the opening of court the next morning,

counsel for the defendants stated that they had been unable to find the original order submitting the issues; that they could not say positively whether such order had been passed, but, as there was no objection to it, proposed that I now sign the order. I suggested that plaintiff's counsel attach their consent. To this plaintiff's counsel demurred, saying that they did not desire to waive any rights they may have, and did not appear as consenting or resisting. Thereupon I signed the order, and the trial proceeded. Upon the introduction of parol testimony by the defendants to sustain the issues submitted to the jury, plaintiff objects upon the grounds hereinafter referred to. The testimony was held incompetent, and I withdrew the case from the jury, and proceeded to try the same on the equity side of the court, upon the pleadings and testimony taken before me in open court.

"The complaint alleges substantially:

"(1) That the lands described in the complaint were levied on and sold by the sheriff under execution against Charles Free, and bought by James B. McCants, on November 2, 1868.

"(2) That McCants sold and conveyed the lands to the plaintiff for \$1,200, then paid by plaintiff on May 1, 1869.

"(3) That plaintiff was the son-in-law of Charles Free and his wife, Harriet, and, being desirous of their retaining the lands during their lives, the parties executed a lease, dated May 15, 1869, by which, in consideration of certain covenants therein mentioned to be performed by Harriet Free, plaintiff leased the lands to her for the term of her natural life, and a paper purporting to be the lease was recorded on January 14, 1885, in the proper office.

"(4) That on January 4, 1869, the plaintiff and Charles and Harriet Free entered into an agreement under their hands and seals by which plaintiff agreed that, upon the termination of the lease by the death of Harriet, the lands should be equally divided among the heirs of the said Charles and Harriet, provided certain conditions therein expressed should be first complied with, among which was the payment to plaintiff of the sum he paid to secure said property, with legal interest at seven per cent. from May 1, 1869, which sum was \$1,200. That this agreement, together with the deeds of the sheriff to McCants and of McCants to plaintiff, and plats relating to the land, was inclosed in an envelope which was sealed and given Mrs. Free, with the following indorsement on it: 'To be opened after the expiration of the lease of Mrs. Harriet Free in the presence of the children, by George L. De Hihns or if dead or otherwise unable to be present, by the oldest living son of Mrs. Free.' The plaintiff has been unable to find said envelope since the death of Mrs. Free, but is informed that it is in existence, and in the hands of defendants' attorneys.

"(5) That no part of said \$1,200 has been paid, and the said Harriet retained possession of the land under the lease until her death, on January 1, 1902 (the said Charles having predeceased her), leaving as heirs at law, and the heirs at law of the said Charles, nine children, named as defendants; and plaintiff, under terms of lease, has taken possession and rented same to a tenant for 1902.

"(6) That plaintiff has sought to have the agreement carried out without the aid of the court, but that the defendants have failed and refused to comply with the conditions by the payment of said sum of money and interest, denying plaintiff's legal rights, and interfering with and threatening to interfere with his quiet possession and receipt of rents, so that he is compelled to ask the aid of the court, and prays that the land be sold and the proceeds applied to the plaintiff's claim, etc.

"Defendants answer, admitting first paragraph of complaint, and so much of paragraph 2 as alleges the conveyance to plaintiff, but deny that plaintiff paid any part of the consideration. They also deny that plaintiff and Charles and Harriet Free entered into the agreement of June 12, 1869, and allege that they have no knowledge or information of the other allegations of the complaint, and for a second offense substantially allege that the funds with which the lands were purchased were not the funds of the plaintiff, but were furnished by Charles Free to the plaintiff for the purpose of purchasing the lands and preserving the same for the benefit of himself, his wife and family, including plaintiff's wife; that the funds so furnished were used by the plaintiff in the purchase of the land, and the deed taken in the name of plaintiff, and submit that a resulting trust thereby arose in favor of Charles, and they, as his heirs at law, are entitled to partition; that, if the instrument set out in paragraph 4 of the complaint (the agreement) was ever entered into, such agreement was merely to carry out the understanding and agreement by which plaintiff should nominally hold the title, without any beneficiary interest therein to himself, for the use of the said Charles and Harriet. Wherefore they ask partition.

"It appears from the testimony that in 1868 Charles Free was heavily embarrassed, there being a large amount of judgments against him, three of which were owned or controlled by J. B. McCants, Esq.; that, under executions based upon these judgments, his lands were sold by the sheriff and bought by Mr. McCants, and nulla bona returns made by the sheriff on other executions against Free. In this state of affairs, Free applied to his son-in-law, the plaintiff, who had just come into possession of a legacy of about \$2,500, our money, from his kindred in Germany. The plaintiff came from his home in Lexington to Winnsboro, and arranged with Mr. McCants to purchase the

property from him for the sum of \$1,200. This arrangement was consummated by the payment of the money and the delivery of the deed from McCants to plaintiff, dated the 1st day of May, 1869, which deed was recorded on September 30, 1869. On the 15th day of May, 1869, the plaintiff leased these premises to Harriet Free for the term of her life, as alleged in the complaint. This lease is executed under seal by the plaintiff, Charles Free, and Harriet Free, witnessed by two witnesses, and was recorded January 14, 1885. On June 12, 1869, the paper called 'Agreement,' which is the basis of this action, was executed by the plaintiff and his wife, Lucinda, under seal, witnessed by William Summer, who is now dead. Upon this agreement appears the following:

"We, the undersigned, do hereby sanction and approve the intention of George L. De Hihns.

"Done at our residence in Fairfield County, S. C., this 2d October, in the year of our Lord, 1869.

Charles Fr. [L. S.]

"Harriet Fr [L. S.]

"It is apparent from an inspection of the paper that Charles and Harriet did not leave themselves room for their full names before the scrolls; hence the abbreviation of the 'Free.' These three papers, together with the deed of the sheriff to McCants, and the envelope in which papers had been sealed, were produced by the defendants at the trial, upon notice from the plaintiff. The envelope is mutilated, but some of the seals are intact, and show the impression of a nickel, which, under the glass, bears date '1869.' The indorsements on the envelopes are as follows:

"Recorded deeds of real estate and personal property for division among the body heirs of Charles and Harriet Free, Fairfield County, So. Ca."

"The seals of those enclosed papers will be broken only in the presence of all the body heirs of Charles and Harriet Free or their body heirs or agents after the lease given of the above property by George L. De Hihns, of Lexington County, to Harriet Free and agency given to Charles Free expires—by the oldest living body son of Harriet and Charles Free."

"Sealed this 2 day of October in the year of our Lord one thousand eight hundred and sixty-nine, in presence of all three unto signed persons concerned."

"The signature to the three persons to this last indorsement has been erased with a knife or some sharp instrument, and partially pasted over with another and different kind of paper. These indorsements on the envelope are in the handwriting of plaintiff, and I have no doubt that the erasures was of the names of the plaintiff and Charles and Harriet Free.

"At this stage of the case the defendants proposed to prove by parol that the purchase

money of the premises, which was the consideration of the deed from McCants to De Hihns, was the property of, and furnished by, Charles Free. To this testimony plaintiff objected on three grounds: (1) Because it would contradict the terms of the deed to McCants; (2) because the defendants, claiming as the heirs at law of Mr. and Mrs. Free, were estopped by the lease and agreement from disputing the title and settlement made through them; (3) that such evidence would tend to show a secret agreement that would be a fraud upon the creditors of Charles Free—and cited 1 Perry on Trusts, § 151; Nesbitt v. Cavender, 30 S. C. 33, 8 S. E. 193; Arnold v. Mattison, 3 Rich. Eq. 153, 154; Broughton v. Broughton, 4 Rich. Law, 491. I did not think the first ground well taken. The deed did not purport to say to whom the \$1,200 paid by plaintiff belonged. But the other grounds, I thought, were well taken; and, in any view, the testimony was inadmissible, because, even conceding it to be true, as averred, that the money was furnished by Free for the purpose of preserving the property to himself and family, the writing signed by the parties at the time of the transaction was the best evidence of the terms on which the settlement was made, and this settlement would be sustained as a family settlement. *Smith v. Tanner*, 32 S. C. 263, 10 S. E. 1008; *Gardner v. Gardner*, 49 S. C. 62, 26 S. E. 1001.

"This ruling practically struck out defendants' second defense and eliminated the issues referred. The issues were therefore withdrawn from the jury, and the defendants thereafter confined to evidence impeaching the writings, or showing performance of the conditions of the agreement. I do not understand the rule laid down in *Ragsdale v. Railroad Company*, 60 S. C. 381, 38 S. E. 609, to conflict with this view. In the first case the court pointed out the remedy provided under the Code for simplifying the issues and ridding pleadings of irrelevant or redundant matter, but based their decision not on the failure of the objecting party to avail himself of that remedy, but upon the fact that the question had not been passed upon by the court below, and therefore the objection could not be raised for the first time in the Supreme Court. In the latter case the exception was held bad on its merits, and the remedy for pleadings stated in the first case approved and affirmed. None of the cases go to the extent of holding that failure of the party to avail himself of the motion to strike out will render competent evidence that will overturn settled principles of law, such as permitting a tenant to those claiming under him to dispute the title of his landlord, or an heir at law the right of his ancestor to dispose of his property in his lifetime, and cannot be carried to such extent without making the right of litigants dependent upon the skill of the pleader rather

er than the law and equity of the cause—the evil the adoption of the Code was intended to obviate.

"Some testimony was introduced tending to show that the signature of Mr. Free to the agreement was not his writing, and the witness who purports to have probated the lease did not sign the probate; but Mrs. Spotts, one of the defendants, testified that she was present and heard the agreement read over by the plaintiff to her father and mother, and the same, together with the other papers, was sealed by plaintiff in the presence of all of them and delivered to her mother. My conclusion is that the papers are all genuine, and were executed and delivered by the parties, placed in an envelope, which was sealed and delivered as alleged in the complaint.

"Charles Free died March or April, 1884; Harriet Free, on January 1, 1902. This action was commenced May, 1902. It was urged that the action was, in effect, the foreclosure of a mortgage, and the agreement an instrument in the nature of a mortgage, and, it not having been recorded, and there having elapsed more than twenty years from the creation of its lien, under section 2449 of the Code of Laws, the action could not lie; and, in this view, leave to amend the answer so as to plead the statute in bar was asked at the close of the argument. I do not think the amendment material. In my view, the agreement creates no lien. It is but an agreement—a contract under seal, based upon good consideration, to convey the premises upon the performance of certain conditions precedent by the heirs of the bodies of Charles and Harriet Free. The defendants are not bound to perform these conditions, but they have the option of so doing, and, if they do, then plaintiff is bound to convey. The action is not one of foreclosure, but an action for the specific performance of a contract vendor against vendee, and its office is to require defendants to perform, or submit to a sale of the lands and application of the proceeds to the contract price. The title is held as security for the price. Vendee cannot compel conveyance until he pays the price—not even though the notes given are barred by the statute. *Blackwell v. Ryan*, 21 S. C. 121; *Gregorie v. Bulow*, Rich. Eq. Cas. 245.

"Upon the whole, I am of opinion that the action is well brought, and the plaintiff is entitled to the relief sought."

Defendants appeal on following exceptions:

"(1) Because his honor erred in withdrawing the issues from the jury upon the ground that the testimony offered by defendants to sustain the allegations of their answer was incompetent, whereas said testimony was competent, the plaintiff not having moved to strike out any part of the answer, and the issues should have been submitted to the jury on such testimony.

"(2) Because his honor erred in holding that the testimony offered by defendants by several witnesses tending to show that Charles Free, deceased, had paid all or a part of the purchase money of the tract of land, as alleged in the answer, was incompetent; the error being that such testimony was competent for the following reasons: (a) It was strictly in reply to testimony offered by the plaintiff. (b) It was strictly competent to prove the allegations of the answer, which the plaintiff had failed to move to strike out. (c) It was competent because it tended to disprove the allegations of the complaint. (d) Because it was competent, by such testimony, for defendants to show the real consideration of the deed from James B. McCants to George L. De Hihns, and that the same was not paid by the said George L. DeHihns, but by another party, in which event the plaintiff would not be entitled to be paid anything on his alleged agreement.

"(3) Because his honor erred in holding that the testimony offered by the defendants to sustain the allegations of their answer was incompetent, whereas he should have held that the said testimony was competent, and should have admitted it to show that the purchase money of the premises described in the complaint was paid by Charles Free at the time of the execution of the deed of James B. McCants to George L. De Hihns, and that such purchase money was not paid by said George L. De Hihns.

"(4) Because his honor erred in holding that the testimony offered by defendants to prove that Charles Free had paid all or a part of the purchase money mentioned in the deed from James B. McCants to George L. De Hihns was incompetent, on the ground that it would have been a fraud against the creditors of Charles Free when his honor should have held that such testimony was competent, no creditor of Charles Free being before the court; and, even if such testimony tended to show a fraud as against the creditors of Charles Free, the defendants should have been allowed to show it, in order that the court might grant no relief to either party, as the plaintiff would have been a participant to any such fraud, and in pari delicto, even if it had been established.

"(5) Because his honor erred in holding that the defendants, claiming as the heirs of Mr. and Mrs. Free, were estopped by the release and agreement from disputing the statements made therein, and in holding that parol testimony could not be admitted to show the true consideration of the deed, whereas he should have held that it is always competent to show the real and true consideration of a deed, even by parol testimony, and he should have further held that the papers mentioned did not constitute a family settlement.

"(6) Because his honor erred in holding

that the writing signed by the parties at the time of the transaction was the best evidence of the terms on which the settlement was made, and in holding that such writing constituted a family settlement, whereas he should have held that the paper referred to was never agreed to by Charles Free and Mrs. Free, as appears from an inspection of said alleged agreement.

"(7) Because his honor erred in not holding, as contended by the defendants, that the deed from James B. McCants to George L. De Hihns, of date the 1st day of May, 1869, was a deed in the nature of a mortgage, and that, taken together with the other papers set forth in the complaint, practically constituted a mortgage, and that, as more than twenty years had elapsed from the date of said deed at the time of the commencement of the action, and no acknowledgment of the debt secured thereby, or any note of any payment thereon, having been recorded on the record of said deed having the effect of a mortgage, that it had ceased to constitute any lien on the premises described in the complaint at the time of the commencement of this action.

"(8) Because his honor erred in refusing to allow defendants to amend their answer pending the trial of this cause so as to set up by way of defense the failure of plaintiff to comply with the provisions of section 2449 of volume 1 of the Code of Laws of 1902.

"(9) Because his honor erred in not holding that the provisions of section 2449 of volume 1 of the Code of Laws of 1902 need not be specially pleaded.

"(10) Because his honor erred in holding that the instrument of writing set forth in the complaint was an agreement, based upon a good consideration, to convey the land described in the complaint to the defendants upon the performance of certain conditions, and that this was an action for special performance of contract between vendor and vendee, when there was no evidence to sustain said findings on the part of his honor.

"(11) Because his honor erred in refusing to admit the testimony offered by the defendants to show that the purchase money, in whole or any part, had been paid by Charles Free, when, if such fact had been established by the testimony, a resulting trust would have arisen in favor of the said Charles Free or his heirs at law."

J. E. McDonald and G. W. Ragsdale, for appellants. A. S. & W. D. Douglass, for respondent.

JONES, J. The decree of the circuit court and the exceptions are reported herewith, and reference may be had thereto for the facts of this case, and the specific points involved in this appeal. No exceptions are taken to the findings of fact upon which the decree rests, and this court is satisfied that the conclusions reached are sound and just,

and it is not deemed necessary to review all the reasons assigned.

The chief reliance of appellants in resisting the relief sought by respondent was their claim of a resulting trust. A resulting trust arises by implication in the absence of evidence of a contrary intent, and cannot arise when an express agreement in writing shows a contrary intent. *Perry on Trusts*, § 124; *Manning v. Screven*, 56 S. C. 83, 34 S. E. 22. The lease and agreement proven in this case between the plaintiff and Mr. and Mrs. Free, under whom defendants claim as heirs at law, show a relation of the parties to the property inconsistent with the resulting trust claimed. It must follow that defendants could not assail the lease and agreement by parol evidence in conflict therewith, and that the exclusion of such evidence and the withdrawal of such issue from the jury were proper. The contention of appellants that the evidence offered was proper, because the answer alleged a resulting trust, and the allegations had been allowed to remain, is fully met by the case of *Martin v. Seaboard Air Line Ry.*, 70 S. C. 8, 48 S. E. 618, wherein this court held that the trial judge has power to exclude evidence in support of irrelevant allegations allowed to remain in a pleading.

The refusal to allow the defendants to amend answer so as to plead the statute of limitations was within the discretion of the court, and no abuse of discretion appears. The amendment was proposed during trial, and its refusal deprived defendants of no substantial right.

We are entirely satisfied with the conclusions of the circuit court that this action is not one practically in foreclosure of a mortgage, but is one in the nature of an action for specific performance of a contract under seal, based upon good consideration, to convey the premises upon the performance of certain conditions precedent.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(70 S. C. 253)

BANK OF SPARTANBURG v. CHICKASAW SOAP CO.

(Supreme Court of South Carolina. Nov. 24, 1904.)

EQUITY—JURY TRIAL.

1. Where complaint alleges an indebtedness on a note and a pledge of notes and mortgage as collateral, and seeks judgment on the notes and an order for the sale of the collaterals and foreclosure of the mortgage, and an application of the proceeds thereof on the judgment, and the answer admits the indebtedness, equitable issues only are raised, and defendant is not entitled to a jury trial.

Appeal from Common Pleas Circuit Court of Spartanburg County; Townsend, Judge.

Action by the Bank of Spartanburg against the Chickasaw Soap Company.

From an order refusing a motion of plaintiff for reference, it appeals. Reversed.

Johnson & Nash, for appellant. Stanley Wilson, for respondent.

POPE, C. J. This appeal involves the single point as to the effect of the pleadings—whether they raised equitable issues, or whether the same raised legal issues. The circuit judge held that they raised legal issues, and hence refused the motion of plaintiff for an order requiring the master to take the testimony. An examination of the pleadings convinces us that the pleadings raise equitable issues. It is true that the complaint sets up an indebtedness of more than \$6,000, yet the answer admits this indebtedness. The complaint also sets up a pledge of \$15,000 of bonds of the Chickasaw Soap Company, secured by a mortgage on its property, and also shows a bond for \$3,200, and mortgage of lands as an additional security to the same, and asks that the bonds be sold and the mortgages foreclosed. The answer admits these facts of the complaint. Thus it is manifest that equitable issues are involved. This was the case in *McLaurin v. Hodges*, 43 S. C. 187, 190, 20 S. E. 991, 992, where this court held: "If the appellant was entitled to have the trial here heard by a circuit judge, sitting as a chancellor, it was serious error to order a part of the issues tried by a jury on the demand of right by the defendant." See, also, the declaration of this court on page 192, 43 S. C., page 998, 20 S. E., of the case just cited. The late Chief Justice McIver declared, in *Hughes v. Kirkpatrick*, 37 S. C. 161, 169, 15 S. E. 912: "So that it is apparent that a trial by jury of any question of fact which arises in the progress of any proceeding cannot be demanded as a matter of right, but only where 'an issue of fact for the recovery of money only, or of specific real or personal property,' arises."

It is the judgment of this court that the order appealed from be reversed, and that the action be recommitted to the circuit court.

(70 S. C. 200)

WM. L. ALLEN & CO. v. DAVIDS et al.
(Supreme Court of South Carolina. Nov. 28, 1904.)

PARTNERSHIP—ACTION AGAINST INDIVIDUAL MEMBERS—COMPLAINT.

1. In an action against individual members of a firm for goods sold to the firm, where service is had on only one partner, it is not necessary that the complaint should allege that, when the goods were sold, plaintiff knew that such defendant was a member of the firm.

Appeal from Common Pleas Circuit Court of Charleston County; Aldrich, Judge.

Action by Wm. L. Allen & Co. against W. Irving Davids and Esdaille M. Solomons, copartners. From an order refusing a motion to amend, defendant Solomons appeals. Affirmed.

Mordecai & Gadsden, for appellant. Smythe, Lee & Frost, for respondent.

POPE, C. J. The plaintiff by this action seeks to recover an account of \$73.60 against the defendant Esdaille M. Solomons, who alone was served with the summons and complaint, as the balance due the plaintiff by W. Irving Davids and Esdaille M. Solomons as copartners in the conduct and management of the Congress Hall Hotel, Saratoga, N. Y. It will be necessary to have before us the complaint and argument of the defendants. They are as follows:

The complaint, omitting the caption, is as follows:

"The plaintiff, complaining of the defendants, alleges as follows:

"(1) That it was at the times herein mentioned, and is now, a corporation created by and existing under the laws of the state of New York.

"(2) That heretofore, on or about the 8th day of June, 1903, the defendants, W. Irving Davids and Esdaille M. Solomons, entered into a written agreement, a copy of which is hereto attached, and made a part of this complaint.

"(3) That by reason of the said agreement the said defendants were copartners in the conduct and management of the Congress Hall Hotel, therein referred to, subsequent to the date of said agreement, and during the operation of the lease therein referred to, and became liable for all the debts contracted by either of said defendants during the said time in the conduct and management of said hotel, or business connected therewith.

"(4) That the defendants are indebted to the plaintiff in the sum of seventy-three and $\frac{60}{100}$ dollars (\$73.60); the said amount representing the balance due for merchandise sold and delivered by the plaintiff to the defendants subsequent to the date of said agreement, and during the operation of the lease referred to therein; the said goods and merchandise, and the time of their sale and delivery to the defendants, and their value, being fully alleged and set forth in the annexed itemized and verified account, which is hereby made a part of this complaint. And the plaintiff alleges that there is now due and owing by the defendants to it, the full and just sum of seventy-three and $\frac{60}{100}$ dollars (\$73.60), as is shown by said account. Wherefore plaintiff demands judgment against the defendants in the sum of seventy-three and $\frac{60}{100}$ dollars (\$73.60)."

And a copy of the agreement is as follows:

"Memorandum of agreement made this eighth day of June, 1903, between, W. Irving Davids, of Charleston, S. C., a party of the first part, and Esdaille M. Solomons, of the same place, party of the second part.

"Whereas, heretofore, by an instrument dated May first, 1903, the party of the first part herein leased of Henry Clement and John B. Clement, as executors, etc., of Wil-

liam B. Clement, and one John Cox, for the term of five months, the property known as Congress Hall, in the village of Saratoga Springs, N. Y.; and

"Whereas, the said lease was signed and executed by the party of the first part herein as sole lessor; and

"Whereas, as understood and agreed between the parties hereto, in the leasing of said hotel, the party of the first part herein is to render his personal services, and the benefit of his experience in the management of said hotel; and the party of the second part is to furnish one-half of the capital necessary to conduct and manage the same; and the parties hereto are to divide the profits, derived from the conduct and management of said hotel, equally share and share alike.

"Now, therefore, it is mutually understood and agreed by and between the parties hereto, that the said party of the first part and the party of the second part have and hold equal interests in the lease above mentioned, and are considered hereby partners in the conduct and management of said Congress Hall, under said lease, and to share and share alike equally in and to the profits derived from said conduct and management of said hotel.

"It is further mutually understood and agreed that the terms and covenants herein shall bind the parties hereto, their executors, administrators or assigns.

"In witness whereof, the parties hereto have set their hands and seals, the day and year above written. W. Irving Davids. [L. S.] Esdaille M. Solomons. [L. S.]"

The attorneys for defendant Solomons served upon plaintiff the following motion:

"You will please take notice that on Tuesday next, 8th of December inst., at the hour of 10 o'clock, or as soon thereafter as counsel can be heard, we shall move the Honorable James Aldrich, presiding judge, at the courthouse in Charleston, for an order requiring the complaint herein to be more definite and certain in the following particulars, to wit: By alleging to whom and under what partnership name the credit was given for the goods and merchandise mentioned in the complaint, and whether said credit was extended to W. Irving Davids and Esdaille M. Solomons, as copartners in business, upon the faith of said copartnership, known to the plaintiff when said credit was given." Upon hearing the motion, and after argument of counsel, Judge Aldrich made the following order: "On hearing the motion of the defendant E. M. Solomons to make the complaint herein more definite and certain in the particulars set forth in the notice of said motion, and after hearing argument for and against said motion by counsel representing the plaintiff and the defendant E. M. Solomons, it is ordered that the complaint be amended as follows: By inserting in paragraph 4, after the words 'sold and delivered by the plaintiff to the defendants,' and be-

fore the words 'subsequent to the date of said agreement,' the following, to wit, 'as copartners in the conduct and management of the said Congress Hall Hotel,' and that in other respects the motion be, and is hereby, refused. It is further ordered that the defendants have twenty days after the service of the said complaint, amended as aforesaid, in which to plead thereon." Thereupon the defendant took the following ground of appeal: "Because the presiding judge erred in not requiring plaintiffs to amend their complaint by alleging to whom and under what copartnership named the credit was given for the goods and merchandise mentioned in the complaint, and whether said credit was extended to W. I. Davids and E. M. Solomons as copartners in business upon the faith of said copartnership, known to the plaintiffs when said credit was given."

The fourth paragraph of the complaint, as amended by the circuit judge, reads as follows:

"(4) That the defendants are indebted to the plaintiffs in the sum of \$73.60, the said amount representing the balance due for merchandise, sold and delivered by the plaintiff to the defendants, as copartners in the conduct and management of the said Congress Hall Hotel, subsequent to the date of said agreement, and during the operation of the lease referred to therein; the said goods and merchandise, and the time of the sale and delivery to defendants, and their value, being fully alleged and set forth in the annexed itemized and verified account, which is hereby made a part of this complaint."

We deem it best to set out a copy of the account:

New York, 10, 27, 1903.

Congress Hall, Saratoga Springs.
Bought of William Allen & Co., 470 Broadway.
1903.

June 24th.	1 guest index book, No. 6,050	\$ 3 00
"	1 pad call lists, No. 6,059..	85
30th.	1 N. Y. form trans. ledger, 4,149 pp.	9 00
"	1 office order book, No. 6,001A	3 00
"	1 book blank checks.	25
"	50 guests' safety envelopes..	1 00
July 8th.	1 bar book, No. 6,000.	2 50
31st.	1 M. breakfast menus, 45 8x7 $\frac{1}{4}$, Erab., 106,925.	7 00
"	3 M. dinner menus, 45 8x7 $\frac{1}{4}$, Erab., 106,926	21 90
"	3 M. luncheon menus, 45 8x7 $\frac{1}{4}$, Erab., 106,927.	21 90
Aug. 8th.	250 guests' safety envelopes..	3 75
"	500 wine lists, 51 4x10, Erab., 106,928	15 00
		<hr/>
		\$86 85
By cash, August 24th		13 25
		<hr/>
		\$73 60

It is apparent that every item embraced in the account is connected with the running of a hotel, and that hotel is "Congress Hall, Saratoga Springs, New York State," and, furthermore, the date of each item is subse-

quent to the alleged partnership agreement, and before its termination. We must always remember that the partnership is a new entity, and binds everybody who is a party to it, whether known as a party to it at the time or not.

Again, to so much of defendant's objection that the complaint does not allege that, at the time the credit was given, the plaintiffs knew of the partnership: In 22 A. & E. Ency. Law (2d Ed.), at page 63, it is held: "A dormant partner is a partner who takes no part in the business, and whose connection with it is unknown." Our own case of *Reab v. Pool*, 30 S. C. 140, 144, 8 S. E. 703, is a case well in point. In this case one S. L. Vaughn purchased an interest in the business conducted in the name of "R. R. Pool, Agent," and the business was conducted in that name. Upon default in payment of the obligation of R. R. Pool, agent, the defendant, Vaughn, was sued as a partner. He tried to avoid such obligation by alleging that he had received none of the profits of the business *and was not known in it.* (Italics ours.) The court, however, held: "Whether Vaughn was known in the business or not could not affect the case. He agreed to become a partner under the old style of 'R. R. Pool, Agent.' He was a partner, but a dormant partner, and, as such, could not, of course, be known in the business." We might multiply authorities, but the foregoing are deemed sufficient. Other courts may take a different view, but we deem our position fully tenable.

It is the judgment of this court that the order appealed from is just and proper, and it is therefore affirmed.

(70 S. C. 232)

McCREERY LAND & INVESTMENT CO. v. MYERS et al.

(Supreme Court of South Carolina. Nov. 29, 1904.)

TRIAL—LEGAL AND EQUITABLE ISSUES—EQUITY—JURISDICTION—BOUNDARIES.

1. Whether legal or equitable issues shall be first tried is in the discretion of the trial judge.

2. Where, in an equitable action, the issue of title is submitted to the jury, all issues which could properly be raised in a legal action for possession of the land, including fraud in the deed introduced by plaintiff, are involved.

3. Equity has no jurisdiction of a suit where mere confusion of boundaries exists, as remedies at law to settle disputed boundaries are sufficient.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 139.]

Appeal from Common Pleas Circuit Court of Richland County.

Action by the McCreery Land & Investment Company against Jeremiah Myers and others. From an order refusing a reference and transferring the case to calendar for trial of legal issues, plaintiff appeals. Affirmed.

Melton & Belser, for appellant. Thomas & Gibbs and W. D. Mayfield, for respondents.

JONES, J. The appeal in this case is from an order of the circuit court, Hon. J. H. Hudson presiding as special judge, transferring the cause to calendar 1 for trial of issue of title by jury, the court holding that the complaint raised the question of title, and that the whole case is a proper one for the jury. The exceptions are as follows: "First. Because his honor held that the whole case was a proper one to be passed upon and decided by a jury, and, so holding, overruled plaintiff's motion to refer, and ordered the cause transferred to calendar No. 1 for trial of the whole cause by jury; whereas, it appearing that the pleadings raised certain equitable issues, namely: (1) The issue as to fraud, misrepresentation, or mistake in the execution of said deed from the defendant Jeremiah Myers to the plaintiff, and the right of the defendants to have said deed and the plat referred to herein reformed; (2) the issue as to the right of the defendants, or any of them, to claim as purchasers for value, without notice, as against the plaintiff; and (3) the issue as to confusion of the boundaries between the lands of the plaintiff and defendants, and the correct location of the boundary line called for in plaintiff's said deed and plat. Said issues, or one or more of them, should have been passed upon and decided by the court in the exercise of its chancery power, and it was error to order the same tried by a jury on the law side of the court. Second. Because his honor ordered the case transferred from calendar No. 1 to calendar No. 2 for trial by jury; whereas, it appearing that the pleadings raised certain equitable issues, or one or more thereof, which the nature of the case and relation of the issues required should be determined prior to the determination of the legal issues as to possession of real estate, the cause should therefore have been retained on calendar No. 2 for the prior determination of said equitable issues, and his honor erred and abused his discretion in ordering the cause transferred to calendar No. 1 at this stage of the proceeding."

We think the exceptions must be overruled, for these reasons:

1. In *Knox v. Campbell*, 52 S. C. 461, 463, 30 S. E. 485, this court held that since the adoption of the Code it is left to the discretion of the judge whether the legal or equitable issues should be first tried, quoting with approval from Pomeroy on Code Remedies, § 86: "The equitable issues may be first tried, and the legal issues afterwards, or the order may be reversed, as the nature of the case and the relation of the issues seem to require." So that, even if it be true, as contended for by appellant, that equitable issues were involved, there was no abuse of discretion on the part of the circuit court in

first submitting the issue of title raised by the pleadings to the jury. We do not understand the order of Judge Hudson as intending to submit any strictly equitable issue to the jury. The issue of title alone is submitted to the jury, which, of course, would involve any issue tendered which could properly be raised and submitted to a jury in a strictly legal action to recover possession of land. For example, in an action to recover land the deed under which plaintiff claims may be assailed for fraud by way of defense before the jury. *De Walt v. Kinard*, 19 S. C. 292; *Archer v. Long*, 38 S. C. 272, 16 S. E. 998. Questions of fraud or mistake may sometimes be adjudicated in actions at law, as in these matters the jurisdiction of equity is not exclusive but concurrent. *Griffin v. Ry. Co.*, 66 S. C. 77, 44 S. E. 562. If, after the issue of title has been determined, there remain any independent equitable issues for determination, these must be tried by the appropriate tribunal.

2. The contention of appellant that the case is one solely of equitable cognizance as a case of confusion of boundaries cannot be sustained. A mere confusion of boundaries of land is not sufficient to give a court of equity jurisdiction. There must be some equity in addition thereto. If the ordinary legal remedies are adequate, they must be resorted to. 1 Story, *Eq. Juris.* (12th Ed.) § 610, 615. The legal remedies provided by our Code for the recovery of possession of land by one out of possession against another in possession claiming title are ordinarily adequate to settle disputed boundaries. The complaint in this is substantially an action to recover possession of a strip of land in the possession of the defendants, claiming title, and this issue of title must be tried by a jury, under section 274, Code Proc. 1902, and the numerous cases so holding.

The judgment of the circuit court is affirmed.

(70 S. C. 529)

BATTLE v. COLUMBIA, N. & L. R. R.
(Supreme Court of South Carolina. Dec. 3, 1904.)

CARRIERS—LOSS OF WIFE'S BAGGAGE—ACTION BY HUSBAND—EVIDENCE—LIABILITY—PARTIES.

1. Where a husband sues a carrier for the loss of his wife's trunk while a passenger, the husband may testify as to the value after the wife has testified as to the contents.

2. A carrier is liable for money necessary for traveling expenses, and jewelry for personal use, carried as baggage in a trunk.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1522.]

3. Where the trunk of a passenger is delivered to the only person in charge of the station, who is at the time engaged at a telegraph instrument, by depositing it at the place indicated by him, and giving him at the time directions as to checking, and notice that the owner would soon appear, and that he would attend to it, it is a delivery to the carrier.

4. Defect of parties can be taken advantage of only by demurrer or answer.

5. The husband has title to the wearing apparel of his wife and children, and other articles convenient to their personal use, so that he may maintain an action for the loss of them in a trunk in the possession of his wife, delivered to a carrier as the baggage of his wife, though no evidence of negligence on the part of the carrier is shown.

Gary, A. J., and Woods and Jones, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; Dantzler, Judge.

Action by P. C. Battle against the Columbia, Newberry & Laurens Railroad. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. Lyles and N. B. Dial, for appellant. Simpson & Cooper, for respondent.

POPE, C. J. This is an action for damages. The complaint is as follows:

"The plaintiff, complaining of the defendant, alleges:

"(1) That the defendant is, and at the times hereinafter stated was, a corporation duly chartered, organized, and doing business under the laws of the state of South Carolina, and owning and operating a line of railroad as a common carrier of goods and passengers between Columbia, South Carolina, and Laurens, South Carolina, a part of said line being in Laurens county and said state, and that Clinton, South Carolina, is a station on said road.

"(2) That on December 30, 1901, Mrs. Bettie Battle, the wife of the plaintiff, with a view to becoming a passenger over the defendant's line of railroad from Laurens, S. C., to Clinton, S. C., about 12 o'clock m. of the said day delivered to the agents of the defendant, at its depot and baggage room at Laurens, S. C., through N. S. Garrett, a trunk containing her wearing apparel, jewelry, the wearing apparel of her children and the plaintiff's children, some bedclothes, provisions, five dollars in money, and other articles, for the purpose of having the same checked as her baggage over the defendant's railroad from Laurens, S. C., to Clinton, S. C., to which place she was going as a passenger over the defendant's said road, and the defendant, through its agent, received the said trunk for that purpose.

"(3) That, shortly after the delivery of the said trunk to the defendant, the said Mrs. Bettie Battle went to the ticket office of the defendant at Laurens, S. C., for the purpose of obtaining passage over the defendant's said railroad to Clinton, S. C., but while she was purchasing her ticket the train over defendant's road from Laurens to Clinton left Laurens, and she was compelled to remain in Laurens until the next day. That shortly after the train left she went to the baggage room of the defendant at Laurens, S. C., to inquire about the trunk, and found the same missing and lost.

"(4) That the defendant, through its negligence and the negligence of its agents and servants, suffered the said trunk to be lost or stolen, and, although the plaintiff has made frequent demands upon the defendant to deliver the said trunk to him, it has failed and still fails to do so.

"(5) That the said trunk and its contents were reasonably worth the sum of two hundred dollars.

"(6) That the plaintiff had been put to considerable trouble and expense in searching for said trunk, and in providing wearing apparel for his wife and children, to the amount of fifty dollars, which expense was caused by the negligence of the defendant in failing to deliver the said trunk to the plaintiff, as it was its duty to do.

"(7) That the said trunk and contents were the property of this plaintiff.

"(8) That the plaintiff, by reason of the negligence of the defendant in failing to deliver the said trunk to him, has suffered damage to the amount of two hundred and fifty dollars.

"Wherefore the plaintiff demands judgment against the defendant for the sum of two hundred and fifty dollars damage, and for the cost of this action."

Answer:

"The defendant, by William H. Lyles, its attorney, answering the complaint in the above-entitled cause:

"(1) Admits the allegations contained in the first paragraph of the complaint.

"(2) Denies each and every other allegation in said complaint contained."

The trial came on before Judge Dantzler and a jury. The trend of the testimony led to establishing this state of facts: On the 30th December, 1901, the trunk of Mrs. Bettie Battle was carried to the depot of the Columbia, Newberry & Laurens Railroad, at Laurens, S. C., by Mr. Garrett, and, by the direction of Mr. Crisp, an agent of the said defendant railway company, it was placed in front of the door of its baggage room, under an assurance of said agent that he would attend to it as soon as he got through some work upon which he was then engaged. The trunk was described as a trunk covered with zinc and strapped by ropes, belonging to a lady who would soon come to the said depot. Mrs. Bettie Battle came down about 2 o'clock, and bought a ticket from Laurens to Clinton, S. C., over the defendant's railroad. She could not find her trunk, and missed taking the train until the next day. She had her brother and brother-in-law to assist her in looking for her trunk, but it was never recovered. Its contents were \$50 worth of her clothing; \$5 in money; two rings (gold finger rings), valued at \$15; her children's clothes, valued at \$30; some small gold pins, valued at \$5; some \$5 worth of cake, sausage meat, and butter; also a counterpane and blanket. The trunk value was \$5. The husband of Mrs.

Bettie Battle, the plaintiff, P. C. Battle, brought suit for \$250. A motion for nonsuit was overruled. Defendant's testimony was offered. After a charge from the presiding judge, the jury brought in a verdict for \$121.50. Thereupon defendant appealed to this court on the following grounds, to-wit:

"(1) Because the circuit judge erred in allowing P. C. Battle to testify, against objection of defendant, to the contents of the trunk—that there was money and jewelry in it.

"(2) Because he erred in not granting defendant's motion for nonsuit, because there was no testimony to show that Crisp was agent for its company: (a) Because there was no testimony to show that the trunk was delivered to the defendant.

"(3) Because he erred in not granting defendant's motion for nonsuit on the ground that the action could not be maintained in the name of P. C. Battle, whereas the testimony showed the trunk and its contents were the separate property of Mrs. Bettie Battle.

"(4) Because he erred in not granting defendant's motion for nonsuit, even if the clothing of the children belonged to the father, the plaintiff, for he was not a passenger nor intended passenger.

"(5) Because he erred in not granting defendant's motion for nonsuit on the ground that there was no contractual relation between it and the plaintiff.

"(6) Because he erred in not granting defendant's motion for nonsuit, inasmuch as there was not a particle of testimony showing that it had any notice whatever that Mr. Battle intended becoming a passenger over its line, and by purchasing a ticket later could not fix the liability on it, there being a joint agency.

"(7) Because he erred in charging the jury, 'When a party delivers baggage to a railroad company, with intention of becoming a passenger, and the road so accepts it, the company will be liable', the error being there was no testimony whatever going to show that the defendant had accepted the trunk, or had any notice that the said Battle intended to become a passenger over its particular line.

"(9) Because he erred in charging the jury, 'If you find that P. C. Battle gave the property to his wife simply to be used by her as his wife, then it is his property, and that he is the proper plaintiff in the case.'

"(10) Because he erred in making a similar charge as the above as to the children's clothes.

"(11) Because he erred in charging the jury the plaintiff could recover for the provisions of the wife, and would be liable for such, and for money and jewelry.

"(12) Because he erred in not setting verdict aside and granting a new trial on defendant's motion, the same being contrary to the law and the evidence in the case."

We will now proceed to pass upon these grounds of appeal in their order.

1. The wife of plaintiff had fully testified to the contents of the lost trunk. The witness P. C. Battle did not attempt to say what articles of property were in the trunk. He was not with his wife when she packed the trunk, and he testified that he only knew because his wife had told him. There was therefore no harm done defendant. Exception overruled.

2. We cannot sustain this exception, for there was testimony showing Mr. Crisp's connection with defendant railway. The value of that testimony was for the jury. Exception overruled.

3. P. C. Battle could maintain his action for any of his property which was in the trunk. He could certainly sue for the \$5 in cash and for his children's clothing. There was testimony that those articles were in that trunk, and that said trunk was carried to the defendant's depot, and delivered at the baggage room in accordance with its agent's direction. This exception is overruled.

4. We cannot hold that Mrs. Battle, to whom plaintiff's property was confided, and who purchased a ticket over defendant's railroad, could not lawfully include her husband's property in her trunk, and that the defendant did not thereby owe a duty to plaintiff therefor, which duty so owed entitled the plaintiff to maintain an action against it therefor. This exception is overruled.

5. We cannot sustain this exception, for the reason just given in discussing the fourth exception.

6. It was not necessary for Mr. Battle to become a passenger, to enable him to recover from the defendant the value of his property which passed into defendant's hands through the contractual relation of Mrs. Battle with defendant. This exception is overruled.

7. We do not think this question was fairly presented to the circuit judge, but, even if it was directly presented, the fact that the plaintiff was not a passenger, but that his wife was such, while she was intrusted with plaintiff's property, would make the railroad responsible to him for such property.

8. We overrule this exception because there was some testimony on this issue.

9. We must sustain this exception. We are not satisfied with the position of the circuit judge on this branch of the case. By our Constitution, a married woman can acquire a right of property by gift. She is, as to that property, its owner. It might be that a clash of claims might arise as between the husband and wife themselves. The railroad should not be liable to pay to each one separately for the property under the circumstances involved in the suit.

10. There was no error by the circuit judge

as to the plaintiff's right of action for his children's clothing, under the circumstances of this case.

11. We only sustain this exception as to the husband's right of action for the \$5 in money.

12. The verdict of the jury covering the value of all of the property—both that of the husband and the wife—the motion for a new trial should have been granted.

I think the judgment should be reversed.

Statement of the Case.

GARY, A. J. (dissenting). This is an action to recover damages for the loss of a trunk. The complaint alleges:

(1) The corporate existence of the defendant.

(2) That on December 30, 1901, Mrs. Bettie Battle, the wife of the plaintiff, with a view to becoming a passenger over the defendant's line of railroad from Laurens, S. C., to Clinton, S. C., about 12 o'clock m. of the said day delivered to the agents of the defendant at its depot and baggage room at Laurens, S. C., through N. S. Garrett, a trunk containing her wearing apparel, jewelry, the wearing apparel of her and the plaintiff's children, some bedclothing, provisions, \$5 in money, and other articles, for the purpose of having the same checked as her baggage over the defendant's railroad from Laurens, S. C., to Clinton, S. C., to which place she was going as a passenger over the defendant's said road, and the defendant, through its agent, received the said trunk for that purpose.

(3) That, shortly after the delivery of the said trunk to the defendant, the said Mrs. Bettie Battle went to the ticket office of the defendant at Laurens, S. C., for the purpose of obtaining passage over the defendant's said railroad to Clinton, S. C.; but while she was purchasing her ticket the train over defendant's road from Laurens to Clinton left Laurens, and she was compelled to remain in Laurens until the next day. That, shortly after the train left, she went to the baggage room of the defendant at Laurens, S. C., to inquire about the trunk, and found same missing and lost.

(4) That the defendant, through its negligence and the negligence of its agents and servants, suffered the said trunk to be lost or stolen, and, although the plaintiff has made frequent demands upon the defendant to deliver the said trunk to him, it has failed and still fails to do so.

(5) That the said trunk and its contents were reasonably worth the sum of \$200.

(6) That the plaintiff has been put to considerable trouble and expense in searching for said trunk, and in providing wearing apparel for his wife and children, to the amount of \$50, which expense was caused by the negligence of the defendant in failing to deliver the said trunk to the plaintiff, as it was its duty to do.

(7) That the said trunk and contents were the property of this plaintiff.

(8) That the plaintiff, by reason of the negligence of the defendant in failing to deliver the said trunk to him, has suffered damage to the amount of \$250.

At the close of plaintiff's testimony the defendant made a motion for nonsuit, which was refused. The jury rendered a verdict for the plaintiff for \$121.50, and the defendant has appealed from the judgment entered thereon.

Opinion.

The first assignment of error is that his honor the presiding judge erred in allowing P. C. Battle to testify, against the objection of the defendant, as to the contents of the trunk—that there was money and jewelry in it. This exception seems to have been taken under a misconception of the facts. The circuit judge, upon objection by the defendant, ruled that the plaintiff could not testify as to the contents of the trunk, but, after Mrs. Battle had testified as to the contents, allowed the plaintiff to testify as to the value of the articles therein contained.

A carrier may be held responsible for the jewelry of a passenger carried for her own personal use, to a reasonable extent. 8 Enc. of Law, 534; 6 Cyc. 667. A passenger has the right to carry with him on his journey, as baggage, a sum of money reasonably necessary for his traveling expenses. 3 Enc. of Law, 535; 6 Cyc. 667.

The second, third, fourth, fifth, and sixth exceptions relate to the refusal to grant a motion for nonsuit, and assign the following errors: (1) Because there was no testimony to show, or tending to show, that the trunk was delivered to the defendant; (2) that the action could not be maintained in the name of P. C. Battle, whereas the testimony showed that the trunk and its contents were the separate property of Mrs. Battle; (3) that, even if the clothing of the children belonged to the father, the plaintiff, he was not a passenger or intended passenger; (4) that there was no contractual relation between the defendant and the plaintiff; (5) that inasmuch as there was not a particle of testimony showing that the defendant had any notice whatever that the plaintiff intended becoming a passenger over its line, and by purchasing a ticket later could not fix the liability on it. The record shows that the motion for nonsuit was made on two grounds: (1) Because there was no testimony to go to the jury as to the delivery of the trunk to the defendant; and (2) because the suit is brought in the name of the wrong party, and he cannot maintain an action against a common carrier for articles of personal property in possession of some one else. No other grounds can be considered by this court.

We will first consider whether there was any testimony tending to show delivery of the trunk to the defendant. It was admitted that M. L. Crisp was the ticket agent and

telegraph operator of the defendant. There was testimony to the effect that he was in the ticket office and at the telegraph instrument, and was the only person in charge of the depot, when the trunk was carried there. N. S. Garrett, who carried the trunk, asked Crisp, who was standing at the telegraph instrument, where to put the trunk, and he said, "Around at the next door." Garrett did so, and called his attention to it. He told him that it was a lady's trunk, who would be there directly, where to check it, and, "Please to take care of it." Crisp told Garrett that as soon as he got through he would take charge of the trunk. Mrs. Bettie Battle came thereafter, bought her ticket, but could not find her trunk.

In 3 Enc. of Law (2d Ed.) 562, it is said: "Delivery to an agent other than the baggage master having supervision and control over matters at the carrier's depot or station is a delivery to the carrier, and it is as binding as if the delivery had been to one whose special duty it was to receive baggage." In *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, 83 Am. Dec. 143, a passenger took his trunk to a station on defendant's line, and requested that it be checked for a train that left in about four hours, but was told by the agent that the company only checked baggage fifteen minutes before the departure of the trains. He left his baggage, and returned at the proper time, got his check, and took passage, but, on receiving his trunk at the place of destination, found that it had been opened, and some of its contents stolen. There was no evidence as to whether it was opened while at the station or en route. It was held that the company must be regarded as having received the trunk when it was first taken to the station, that their liability attached at that time, and that it was therefore immaterial where the articles were stolen." Enc. of Law (2d Ed.) 561, note. In the case of *Rogers v. R. Co.*, 38 How. Prac. (N. Y.) 289, the baggage was sent to the station in the care of an expressman, who delivered it to the company's agent, calling his attention to it, who thereupon replied, "All right." It was held that such proof established a prima facie case of delivery to the company, although it appeared that such person was not the agent having charge of the receipt of baggage; that where a company sanctions the employment of a ticket agent, and holds him out to the world as its agent, it is estopped from repudiating his act in accepting baggage for transportation. These authorities show that this assignment of error cannot be sustained.

We will next consider the assignment of error that the suit was brought in the name of the wrong party. An objection that there is a defect of parties is waived unless there is a demurrer or answer insisting upon this objection. *Shull v. Caughman*, 54 S. C. 203, 32 S. E. 301. The only pleading on the part of the defendant in this case was a general

denial. This objection was therefore waived.

The seventh and eighth exceptions are as follows:

"(7) Because he erred in charging the jury, 'When a party delivers baggage to a railroad company in contemplation of becoming a passenger, and the baggage is so accepted, then that establishes the relation of passenger to the railway;' the error being there was no evidence whatever that the plaintiff, P. C. Battle, ever intended becoming a passenger.

"(8) Because he erred in charging the jury, 'When a party delivers baggage to a railroad company, with intention of becoming a passenger, and the road so accepts it, the company will be liable;' the error being there was no testimony whatever going to show that the defendant had accepted the trunk, or had any notice that the said Battle intended to become a passenger over its particular line."

In order to comprehend the force and effect of the charge, it will be necessary to determine what the rights of the plaintiff are under the complaint. The general rule of the common law is that the owner of personal property having committed no act of estoppel has the right to recover its possession from any one withholding it from him. *Carmichael v. Buck*, 10 Rich. Law, 332, 70 Am. Dec. 226. Or if it has been wrongfully sold, he has a right of action against the seller for the proceeds arising from the sale thereof, or for the value of the property. See authorities cited in the concurring opinion in *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449. These principles, however, are not applicable to this case. The plaintiff's wife was in possession of his alleged property as bailee. The general rule is that during the continuance of the bailment the bailee alone has a right of action for damages arising from an interference with the possession of the property. *Steele v. Crockett*, Dud. 16, 31 Am. Dec. 546; *Clarke v. Poozer*, 2 McM. 485. When, however, the act of a third party causes the destruction or loss of the property itself, it is an infringement of the bailor's rights, and he, as well as the bailee, may sue. 3 Enc. of Law, 763. The plaintiff's action does not rise *ex contractu*, but *ex delicto*, and it was incumbent on him to prove that the alleged negligence or recklessness of the defendant caused the loss of his property. The charge gave the plaintiff the benefit of the law as to passengers, when he in no respect occupied that position. The defendant did not owe him any duty as a passenger, and the charge was misleading and prejudicial to the defendant. These exceptions must therefore be sustained.

The ninth exception is as follows: "(9) Because he erred in charging the jury, 'If you find that P. C. Battle gave the property to his wife simply to be used by her as his wife, then it is his property, and that he is

the proper plaintiff in the case.' This is only a portion of the charge upon this question, and, when considered in connection with the other portions, it is free from error. The test is whether it was the intention of the parties that the husband should part with his right of ownership in the property, and that the title should vest in the wife as her separate estate. *State v. Pitts*, 12 S. C. 180, 32 Am. Rep. 503. The charge was in conformity with this principle.

The tenth exception is as follows: "Because he erred in making a similar charge as to children's clothes." The rule is thus stated in *State v. Trapp*, 14 Rich. Law, 203, 207: "Articles of property furnished by a father, in fulfillment of his natural duty to provide for his children, to his minor son, who lives with him, may be described in an indictment, even for larceny, as the property either of father or of the son. The general property may be said to be in the father, who has bought and paid for them—the use, in the child. 2 Russ. Cr. 94; *State v. Williams*, 2 Strob. 229. But where, in an indictment for larceny of certain articles of wearing apparel, the property was laid to be in J. W., and the proof was they belonged to a son of J. W., nineteen years old, bound apprentice to his father, and entitled by the covenants of his indentures to be supplied with his clothing, the court held the indictment defective. 2 Russ. Cr. 95. The clothing had been furnished, not in discharge of the father's natural duty, but in performance of a contract, and for a valuable consideration. Whatever property he had held in them had been divested, and the ownership was exclusively in the son." So, in the case under consideration, if the children's clothes were furnished by the father in fulfillment of his natural duty to provide for them, he has a right of action for the loss of the property through negligence. It is, however, incumbent on him to establish the fact of negligence.

The eleventh exception is as follows: "(11) Because he erred in charging the jury the plaintiff could recover for the provisions of the wife, and [the defendant] would be liable for such, and for money and jewelry." As hereinbefore stated, the plaintiff's right to recover damages is dependent upon his ownership of the property.

The twelfth exception is as follows: "(12) Because he erred in not setting aside verdict and granting a new trial on defendant's motion, the same being contrary to the law and the evidence in the case." This exception points out no specific error, and is too general for consideration.

WOODS, J. I concur in the views expressed by Mr. Justice GARY, except as to the seventh and eighth exceptions. These exceptions are as follows:

"(7) Because he erred in charging the jury, 'When a party delivers baggage to a railroad

company in contemplation of becoming a passenger, and the baggage is so accepted, then that establishes the relation of passenger to the railway; the error being there was no evidence whatever that the plaintiff, P. C. Battle, ever intended becoming a passenger.

"(8) Because he erred in charging the jury, 'When a party delivers baggage to a railroad company with intention of becoming a passenger, and the road so accepts it, the company will be liable;' the error being there was no testimony whatever going to show that the defendant had accepted the trunk, or had any notice that the said Battle intended to become a passenger over its particular line."

Whether the trunk was delivered to the railroad company and accepted by it as baggage was a question of fact for the jury. It was also a question of fact whether the contents were the property of the husband, who was the plaintiff, or of his wife. The charge of the circuit judge on these two points, as Mr. Justice GARY has shown, was free from error. If the trunk and its contents were the property of the husband, received by the carrier as baggage carried by the wife, and the contents were of such character as should be regarded baggage, then the carrier should be held liable to the husband, just as if he himself had delivered the trunk as a passenger. The ordinary baggage of a wife and of children, consisting of wearing apparel and other articles convenient for personal use, are usually furnished by the husband, and the title is in him, while the use is enjoyed by the several members of the family upon whom it may be bestowed. When the railroad company received such property to transport it as baggage for the wife as a passenger, it received it as a common carrier, and became liable to the owner as a common carrier; and it is not incumbent on the husband, suing as the owner for its loss, to prove negligence, as a condition of recovery. In *Sonneborn v. Ry. Co.*, 65 S. C. 502, 44 S. E. 77, and *Harzburg v. Ry. Co.*, 65 S. C. 539, 44 S. E. 75, the owners were not passengers, but the trunks were filled with samples, and checked by traveling salesmen, who were merely the agents of plaintiffs. The actions were brought by the owners, and the railroad company was held in both cases to the full liability of common carriers. As the defendant's liability was the same as if the plaintiff himself had been a passenger, there was no error in charging the propositions of law quoted in the seventh and eighth exceptions. This seems the reasonable and just view. It is supported by *Curtis v. R. Co.* (N. Y.) 30 Am. Rep. 271, and *Richardson v. R. Co.* (Ala.) 5 South. 308, 2 L. R. A. 716, and we have not been able to find any authority to the contrary.

Associate Justice JONES concurs in this opinion that all the exceptions should be overruled; the CHIEF JUSTICE holds in his

opinion that all the exceptions should be overruled except the ninth; and Associate Justice GARY holds in his opinion that all the exceptions should be overruled except the seventh and eighth. The result is that all the exceptions are overruled by a majority of this court, and the judgment of the circuit court is affirmed.

(70 S. C. 279)

MORRIS v. SPARTANBURG RY., GAS & ELECTRIC CO.

(Supreme Court of South Carolina. Nov. 24, 1904.)

ABATEMENT—ACTION FOR WRONGFUL DEATH.

1. An action under Civ. Code 1902, §§ 2851, 2852, brought by an administrator of a son for his wrongful death, for the alleged benefit of his father and brothers and sisters, does not abate on the death of the father, though he was sole beneficiary under the statute when the action was commenced, and on the death of the father the action may be carried on for the benefit of whoever may be entitled to participate in the recovery.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 33.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Buchanan, Judge.

Action by Jackson B. Morris, administrator of William S. Morris, against the Spartanburg Railway, Gas & Electric Company. From an order refusing a motion to declare action abated, defendant appeals. Affirmed.

Sanders & De Pass, for appellant. Stanyarne Wilson and C. P. Sims, for respondent.

JONES, J. The plaintiff, as administrator of William S. Morris, deceased, brought this action against defendant company for damages for wrongfully and negligently causing the death of his intestate by running its railway car over him near Glendale Factory, on its line between Spartanburg, S. C., and Clinton, S. C., in May, 1902. The action was brought under sections 2851, 2852, et seq., Civ. Code 1902, vol. 1, and the complaint, inter alia, alleged: "That said deceased left as his only heirs at law and distributees his father, Wm. Simpson Morris, his brother, Jackson B. Morris, and his sisters, Frances Crocker and Tallulah Burdett, for whose benefit this action is brought." Before the case was called for trial, the father, Wm. Simpson Morris, died, and thereupon defendant gave notice of motion to strike from the paragraph of the complaint above quoted the words, "his brother, Jackson B. Morris, and his sisters, Frances Crocker and Tallulah Burdett," on the ground that the complaint did not state a cause of action in their favor, and also gave notice of motion to dismiss the complaint on the ground that the action had

abated by the death of William Simpson Morris, the father, the sole person who was beneficiary at the death of intestate or commencement of the action. The motion was refused by Judge Buchanan, and this appeal from such refusal presents the question whether the death of the father, after the commencement of the suit, abated the action.

Section 2851 provides: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony."

Section 2852 provides: "Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused; and if there be no such wife or husband, or child or children, then, for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused, as may be dependent on him for support, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, wilfulness or malice as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

The statute is remedial, and should be liberally construed, so as to accomplish its object. It was designed to remove the common-law rule, founded on the maxim, "*Actio personalis moritur cum persona*," as an obstacle to the recovery of damages for death of a party by a wrongful act, neglect, or default of another, and to create a right of action in the administrator of the deceased for the benefit of the persons named in the statute. In re Estate Mayo, 60 S. C. 401, 415, 38 S. E. 634, 54 L. R. A. 660. The award of damages for the wrongful death is the important matter; the manner of distribution is of secondary consideration. We think it would be too narrow a construction of the statute to hold that an action there-

under could abate as long as any beneficiary person or class named in the statute existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still the statute had other beneficiaries in contemplation in the event of his death. The brothers and sisters of the deceased named in the complaint are his heirs at law, and, since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary. Under the statute the action must be prosecuted in the name of deceased administrator, and he is living to carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had.

The judgment of the circuit court is affirmed.

(70 S. C. 295)

L. T. MADDEN & CO. v. PHOENIX ASSURANCE CO.

(Supreme Court of South Carolina. Nov. 30, 1904.)

INSURANCE—WAIVER OF PROOFS—IRON-SAFE CLAUSE—OTHER INSURANCE—PLEADING—DEFENSE—EVIDENCE.

1. In an action on an insurance policy, where there was evidence that at the request of the insured an agent of the insurer came to the scene and informed insurer that the matter would be adjusted, and the adjuster refused to assist in making up proofs of loss according to the promise of the insurer, and the proofs executed were found defective by the insurer, and liability was denied because the policy was void, as to whether proofs of loss were waived was for the jury.

2. Where at the time of making an application for insurance the insured showed an inventory of the goods to the agent of the insurer, who said it was all right, the insurer thereby waived the right to insist that the inventory did not conform to the iron-safe clause of the policy.

3. Where there was some evidence that the books and inventory were kept in a fireproof safe, and were produced for the inspection of the company after the loss, the question of compliance with the iron-safe clause is for the jury.

4. An agent of an insurance company issued a policy having knowledge that another company, of which he was also agent, had a policy on the same goods, issued by his predecessor. *Held*, that his knowledge would be imputed to the latter company, and on its failure to cancel the policy tended to show waiver of a provision prohibiting other insurance.

5. In an action on an insurance policy, where defendant claimed that plaintiff in his application made false statements as to when the inventory of the stock had been taken, testimony was competent to show good faith on the part of plaintiff, and that misstatement as to the date was a mistake.

6. Where in an action on a policy, plaintiff alleges ownership of the property destroyed in himself, the insurance company under general denial may prove ownership in another.

7. In an action on an insurance policy, under general denial of allegation that the fire did not happen through the fault or negligence of plaintiff defendant may show that plaintiff burned his own property.

8. Error in admitting immaterial evidence is not ground for reversal.

9. A salesman who has had experience in merchandising and has inspected a stock of goods is qualified to testify as to its value.

Appeal from Common Pleas Circuit Court of Laurens County.

Action by L. T. Madden & Co. against the Phoenix Assurance Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Johnson & Nash and W. R. Richey, for appellants. Ferguson & Featherstone and King, Spalding & Little, for respondent.

GARY, A. J. This is an action for the recovery of \$1,200 on a policy of insurance issued by the defendant to the plaintiffs 1st September, 1904, on their stock of goods at Cross Hill, S. C., which was destroyed by fire on the 12th day of June, 1902. The defendant answered the complaint, denying the material allegations thereof, and interposing the following defense: "That the plaintiffs violated the terms and conditions set forth in the policy of insurance in the following particulars: (1) That they failed to keep and furnish the defendant the inventories and books provided for in said policy, and to keep the same in an iron safe or other safe place, as therein provided. (2) That they took out other and further insurance on the stock of goods covered and other property covered by their contract with the defendant without defendant's consent, thereby making the contract with defendant null and void. (3) And, further, that at the time defendant's policy was issued the plaintiffs had other insurance on their stock of goods, of which fact they failed to notify defendant. (4) That the plaintiffs, in their application for insurance, made sundry false representations as to value of stock on hand when the inventory had been taken, other insurance thereon, and as to fires previously had by them, thereby rendering the policy issued to them by defendant null and void." After all the testimony for both sides in this case had been taken, the defendant moved the court to instruct the jury to write a verdict for the defendant on the following grounds: (1) Because, under the proof of this case, the undisputed proof has been a failure to furnish such proof of loss as the law required by the written contract of the insurance policy, which was before the court. (2) There has been a total breach of what is known as the 'iron-safe clause' before the court. (3) There is in existence other insurance without notice within contemplation of the policy." After argument the court ruled as follows: "I am satisfied the case is fatal on all three grounds, and I will have to instruct a verdict for the defendant"—which he did. The plaintiffs appealed, assigning errors on the part of his honor the circuit judge in directing a verdict, and on other grounds set forth in the exceptions.

We proceed to the consideration of those

exceptions assigning error in directing a verdict on the first ground mentioned. There was testimony introduced to establish the following facts: Immediately after the fire the plaintiff wrote to J. W. Spence, the agent of the defendant, giving him notice of the fire, and requesting him to come to Cross Hill. The plaintiffs had policies of insurance on their stock of goods in two companies. J. W. Spence came, and in the course of conversation said to P. H. Madden that he would have the whole matter adjusted; that he need not put himself to any trouble; that he would ask the agent of the other company to let one man adjust the loss under both policies. Spence told the plaintiffs to write to L. R. Warren at Richmond, Va., who was the adjusting agent of the company. On the 11th of July, 1902, the plaintiffs wrote to the defendant as follows: "Cross Hill, S. C., July 11, 1902. Phoenix Assurance Company—Gents: We send you statement what was lost on June 12th, 1902, on Policy No. 5625260. We had on September the 1, 1901, date of policy, amount of goods \$2,629.47; bought since \$1,800.49. We lost \$2,380.85. This is correct. Yours truly, L. T. Madden & Co. P. S. How the fire started is not known." The letter was sworn to before a notary public. On the 6th of August, 1902, the plaintiffs wrote to L. R. Warren, and likewise to the company, stating that they had not heard from the defendant, and requesting a reply. On the 14th of August, 1902, the plaintiffs wrote a letter to L. R. Warren, the adjusting agent, giving the same information in the same words as was contained in their letter of July 11, 1902, and stating that the Piedmont Insurance Company had a policy for \$500 on the same property. Neither Warren nor the company replied until the 11th August, 1902. Wrote to the assured on the 27th of August, 1902, declining to receive the papers as proofs of loss, and stating the defects therein as such. They expressly advised the plaintiffs that the company waived none of its rights. This letter was inclosed with one dated 28th of August, 1902, stating that Warren would request F. M. Butt, of Augusta, Ga., to visit Cross Hill, and investigate the loss, and would suggest to him to show the plaintiffs how to fill up and execute the proofs of loss, if they so desired, but that this would be done only to facilitate them, and without waiver of any of the company's rights; that the sole authority of F. M. Butt was to investigate and report, but that any proposition made through F. M. Butt would be considered. F. M. Butt went to Cross Hill, but refused to render the plaintiffs any assistance in the preparation of the proofs of loss, and said to them that the insurance policy was null and void from the date it was issued. There was other correspondence, which we do not deem it necessary to reproduce.

Let us see to what extent the acts and

declarations of J. W. Spence and F. M. Butt, the company's agents, were binding upon it. Section 1810 of the Code of Laws (Civ. Code 1902) is as follows: "Sec. 1810. Any person who solicits insurance in behalf of any insurance company not organized under or incorporated by the laws of the state, or who takes or transmits other than for himself any application for insurance, or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine and inspect any risk, or receive, collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or the consummating of any contract of insurance for or with any such company other than for himself, or who shall examine into and adjust or aid in adjusting any loss for or in behalf of any such insurance company, whether any such acts shall be done at the instance or request or by the employment of such insurance company, shall be held to be acting as the agent of the company for which this act is done or the risk is taken." This section was construed in the case of *Norris v. Ins. Co.*, 57 S. C. 358, 365, 35 S. E. 572, 574. In that case the insurance company contended that Smith was not its agent, as far as the plaintiff was concerned. The court said: "But we are not prepared to take such subtle views of the matter of agency. These corporations act through agents. There is nothing in the policy issued by this insurance company which names any agent as such who can bind the company. This insurance company must remember that its contracts made within our state limits under our statute are taken with section 1481 (now 1810), hereinbefore quoted, as a part of such contracts, and that this section 1481 does not, in its use of the word 'agent,' place any limitations upon his powers so as to deprive any one who deals with such agent with respect to a contract of insurance made by such a one with the agent's insurance company as to the principle of the right to impute knowledge of such agent to the knowledge of the principal." When a person does any of the acts enumerated in section 1810 of the Code of Laws, the presumption is that he was the agent of the insurance company, but such presumption is subject to rebuttal. This principle does not infringe upon the doctrine announced in *Young v. Ins. Co.*, 68 S. C. 387, 47 S. E. 681. Our conclusion is that the acts and declarations of the agents, J. W. Spence and F. M. Butt, were prima facie binding upon the defendant, and that they furnished evidence of waiver on the part of the defendant to insist upon its right to require compliance with the terms of the policy as to proofs of loss, especially when F. M. Butt refused to assist in the preparation of the proofs of loss, and declar-

ed that the policy was null and void from the time it was issued. These facts tended to show a denial of liability on the part of the defendant, and that it intended to rely upon the fact of forfeiture of the policy by the plaintiffs as a ground for refusing payment. In the case of *Dial v. Life Association*, 29 S. C. 560, 579, 8 S. E. 27, 38, the court uses this language: "The case of *Knickerbocker Life Insurance Company v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 868, with the authorities therein cited, shows conclusively that a distinct refusal to pay and a denial of liability upon the ground that the policy had lapsed and was forfeited is a waiver of the condition precedent requiring proof of death; and this doctrine seems to have been recognized in this state in *Neve v. Charleston Insurance & Trust Company*, 2 McMill. 237; *Madsden v. Phoenix Fire Insurance Company*, 1 S. C. 24. When, therefore, the company was notified of the death of Dial, and the necessary blank forms to make out proof of death were applied for, and refused upon the ground that the policy had been forfeited, this was a waiver of the required proof, or at least was sufficient evidence of such waiver as rendered it necessary to submit the question to the jury." This principle is applicable to fire as well as life insurance policies. *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Stickley v. Ins. Co.*, 37 S. C. 56, 16 S. E. 280. It was error, therefore, not to submit the question of waiver to the jury.

We will next consider whether his honor the presiding judge erred in directing a verdict on the ground that there was a total breach of what is known as the "iron-safe clause" of the policy. That clause is as follows: "1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2d. The assured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause and during the continuance of the policy. 3d. The assured will keep such books and inventory and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night and at all times when the building mentioned in this policy is not actually open for business, or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for this inspection of this company, this policy

shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." The sections of this clause will be considered in their regular order.

First section. The testimony shows that the plaintiffs made an inventory of their stock of goods, which was completed on the 25th of August, 1901, and that they exhibited the inventory to the defendant's agent when they made application for policy of insurance; that the agent raised no objection to it, but, on the contrary, said it was all right. The case of *Pelzer Manufacturing Co. v. Sun Fire Office* shows conclusively that the defendant waived the right to insist upon the objection that it did not conform to the requirements of the policy.

Second section. The plaintiffs introduced in evidence the invoices of goods bought between 25th August, 1901, and 12th June, 1902, amounting to \$1,800.46. They also offered in evidence their cashbook, showing cash sales from 25th August, 1901, to 12th June, 1902, amounting to \$1,910.96. The following is a sample page of the cashbook set out in the record: "Cash sales for September, 1901.—2d, \$1.00; 3d, \$1.00; 4th, \$1.10; 5th, \$1.80; 6th, \$1.25; 7th, \$1.50; 8th, \$1.00; 10th, \$1.25; 11th, \$1.50; 12th, \$1.30; 13th, \$1.00; 14th, \$1.50; 16th, \$1.25; 17th, \$1.00; 18th, \$1.00; 19th, \$1.25; 20th, \$1.50; 21st, \$1.25; 23d, \$1.40; 24th, \$1.10; 25th, \$1.00; 26th, \$1.15; 27th, \$1.10—total, \$28.20." They also offered in evidence their credit sales book, showing credit sales up to 12th June, 1902, amounting to some \$300 or \$400, the amount of which was included in the cash sales. This afforded at least some evidence of a compliance with the requirements of the policy, and presented a question for the jury to determine as to its force and effect. If there is any evidence whatever tending to establish a fact, the judges cannot determine its sufficiency, but it must be submitted to the jury. In volume "b" of *Starkie on Evidence* it is said: "It has been frequently doubted whether a particular question be one of law or fact. Thus far it is clear that whenever, upon particular facts found, the court, by the implication of any rules of law, can pronounce of their legal effect with reference to the allegations on the record, such inference is matter of law. It is also clear that whenever the court cannot pronounce on the legal effect of particular facts, and when it is requisite to enable them to do so, that the jury should find some other inferences or conclusions, such further inferences or conclusions are questions of fact." In the case of *Glover v. Gasque*, 67 S. C. 13, 34, 45 S. E. 113, 119, the court, after quoting the language thus mentioned, proceeds as follows: "It is unquestionably the duty of the court in construing a written instrument, to interpret its language, and it may also state the effect thereof, where it is susceptible of but one inference; but where the inference to be drawn from

the facts stated in the instrument is in dispute, and such facts susceptible of more than one inference, then the question must be determined by the jury, especially when the inference to be drawn is dependent upon other facts in the case." See, also, *Thompson v. Protective Union*, 66 S. C. 459, 45 S. E. 19. The burden of proof rested upon the defendant to show that the policy was forfeited, and when the circuit judge decided that the testimony was sufficient to establish that fact, he invaded the province of the jury, it being susceptible of more than one inference. *Roach v. Security Fund Co.*, 28 S. C. 431, 6 S. E. 286; *Kingman v. Ins. Co.*, 54 S. C. 599, 32 S. E. 762.

Third section. There was testimony to the effect that the books and inventory were kept in a fireproof safe. There was also testimony that the books and inventory were produced for the inspection of the company.

The next question for consideration is whether there was error in directing a verdict on the ground that there was in evidence other insurance without notice, in contemplation of the policy. In the application of the policy of insurance in this case is the following question: "Is there now other insurance on said property? (If there is, state (1) how much; and (2) in what company or companies.)" To which the plaintiffs answered, "Yes, \$500 on stock expired February, 1902." The policy provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." When the policy for \$500 expired in February, 1902, it was not renewed. In January, 1902, the plaintiffs wrote a postal card to S. E. Miller, who was the defendant's agent when the policy in suit was issued. As J. S. Spence had succeeded him as agent of the defendant, he wrote to the plaintiffs as follows on the 30th of January, 1902: "Your postal to Mr. S. E. Miller in regard to insurance received, and as he has sold his fire insurance business to me, he referred it to me. I shall be glad to take the matter up with you on the terms named to Mr. Miller, namely: payment of \$20 now and balance in a short while. You will please send me to-morrow the old policy of Simpson & Miller, so that I can see the exact amount and circumstances in the matter. Trusting to hear from you at once and I will write the policy and send it to you at once." The policy was issued in another company for \$600, but was canceled on the 12th of February, 1902, because that insurance company objected. J. W. Spence testified that he would have canceled, also, the policy now in litigation, but was informed by the plaintiffs that they had bought their spring stock, and expected likewise to have a car load of corn in a few days. To the question, "As

a matter of fact, you were agent of this company, and let that \$1,200 policy stand?" he answered, "Yes." The defendant introduced in evidence a policy of insurance issued by the Piedmont Mutual Insurance Company for \$500 on the 30th of April, 1902, to L. T. Madden & Co., covering their stock of goods at Cross Hill, and it was of force at the time their stock of goods was burned. J. W. Spence testified that he did not have knowledge of this policy. It may be said that J. W. Spence permitted other insurance on the property when he himself insured the property in another company, although he knew that the policy in dispute was then of force. In 7 Enc. of Law (1st Ed.) 1017, it is said: "But knowledge of other insurance on the part of a general agent as a local agent authorized to write policies for the company and transact its business generally in his locality is treated as the knowledge of his company, and it has been held that his waiver of notice of other insurance—as by the receipt of renewal premiums after he has knowledge of other insurance on the premises—is binding on the company, although the policy provides that no consideration can be waived except in writing by the secretary, and that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." When J. W. Spence, the agent of the defendant, insured the plaintiffs, and in another company, his knowledge that there was other insurance is imputed to the defendant. *Norris v. Ins. Co.*, supra. And its failure to cancel the policy and return the premium of insurance after such knowledge was a circumstance tending to show waiver of the right to insist upon the provision of the policy prohibiting other insurance. The burden of proof rested upon the defendant to show that the policy was forfeited, and when the circuit judge decided that the evidence was sufficient to establish that fact he invaded the province of the jury, the testimony being susceptible of more than one inference.

The sixth exception is as follows: "(6) Because the court erred in not allowing P. H. Madden to testify as to a mistake that was written in the application as to the date his inventory was taken, it not being an effort to vary the terms of the paper, but to correct an error." The defendant, in its answer, alleged that the plaintiffs in their application for insurance made false statements as to when the inventory had been taken. The testimony was competent, not only for the purpose of showing good faith on the part of the plaintiffs, but likewise to establish the fact that the defendant had notice of the true facts before issuing the

policy. The court is not confined to the exercise of its chancery powers in administering relief from mistakes. The doctrine is thus stated in *Moore v. Edwards' Ex'rs*, 1 Bailey, 23 (approved in *Hodges v. Kohn*, 67 S. C. 69-72, 45 S. E. 102, 103): "Accidents and mistakes certainly constitute one branch of equity jurisdiction; but it is not peculiar except when a discovery is indispensable, or the nature of the relief such as to require the extraordinary aid of chancery. Actions at law to recover back money paid by mistake constitute in all the books of practice a conspicuous class of causes for which the action of assumpsit may be maintained at law; and there is no question that in general, when the facts can be proved according to the rules of the common law, and the remedy is such as a court of law can administer consistently with the prescribed modes of proceeding, mistakes may be inquired into in a court of law. In the case under consideration the plaintiff sued out a *sci. fa.* to revive a judgment against the defendant, and as evidence of payment the defendant procures an execution on which is indorsed the word 'Satisfied.' The plaintiff replies it was so indorsed by mistake. There is nothing magical in the term itself. The evidence offered was admissible according to the rules of the common law. The relief was such as a court of common law was competent to give, and the court therefore clearly had jurisdiction."

The seventh exception is as follows: "(7) Because the court erred in allowing testimony as to the ownership of the burned property when they had not specially denied it, it being submitted that the defendant must deny specially that plaintiffs did not own the goods before it can assail their ownership." The complaint alleges that at the time of making said insurance and until the fire they were the owners of the property insured. The testimony was responsive to this allegation, and was therefore competent. *Latimer v. Cotton Mills*, 66 S. C. 135, 44 S. E. 559.

The eighth exception is as follows: "(8) Because the court erred in allowing testimony as to a scuttle hole in the store, and other matters tending to show, and for the purpose of showing, that Madden burned his own store, when the defendant had not pleaded any such defense." The complaint alleges that the fire did not happen by any negligence or by any fault of the plaintiffs. This exception is disposed of by what was said in considering the seventh exception.

The ninth exception is as follows: "(9) Because the court erred in allowing the witness E. B. Rasor to answer the question, 'Might or not a man who is familiar with that class of goods form a pretty accurate idea?' it being suggested that this calls for a mere opinion about which the witness may have no right to have an opinion; especially

to express it." This was an immaterial question, and was in no wise prejudicial to the rights of the plaintiffs.

The tenth exception is as follows: "(10) Because the court erred in allowing the question by defendant's attorney to B. B. Goodman, 'Empty shoe boxes would not amount up very fast, would they?' It is suggested that this is a leading question, and presumed the fact that there were empty shoe boxes." This exception is disposed of by what was said in considering the ninth exception.

The eleventh exception is as follows: "(11) Because the court erred in holding and ruling that a witness may give his opinion about the value of a stock of goods, whether he knows anything about it or not." The testimony showed that the witness had experience in merchandising, and had likewise sold goods as a salesman, and that he had inspected the stock of goods insured. Under these circumstances the testimony was admissible. In 1 Elliott on Evidence, § 685, the rule is thus stated: "Witnesses who are not strictly experts, as well as expert witnesses, may testify as to the value of the property, real or personal, or as to the value of services in a proper case. They must, however, have some knowledge on which to base their opinion. If they have such knowledge, the fact that it is slight will go to the weight of their testimony, rather than to its competency; but, if they are not acquainted with, or have no knowledge of, the matter in question, so that their opinion can in no way aid the jury, the court should refuse to permit them to give an opinion which would necessarily be a mere guess of conjecture." See, also, sections 671, 672, 675, and 686.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

(70 S. C. 233)

STATE ex rel. KIRVEN v. SCARBOROUGH.
(Supreme Court of South Carolina. Nov. 30, 1904.)

VENUE—MANDAMUS—CONTEMPT—JURISDICTION.

1. Under Gen. St. 1882, § 2344, providing that if any issue shall be joined in mandamus the person suing such writ shall try the same in such place as a civil action might be tried in, the circuit judge has no jurisdiction of a proceeding in mandamus in any other county than the one in which the defendant resides.

2. The disobedience of an order made by the judge without jurisdiction is not contempt.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 65.]

3. A judge at chambers has no jurisdiction to pass judgment for criminal contempt not committed in the presence of the court.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 138.]

Appeal from Common Pleas Circuit Court of Darlington County; Watts, Judge.

Application by the state, on the relation of J. K. Kirven, against R. J. Scarborough.

From an order granting the same, respondent appeals. Reversed.

Spears & Dennis, for appellant. Coggeshall & Edwards, for respondent.

JONES, J. On December 24, 1903, John Floyd, a magistrate for Darlington county, on the affidavit of T. Z. Odom, issued a warrant against J. K. Kirven for larceny of a mule, valued at \$150; and at the same time issued a search warrant directing R. J. Scarborough, as special constable, to search the premises of J. K. Kirven, take possession of said mule, and keep the same to be disposed of according to law. The case having been transferred to Magistrate H. E. P. Sanders, he conducted the preliminary examination, and found that the prosecutor had utterly failed to produce any proof that the said John K. Kirven was guilty of the charge of larceny, or that the property seized under the said search warrant was stolen property; but, on the contrary, it appeared that the said property had been wrongfully taken from the possession of the said John K. Kirven. He accordingly dismissed the case, and ordered Scarborough to restore the property to the possession of Kirven. Upon failure or refusal of Scarborough to obey the order of Magistrate Sanders, Judge Watts at chambers issued an alternative writ of mandamus, commanding Scarborough to deliver the mule, as required by the order of Magistrate Sanders, or show cause at Cheraw, S. C., why he did not obey said order. Scarborough made return, among other matters, claiming that it was a matter of physical impossibility for him to comply with the order of the magistrate or the writ of mandamus, as the property was no longer in his custody or control, but had been turned over to the prosecutor, T. Z. Odom, under the order of the magistrate who issued the papers. Judge Watts held the return insufficient, and issued a peremptory writ of mandamus, January 18, 1904, commanding Scarborough to forthwith deliver the property to Kirven. From this order Scarborough gave due notice of appeal, making the point, among others, that Judge Watts had no authority to make the alternative writ of mandamus returnable at chambers, and to hear and determine the issues therein involved out of the county in which respondent resides. Scarborough resides in Darlington county, and the issues were heard and determined by Judge Watts at his chambers in Cheraw, S. C., in Chesterfield county.

Scarborough having failed or refused to turn over the mule as directed, Judge Watts, on January 22, 1904, issued an order requiring Scarborough to show cause before him at his chambers in Cheraw why he should not be adjudged in contempt of court. To this Scarborough made return that it was impossible for him to obey the order of the magistrate or the writ of mandamus; that he had turned the mule over to Odom, as

ordered by Magistrate Floyd; that Odom had turned it over to W. B. Brunson, the man from whom he had purchased it; that Brunson had turned it over to N. R. Harrell, a partner of John K. Kirven, in the firm of Harrell & Kirven, who claimed to be the owner of the mule; that demand had been made upon Harrell for the mule, and that Harrell had informed him that he had disposed of it; that he (Scarborough) had made diligent inquiry as to the whereabouts of the property without being able to find it; that he intended no disrespect to the orders of the court, and would willingly comply if possible. A counter affidavit by Magistrate Floyd was submitted, to the effect that Scarborough did not apply to him, either before or after the case was heard by Magistrate Sanders, for direction as to what disposition to make of the mule.

On February 2, 1904, Judge Watts, at his chambers, Cheraw, S. C., made an order adjudging Scarborough in contempt, for refusing to obey the peremptory writ requiring him to deliver the mule to Kirven, the order concluding as follows: "It is therefore ordered that the said R. J. Scarborough do within ten days from the date hereof turn over to the said John K. Kirven the said dark brown mule, as required by the order of this court of date January 18, 1904; and that in case he fails so to do within the aforesaid period of ten days he do pay to the clerk of the court of Darlington county, in the state aforesaid, a fine of \$150, to be held by the said clerk of court subject to the further order of this court. It is further ordered that in case the said R. J. Scarborough shall fail to pay the said fine of \$150 within the said period of ten days and two days thereafter, to wit, within twelve days from the date hereof, the said R. J. Scarborough be committed to the common jail of Darlington county, in the state aforesaid, and there kept in close confinement without bail for the term of sixty days."

From this order R. J. Scarborough appeals upon the following exceptions: "(1) His honor should have held that the return of the respondent to the aforesaid rule to show cause why he should not be adjudged in contempt showed conclusively the actual inability and impossibility for the respondent to perform the conditions of the said order before the issuance of the same or of any proceeding connected therewith, and that the said inability was not caused or brought about by any negligence or default on the part of the respondent, and that he did not willfully defy the court or its authority, and had exhausted every means and made every effort to obey the said order, and it was error and abuse of discretion not so to hold. (2) His honor should have held that the notice of intention to appeal to the Supreme Court from the peremptory writ having been served, and such service made known to the court, the court could not proceed to adjudge

the respondent in contempt for failure to obey said order pending appeal from the said order, and it was error not so to hold. (3) His honor should have granted respondent's motion to quash and dismiss the peremptory writ, upon which the contempt proceedings were based, for irregularities and want of jurisdiction apparent upon the face of the proceedings, in that (a) the court had no power or authority to make the writ returnable at chambers, and to hear and determine the issues therein involved outside of the county wherein the respondent resided; (b) inadequacy of legal remedy was not shown, or any facts from which it could be inferred; (c) no special interest in the property was alleged, which gave the relator a legal or equitable right to the writ or to entitle him to the relief sought; (d) no facts alleged from which it can be inferred the respondent had the ability to comply, and it was error not so to hold. (4) His honor should have held that the affidavit upon which the contempt proceedings were based was insufficient, in that (a) it did not allege respondent's ability to comply, nor a willful disobedience of the order of the court; (b) a refusal to obey with ability to do so; (c) nor did it allege any willful negligence or default on the part of the respondent, and it was error and abuse of discretion not so to hold. (5) His honor should have held that he had no power or authority to punish for a contempt in the case at his chambers, in that the acts complained of, which, in the judgment of the circuit judge, constituted a contempt of his court, occurred before the circuit judge acquired jurisdiction over respondent or of the subject-matter of the proceedings, and arose out of a criminal case; and he erred in not so holding. (6) It appearing by respondent's return that there were other parties other than relator and respondent directly interested in the question involved, claiming the property which respondent was ordered to turn over to the relator, all parties should have been remitted to an action at law and the proceedings dismissed, and it was error for his honor, the circuit judge, not so to hold."

The disobedience of an order made by a court or judge without jurisdiction is not a contempt. *State v. Nathans*, 49 S. C. 200, 27 S. E. 52. If, therefore, Judge Watts had no jurisdiction to hear and determine the issues raised by the return of the writ of mandamus, the failure or refusal of Scarborough to obey his order thereon does not constitute a contempt. The writer of this opinion, in the opinion prepared by him in the case of *La Motte v. Smith*, 60 S. C. 558, 562, 27 S. E. 933, 934, used the following language: "Proceedings in mandamus are triable in the county where the respondent resides. It is true that sections 145 and 146 of the Code of Procedure, relating to the place of trial of civil actions, do not directly apply to proceedings in mandamus; since section 452 of

the Code provides that, 'until the Legislature shall otherwise provide, the second part of this Code of Procedure shall not affect proceedings by mandamus or prohibition.' But in section 2344, Gen. St. 1882 (section 2459, Rev. St. 1893), it is provided: 'If any issues shall be joined on such proceedings (mandamus), the person or persons suing such writ shall and may try the same in such places as a civil action might or should have been tried,' etc. So that whether we may look to the Code of Procedure to ascertain the meaning of 'a civil action,' or whether it means 'action on the case,' under the practice before the Code, as said in *State v. Treasurer*, in 10 S. C. 40, an issue in mandamus proceedings should be tried where the respondent resides."

This we regard a correct statement of the law. It must follow that Judge Watts had no jurisdiction to hear and determine the issues in the mandamus proceedings in a county other than that in which the respondent in such proceedings resided. It does not appear that any objection was made to the jurisdiction of Judge Watts on the hearing of the return to the writ of mandamus, but it has been determined that a question of jurisdiction may be first raised in this court. *Ware v. Henderson*, 25 S. C. 385; *Bell v. Fludd*, 28 S. C. 313, 5 S. E. 810.

Furthermore, this was a proceeding in criminal contempt, and in the case of *State v. Nathans*, supra, this court held that a judge at chambers has no jurisdiction to pass judgment or sentence for criminal contempt, except such as may be committed in the immediate presence of the court.

Those views necessarily work a reversal of the judgment appealed from, and it is deemed improper to further consider the exceptions. The order adjudging appellant in contempt is therefore set aside for want of jurisdiction.

(70 S. C. 271)

WALKER v. CASSELS et al.

(Supreme Court of South Carolina. Nov. 29, 1904.)

SAWYER'S LIEN—WAIVER—LIMITATIONS—PAYMENTS—APPEAL—REVIEW.

1. A sawyer has a lien on lumber sawed for the sawing so long as he retains possession thereof.

2. Where the sawing of certain lumber had been completed, and the sawyers had left the ground without leaving any agent in charge, and plaintiff stacked the lumber, and used some of it, and sold a considerable portion of it, he was in possession, and any lien of the sawyers was waived.

3. A payment on a note, made by the direction of the maker, was sufficient to prevent the bar of the statute of limitations.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Limitation of Actions, § 623.]

4. Whether a judgment was entered in conformity to the decree in the case cannot be first questioned on appeal.

Appeal from Common Pleas Circuit Court of Chester County; Townsend, Judge.

Action by W. N. Walker against W. W. Cassels and J. L. Saunders. From the decree, defendant Cassels appeals. Modified.

The special referee made the following finding and conclusions, among others: "Third. What damages has the plaintiff proven against the defendant Cassels on account of his attempted seizure and sale of the lumber under his supposed sawyer's lien? Under the contract for sawing the defendants were bailees of the logs and lumber, and by the common law, I think, had a claim or lien on the logs and lumber committed to them for their bill for sawing, so long as they retained actual possession; but, if they surrendered possession to the plaintiff or other party, this special claim or lien was waived and gone. Edwards on Bailments, §§ 420-424. No stress was laid by either side on the point as to who was in possession on the 26th of October, 1901, when Cassels put up his notices and advertised the lumber for sale. But the tendency of the testimony is to show that plaintiff was in possession. The sawing had been completed, and the sawyers, so far as I gather from the evidence, had left the ground, and no claim is made that they left any agent in charge. Plaintiff had stacked the lumber, used some of it, and sold a considerable portion of it, and it was on his own ground. So I must conclude he was in possession, and any lien the defendants may have once been entitled to was waived."

Henry & McLure, for appellant. Caldwell & Gaston, for appellee.

GARY, A. J. This action arises out of a contract between the parties to this suit for the sawing of a large quantity of lumber for the plaintiff, and an attempt on the part of the defendants to sell said lumber under an alleged sawyer's lien to pay for the sawing. The plaintiff also alleges a balance due by the defendant Cassels on a note as an offset to the sum due for the sawing. The complaint also prayed for an injunction, which was granted. The defendant Cassels appealed from the judgment of the circuit court.

The first question presented by the exceptions is whether his honor the circuit judge erred in his finding as to the price agreed upon for the sawing of the lumber. The finding of the special referee was sustained by the circuit judge, and it has not been made to appear to us that the preponderance of the testimony is against such finding.

The next question for consideration is whether the circuit court erred in its ruling that the defendants did not have a lien on the lumber for sawing at the time of the attempted seizure thereof. The report of the special referee as to this issue was sustained by the circuit court. The reasons assigned by the special referee for concluding that there was not a lien at the time mentioned are satisfactory to this court.

The next assignment of error is on the ground that the circuit judge held that the plaintiff was entitled to damages to the amount of \$50 by reason of the unlawful seizure of the lumber by the defendant Cassels. The special referee found that the plaintiff was only entitled to damages amounting to \$5. The circuit judge erred in overruling the report of the special referee upon this issue. The reasons assigned by the special referee are satisfactory to this court. It was the fact that the lumber had been delivered to the plaintiff that destroyed the defendant's lien for the sawing. The injury to the lumber took place after the delivery; therefore the defendants were not responsible therefor. *Doxier v. Johnston*, 2 Hill, 297.

The next question is whether there was error in holding that the note executed by Cassels was not barred by the statute of limitations. The payment on the note was made by the direction of Cassels, and this necessarily prevented the bar of the statute.

The last question is whether the judgment was entered in conformity with the decree. The circuit court has not ruled upon this question, and it cannot be made in the first instance in this court.

It is the judgment of this court that the judgment of the circuit court be affirmed, except in the particular hereinbefore mentioned, and that it be modified in that respect.

(70 S. C. 266)

SUTTON v. CATAWBA POWER CO.

(Supreme Court of South Carolina. Nov. 29, 1904.)

COMPLAINT—AMENDMENT—NEW TRIAL.

1. Under Code Civ. Proc. 1902, § 194, giving large powers of amendment, the exercise of such powers by the allowance of an amendment of complaint after verdict and new trial ordered will not be disturbed, where the amendment was material to the case, which had been defectively stated, and did not substantially change the cause of action.

Appeal from Common Pleas Circuit Court of York County; Townsend, Judge.

Action by A. E. Sutton against the Catawba Power Company. From an order permitting plaintiff to amend his complaint, defendant appeals. Affirmed.

Wilson & Wilson, for appellant. Jas. F. Hart, for appellee.

JONES, J. This is an appeal from an order of Judge Townsend allowing the complaint to be amended after a new trial ordered by Judge Dantzler. The original complaint relevant to the amendatory matter was as follows:

"(3) That on and before the 18th day of April, 1901, the defendant herein began the construction of a dam from the east bank of Catawba river, about three hundred yards above plaintiff's lands, for the purpose of impeding and storing the waters of said

river; and also on the west side of said river, at a point a short distance below where the unfinished dam projected into the same, had built of stone and timber an extensive structure known as a 'cofferdam,' of a height of about thirty feet, which extended from the west bank of said river to and beyond the middle thereof one hundred and fifty feet.

"(4) That, owing to the wanton and negligent manner in which said cofferdam was constructed, and without due regard to the rights of plaintiff herein, the flood waters of said Catawba river were, on or about the said 18th day of April, 1901, and days following, thereby diverted from their proper channel by the obstructions aforesaid, and were turned with great force and in great volume upon and across the lands of plaintiff, tearing away protective embankments, tearing up and washing off the soil, and depositing sand and other worthless substances thereon, and rendering a large part of the same unfit for cultivation, and of no value whatever.

"(5) That by reason of said continued cofferdam obstruction in said river, which was subsequently, in the early summer of 1901, built and extended yet further into and across said river, the flood waters of said river thereafter continued to be diverted from their proper channel, and were driven over and across plaintiff's lands, tearing up and carrying away the soil of other portions of her said lands, and depositing other sand and worthless substances thereon, and rendering other large portions thereof unfit for cultivation or other use.

"(6) That said cofferdam obstruction of the height aforesaid is yet standing from the west bank into and partly across the said river, and is daily being extended further into and across the same. And plaintiff alleges that by reason of the natural embankments protecting her said lands from flood waters having been destroyed as herein alleged, and by reason of the continued diversion of said river from its natural course at seasons of flood, the remaining portions of her said lands will be destroyed and rendered valueless.

"(7) And plaintiff alleges that she has sustained injury and damage to the value of her said lands and the income and profits accruing therefrom by reason of the negligent and improper construction of the said dam and cofferdam, in disregard of her rights and of defendant's duty, to the amount of ten thousand dollars."

The complaint as amended reads as follows:

"(3) That prior to the 18th day of April, 1901 (as it was authorized by statute to do, subject to the provision that it should be liable for all damages caused by its so doing), the defendant herein began the construction of a dam across the said Catawba river from the east bank of the river about

three hundred yards above plaintiff's lands, for the purpose of impeding and storing the waters of said river; and also to the west side of said river at a point a short distance below where the unfinished dam projected into the same, had built of stone and timber an extensive structure known as a 'cofferdam,' of a height of about thirty feet, which extended from the west bank of said river to and beyond the middle thereof one hundred and fifty feet.

"(4) That, owing to the construction of the said dam and cofferdam in the said navigable stream and to the wanton and negligent manner in which said dam and cofferdam were constructed, without due regard to the rights of plaintiff herein, the waters and flood waters of said Catawba river were, on or about the said 18th day of April, 1901, and days following, diverted from their proper channel by the obstructions aforesaid, and were turned with great force and in great volume upon and across the lands of plaintiff, tearing away protective embankments, tearing up and washing off the soil, and depositing sand and other worthless substances on the land, rendering a large part of the same unfit for cultivation, and of no value whatever.

"(5) That by reason of said continued cofferdam construction in said river, which was subsequently, in the early summer of 1901, built and extended yet further into and across said river, the flood waters of said river thereafter continued to be diverted from their proper channel, and were driven over and across plaintiff's said lands, tearing up and carrying away the soil of other portions of her said lands, and depositing other sand and worthless substance thereon, and rendering other large portions thereof unfit for cultivation or other use.

"(6) That said cofferdam obstruction of the height aforesaid is yet standing from the west bank into and partly across the said river, and is daily being extended further into and across the same. And plaintiff alleges that by reason of the natural embankments protecting her said lands from flood waters having been destroyed, as herein alleged, and

by reason of the continued diversion of said river from its natural course at seasons of flood, the remaining portions of her said lands will be destroyed and rendered valueless.

"(7) And plaintiff alleges that she sustained injury and damage through the injury and damage to her said lands and the lessening of the income and profits accruing therefrom by reason (of the construction of the said dam and cofferdam), and the negligent and wanton manner of their construction, in disregard of her rights and of the defendant's duty, to the amount of ten thousand (\$10,000) dollars."

In permitting the amendment the court said: "It is not intended by this order, nor is it the true meaning of the order, to add a third cause of action to the complaint, based upon the mere construction of the dam. The amendment is allowed for the purpose of stating more clearly the plaintiff's alleged causes of action for (1) constructing the dam and cofferdam without due regard to the rights of the plaintiff, and (2) constructing the dam and cofferdam in a negligent and wanton manner."

The question raised by the exceptions is whether the allowance of the amendment permitted plaintiff to insert a new cause of action. While the Code of Civil Procedure of 1902 does not authorize the substitution of a new cause of action by way of amendment, yet section 194 gives very large powers of amendment, and the exercise of such powers will not be disturbed except for abuse of discretion. *Ruberg v. Brown*, 50 S. C. 397, 27 S. E. 873. The amendment proposed should be material to the case, which has been defectively stated, and must not substantially change the cause of action. *Proctor v. Railway*, 64 S. C. 49, 42 S. E. 427. We do not think that the amendment allowed amounts to the insertion of a distinctly new cause of action, but falls within the rule permitting amendments "by inserting other allegations material to the case."

The judgment of the circuit court is affirmed.

(121 Ga. 673)

FOSTER v. PHINIZY et al.

(Supreme Court of Georgia. Jan. 27, 1905.)

REOPENING DECREE—OBJECTIONS TO REMEDIES
—WAIVER.

1. The facts disclosed by the record present a meritorious case for the reopening of the decree.

2. While parties cannot by consent confer jurisdiction upon a court which has none, they may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject-matter.

3. The objection to the remedy pursued not being made in the proper manner, and not being insisted upon in the court below, and the case having been heard and determined upon its merits without reference to such objection, a waiver in reference to the remedy resulted.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by one Turnbull against F. C. Foster and others, in which one Phinzy was made a party. The application of Mrs. Pauline Foster to be made a party was denied, and decree rendered, and thereafter she filed an application praying that she be made a party, and that the decree be reopened and amended. This application was denied, and Foster brings error. Reversed.

Saml. H. Sibley, for plaintiff in error. Q. L. Williford and George & Anderson, for defendants in error.

COBB, J. Mrs. Turnbull and three Fosters were tenants in common of a tract of land, in which each was entitled to an undivided one-fourth interest. It was agreed that F. C. and L. H. Foster should cultivate the land and make certain improvements, and from the rents and profits reimburse themselves for the sums which they might thus expend. Mrs. Turnbull filed an application for partition, and the two Fosters above referred to filed a plea in which they set forth the agreement that they had made improvements, and that they had not been reimbursed therefor. While this case was pending, Phinzy became the owner of the interest of F. W. Foster in the land, and was made a party, and the name of F. W. Foster stricken from the case. A decree was rendered providing for a division of the land into four parcels; the decree reciting the amount that was still unpaid for improvements, and providing that one-fourth of this amount should be chargeable against the parcel which had been set apart to Phinzy, and that F. C. and L. H. Foster should have a special lien on the land for its payment. There was no personal judgment rendered against Phinzy for the amount. To this decree Mrs. Turnbull and Phinzy excepted, and Mrs. Pauline Foster, the divorced wife of L. H. Foster, filed what purported to be a cross-bill of exceptions, complaining of the refusal of her application to be made a party to the proceeding. The decree was affirmed, and the bill of exceptions sued out by Mrs. Pauline

Foster was dismissed on the ground that no ruling had been made in the court below on her application to be made a party to the proceeding. *Turnbull v. Foster*, 116 Ga. 765, 43 S. E. 42. Subsequently, on January 27, 1903, Mrs. Foster filed an application to be made a party to the case, and prayed that the decree be reopened and amended so as to set up certain rights which she claimed against her former husband, L. H. Foster. Upon this application, *scire facias* was issued and served upon the parties to the decree. Phinzy filed an answer, in which he alleged that Mrs. Foster should not be allowed to become a party for the reason that the case had been disposed of by a final decree, and for the further reason that he was entitled, under a judgment against L. H. Foster, to the amount which the decree provided should be charged against the land set apart to him; the basis of this claim being fully set forth in the answer. Mrs. Foster filed a reply to Phinzy's answer, in which she set forth in detail the grounds upon which she claimed that the amount due her former husband should be decreed to her. Upon these pleadings the case came on to be tried by the judge upon an agreed statement of facts, and, after hearing argument, an order was passed denying and overruling the application of Mrs. Foster. From the agreed statement of facts, the following appears: L. H. Foster and his wife separated in May, 1894. Suit for divorce was thereafter filed, and on January 8, 1895, a judgment was rendered, awarding Mrs. Foster a specific amount per month as temporary alimony. On March 11, 1898, a final judgment was rendered, granting a divorce and decreeing to her the sum of \$2,500 as permanent alimony, and that she have a special lien upon certain property embraced in the schedule filed with the application for divorce; the one-fourth interest in the land above referred to being embraced therein, as well as other property, including notes and accounts. The amount now in controversy (that is, the sum charged against the land set apart to Phinzy) was not, in terms, referred to in the schedule or the decree; and no language was broad enough to embrace it, unless a general reference to notes and accounts would accomplish this purpose. L. H. Foster had been insolvent since January 9, 1897, and all of his property, except the amount now in controversy, has been absorbed by judgments which have priority over the judgment of Mrs. Foster. The partition proceeding was filed March 3, 1896, and the answer of L. H. and F. C. Foster, claiming a lien on the share of F. W. Foster, was filed during the same month. On January 9, 1897, L. H. Foster executed four promissory notes, payable to F. C. Foster, which notes were indorsed by the latter to F. W. Foster, and by him to Phinzy, before maturity, as additional security for a pre-existing debt of F. W. Foster to Phinzy. These notes were made with-

out consideration, merely for the accommodation of F. W. Foster, but Phinzy had no notice of this fact. Phinzy obtained judgment on these notes in March, 1900, and the execution issued thereon was entered on the general execution docket on March 16, 1900. On November 23, 1900, L. H. Foster made a written assignment to Mrs. Foster of the claim which he had under the partition decree against the land set apart to Phinzy. At this time Mrs. Foster had no actual notice of Phinzy's claim against her former husband. Written notice of this assignment was given to the then attorney of record of Phinzy on November 25, 1904. On November 11, 1902, Phinzy sold the land set apart to him, conveying the same with warranty, and the purchaser from Phinzy has since sold to others.

1. The claim which L. H. Foster had against F. W. Foster on account of improvements made under the contract above referred to, and which was in the partition decree asserted against the land set apart to Phinzy, was a mere chose in action. L. H. Foster, under the decree, recovered his full interest in the land as such; and his recovery for improvements was not a recovery of land in any sense, but a recovery of a debt which F. W. Foster owed to him, and which was, under the facts of the case, decreed to be chargeable against the interest of F. W. Foster in the land. Being a mere chose in action, no judgment lien attached thereto; and it was therefore under the control of L. H. Foster, as against his judgment creditors of every class, until they, either by garnishment or other appropriate remedy, either at law or in equity, brought the same before a court having jurisdiction to adjudicate the rights of creditors therein. Until this was done, L. H. Foster had the right, under the law, to dispose of the same for value, provided the transaction in which he did it was not entered into for the purpose of defrauding his creditors, and there was no creditor who, at the time he disposed of it, had an equity against him which could be asserted against the transferee. If the assignment to his former wife was made in good faith and for value, it passed to her the title to the chose in action, but she took it subject to any existing equities which F. W. Foster or his assignee might have had against her former husband. There is no evidence that the assignment was made with any fraudulent intent. Mrs. Foster was a purchaser for value, the consideration being the judgment which she had against her former husband for alimony. Neither F. W. Foster nor Phinzy had any claim against L. H. Foster at the time the partition proceedings were begun, or at the time the plea setting up the claim for improvements was filed. Neither had a right of legal set-off, and, if Phinzy has any right of set-off at all, it is one which the aid of a court of equity is necessary to enforce. In the as-

sertion of every equitable right, the one who asserts it must give effect to all the equitable rights of his adversary in the property in controversy, and hence this controversy is to be determined according to equitable principles.* Mrs. Foster is the holder of the legal title to the chose in action under her assignment, and, if her equities are superior or even equal to those of Phinzy, the law will prevail, and the legal title acquired by the assignment will control the determination of the issue. The liens of none of the judgments have attached to the property in controversy, and the dates of the judgments are therefore immaterial. The case is to be dealt with as if the fund were before the court under a proceeding in the nature of an equitable garnishment. Mrs. Foster has acquired no superior right by being the older judgment creditor. She has acquired a right by her assignment which will be controlling in her favor unless Phinzy has an equity which would override her legal title. Mrs. Foster is a purchaser for value of the chose in action. So far as her rights are concerned, Phinzy is not to be treated as a purchaser for value of the note of L. H. Foster. It was taken as collateral security for a pre-existing debt. He paid no new consideration for it, he parted with nothing, and his status was not changed. No matter what might be his rights as against L. H. Foster in reference to a plea of no consideration, certainly as against the rights of Mrs. Foster he is to be treated as a mere volunteer. The contest, therefore, is between Mrs. Foster, as a purchaser for value, and Phinzy, as a mere volunteer; and, under such circumstances, the rule in equity is as old as equity jurisprudence itself. By the judgment against L. H. Foster he acquired no legal lien against the property in controversy, and, not having expended anything in order to obtain the note against L. H. Foster, he has nothing which would give him a standing in a court of equity. He has no rights, either legal or equitable, which would prevail over the legal right of Mrs. Foster as the assignee of the chose in action which her former husband had against the land formerly owned by F. W. Foster.

2, 3. If a proper objection had been made in a proper manner to the court's entertaining the application of Mrs. Foster to reopen the decree, to which she was not a party, and the judge had refused the application on this ground, an affirmance of the judgment would probably have resulted. While parties by consent cannot confer jurisdiction upon a court in reference to a matter of which the court has no jurisdiction, they may, either expressly or by their conduct, waive an objection to a remedy asserted in a court having jurisdiction, but which would be held to have been an improper remedy if a timely objection had been made. *Coston v. Dudley*, 65 Ga. 252. Phinzy, in his an-

swer to the scire facias, alleged that Mrs. Foster's application should not be granted, because she was not a party to the decree which she was seeking to reopen, but this was not proper subject-matter of an answer. All of the facts necessary to a determination of this question appeared upon the face of the proceeding, and objection to the remedy should have been made either by demurrer or motion to dismiss. Civ. Code 1895, § 5049; Jones v. McNealy, 114 Ga. 393, 40 S. E. 248; Mathis v. Fordham, 114 Ga. 369, 40 S. E. 324; Kelly v. Strouse, 116 Ga. 883, 43 S. E. 230. While the cases just cited related to an ordinary action begun by petition and process, the principle of the decisions is applicable to the pleadings in any proceeding; the general rule in all cases being that issues of law must be raised either by demurrer or motions in the nature of a demurrer, and that an answer is not the appropriate way to bring such matters before the court. In addition to this, it is clear from the record that the parties, by the way in which they dealt with the case in the court below, waived any objection to the remedy pursued, and that the judge acquiesced in this waiver. The fact that Mrs. Foster was not a party to the decree which she was seeking to reopen appears in her application, and the hearing was had upon an agreed statement of facts which was entirely foreign to the question that she was not properly in court; and in this court counsel for the defendants in error does not, in his brief, refer to that portion of the answer which raises objections to the form of remedy pursued. The waiver was complete in the court below, and no disposition was manifested in this court to avoid the effects resulting from its existence. The order of the judge is entirely consistent with the view that he passed upon the merits of the case, and did not refuse the application on the ground that the wrong remedy was pursued.

Judgment reversed. All the Justices concur.

(70 S. C. 357)

EWART v. BOWMAN.*

(Supreme Court of South Carolina. June 13, 1904.)

SPECIFIC PERFORMANCE—DEFENSES.

1. Under a contract to purchase a half interest "in remainder, reversion or of whatever nature the same may be," the purchaser cannot decline to comply, on tender of a deed not objectionable in form, on the ground that the title attempted to be conveyed is not good, where he knew at the time of making the contract the defect claimed.

Appeal from Common Pleas Circuit Court of Newberry County; Aldrich, Judge.

Action by William F. Ewart against Katie E. Bowman. From an order dismissing the complaint, plaintiff appeals. Reversed.

Johnstone & Welch, for appellant. Lambert W. Jones, for respondent.

GARY, A. A. J. This is an action for the specific performance of a written contract, and was commenced on the 2d day of July, 1902, by service on the defendant of the summons and complaint. The agreement upon which the action is based is as follows:

"State of South Carolina, Newberry County. This memorandum witnesseth:

"(1) That I, Katie E. Bowman, do hereby promise, agree and bargain to purchase of William F. Ewart his one-half interest in remainder, reversion, or of whatever nature the same may be, in the following described real estate, to wit: * * *

"(2) That I agree, promise and bargain to pay to William F. Ewart for said one-half interest the sum of five hundred dollars, the same to be paid or secured to be paid whenever a proper deed of conveyance is tendered me, and conveying a valid title thereto.

"(3) That I, William F. Ewart, do hereby accept the foregoing offer of Mrs. Katie E. Bowman, and do hereby agree, promise and bargain to forthwith make a proper deed of conveyance to her for said one-half interest, she to pay the purchase price or secure the same whenever I tender to her said proper deed of conveyance.

"In witness whereof, we hereunto set our hands and seals, this 11th day of June, 1902. Katie E. Bowman, Wm. F. Ewart.

"Signed, sealed and delivered in the presence of M. E. Abrams, J. W. Hipp."

The complaint, after reciting the facts of this agreement, alleges: "That thereafter the plaintiff tendered to the defendant a proper deed of conveyance for said interest in said land, which deed she declined to accept, and also declined to pay said consideration of \$500, which she had agreed and promised to pay in said contract; her refusal to accept said deed and to pay said money being based upon the ground that good title to said interest could not be conveyed to her by the plaintiff, all of which will fully appear by reference to the grounds of her objection, hereto annexed, and marked 'Exhibit B,' and made a part of this complaint."

The grounds of objection referred to in the answer are contained in a letter written by the defendant on the 12th of June, 1902, which is as follows:

"Newberry, S. C., June 12, 1902. Mr. Wm. F. Ewart, Newberry, S. C.—Dear Brother: This is to inform you formally that I will not accept the deed tendered me for the property mentioned and described in the written agreement to purchase, signed by you and me on June 11th, 1902.

"The grounds for my refusal to comply with the terms of said memorandum are these:

"(1) I am advised that there is a serious question as to whether the title you tendered

*Rehearing denied December 3, 1904.

me to this property is good or valid; no objection, however, to the form and substance of your proffered deed, but to the title it attempts to convey.

"(2) I am advised, also, that there is a serious question as to your being able at this time to make a good or valid title to said property. The cloud upon this title above referred to is, so I am impressed, that this lot or premises has been held by the town of Prosperity, S. C., adversely to you for twenty years—indeed, over forty years.

"Yours very truly, K. E. Bowman."

The answer of the defendant admits the execution of the contract of purchase of the interest of the plaintiff in the lot described in paragraph 1 of the complaint. The answer also admits that the defendant refused to accept a deed from plaintiff, and gave her reasons in writing to plaintiff, as shown in Exhibit B, which she insists are good and sufficient reasons for her not accepting and paying for such title as plaintiff can now give or offer her to said lot, as shown in Exhibit C. The answer further alleges that plaintiff once had good and valid titles under the deed from James Graham to De Witt C. Graham, trustee, yet he has long since allowed said title to lapse and become extinct; by reason of the lapse of time the said premises have been used adversely to his interest, continuously, and to that of this defendant as well, amounting to 48 years nearly, from 1853, the date of deed to De Witt C. Graham, trustee, to present time; that she is advised that plaintiff cannot now give her good and valid and sufficient title to said lot, and hence cannot lawfully insist upon her accepting any title from him, nor paying him said sum of \$500.

The cause was tried on circuit by Judge James Aldrich on an agreed state of facts, and on the 27th day of February, 1903, he filed a decree dismissing the plaintiff's complaint, with costs, upon the ground that the lot described in plaintiff's complaint had been held by others adversely to plaintiff for a statutory period, and that the right of plaintiff to the possession was barred, and that the title tendered by him to defendant is not a good and sufficient conveyance of said lot. From this decree the plaintiff appeals to this court upon five exceptions, as follows:

"(1) The court erred in decreeing that the title tendered by the plaintiff to the defendant was not a good and sufficient conveyance of the lot in question.

"(2) That the court erred in decreeing that the complaint herein be dismissed.

"(3) That the court erred in decreeing that the fee to the lot in question was in the trustee, and still remains in him, and that consequently all who claim through him are barred.

"(4) The court erred in not decreeing that the plaintiff, under the deed in question, had a good and sufficient title to the said lot,

and, this being so, the defendant should comply with the terms of her purchase.

"(5) The court erred in not decreeing that the defendant should specifically perform her contract to purchase the said lot."

We think the circuit judge was in error in dismissing the plaintiff's complaint. The plaintiff, by his agreement, did not agree to tender to defendant a good and sufficient conveyance of said lot. On the contrary, the defendant obligated herself to pay the plaintiff \$500 for the interest of the plaintiff in said lot; the agreement expressly reciting, "That I, Katie E. Bowman, do hereby promise, agree and bargain to purchase of William F. Ewart his one-half interest in remainder, reversion, or of whatever *nature the same may be* in the following described real estate, to wit: * * * (Italics mine.) The deed tendered certainly was sufficient in form to convey all the interest of the defendant in said lot. In fact, no objection is made to the deed on that ground, for, in the letter of defendant setting out her reasons for declining, she expressly states and disavows any objection to the form: "No objection, however, to the form and substance of your proffered deed, but to the title it attempts to convey." The defendant does not ask to be relieved from her contract on the ground that she was overreached or not informed as to the status of the plaintiff's title, nor that she had made a hard, unreasonable, or unconscionable bargain. Nor does she plead any equity that would entitle her to be relieved of her contract. She is a sister of the plaintiff, and equal owner then and now of whatever interest he had. She knew at the time she purchased the interest of plaintiff that the defect which she now sets up—adverse possession—existed. In the third paragraph of her answer she alleges: "That the said plaintiff once had good and valid titles under said deed from James Graham to De Witt C. Graham, trustee, yet he has long since allowed said title to lapse and become extinct. By reason of the length of time the said premises have been adversely used to his interest, continuously, and to that of this defendant as well, amounting to forty-eight years nearly, from 1853, the date of deed to De Witt C. Graham, trustee, to present time." In the absence of any allegation of concealment, misrepresentation, or fraud, we think the defendant should comply with her agreement.

From this view of the case, it is not necessary to pass upon the nature of the interest the plaintiff would take under the trust deed, nor whether title could be acquired by an adverse claimant holding prior to the death of the life tenant. Suffice it to say that whatever interest the plaintiff has or will have under the terms of the deed of James Graham, trustee, is conveyed by the deed tendered by him to the defendant in this case, and that interest is what she agreed to purchase.

It is therefore ordered that the judgment of the circuit court be reversed, and the case be remanded to the circuit court, with directions to issue such orders as may require the defendant to specifically perform her contract as prayed for in plaintiff's complaint.

(70 S. C. 254)

DENNIS v. ATLANTIC COAST LINE R. R.

(Supreme Court of South Carolina. Nov. 28, 1904.)

DEATH BY WRONGFUL ACT—RAILROAD EMPLOYEE—EXTENT OF REMEDY—LIMITATIONS.

1. The act of North Carolina of 1897 (Priv. Laws N. C. 1897, p. 83, c. 56) giving a remedy for death by wrongful act to any employé of a railroad company operated in the state is only an enlargement of the Lord Campbell act (Code N. C. §§ 1498-1500), and must be construed with it.

2. An action will lie in the state under a statute of a foreign state where its provisions are not contrary to those of the state, but, as to the extent of the remedy, plaintiff will be governed by the limitations of such foreign state.

3. The provision in Lord Campbell's act of North Carolina (Code N. C. § 1498) that a failure to commence an action of wrongful death in one year should extinguish the right conferred by the statute applies to an action under the act brought in South Carolina.

Appeal from Common Pleas Circuit Court of Florence County; Gage, Judge.

Action by Cornelia A. Dennis, administratrix of Frank McGowan, against the Atlantic Coast Line Railroad. From judgment sustaining demurrer to complaint, plaintiff appeals. Affirmed.

W. F. Clayton, for appellant. Willcox & Willcox, for respondent.

GARY, A. J. Frank McGowan, a resident of South Carolina, was an engineer in the employment of the defendant, and was killed in North Carolina by the wreck of an engine he was running on the 10th November, 1900, more than one year before this action was commenced by his administratrix. It is alleged that the death of the intestate was caused by defects in the machinery and appliances he was operating, and that the defendant had notice of such defects.

An agreement between counsel is set out in the record, in which appears the following statement: "The issue is as to whether the plaintiff was barred of her right of action in this state, it being admitted that, under the Lord Campbell act of North Carolina, the action must be brought within one year, while in the state of South Carolina the limitation was two years, and that this action was brought after the lapse of one year and within two years; the object being to bring all matters before this court on this one appeal, and to save several appeals." The reason for the agreement was because this question would not otherwise at this time have been properly before the court.

The appellant contends that her action

was brought under the statute of North Carolina passed in 1897; that it was independent of the Lord Campbell act (Code N. C. §§ 1498, 1500); that its provisions were comprehensive enough to afford relief in this action; that the statute of limitations pertains merely to the remedy, and is governed by the *lex fori*. That statute is as follows: "Section 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Priv. Laws N. C. 1897, p. 83, c. 56. The other section has no application to this case. The respondent contends that this statute is but an enlargement of the provisions of the Lord Campbell act; that they are in *pari materia*, and must be construed together; that the time within which the action must be brought under the Lord Campbell act is in no sense a statute of limitations; and that any facts that would have destroyed the right of recovery if the suit had been instituted in North Carolina will defeat the action in this state.

The Lord Campbell act of North Carolina is as follows: "Whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executors, administrators, or collectors, and this notwithstanding the death, and although the wrongful act or neglect causing death, amount in law to felony." Code N. C. § 1498. The statute of 1897 has been declared by the Supreme Court of North Carolina, in the case of *Hancock v. N. & W. R. R.*, 124 N. C. 222, 32 S. E. 679, to be constitutional. Our construction of the statute of 1897 is that it was merely intended to enlarge the provisions of the Lord Campbell act, that it was in the nature of an amendment to that act, and that they must be construed together.

This action could not have been maintained in North Carolina after more than one year had elapsed from the death of the person suffering the injury. In *Huntington v. Attrill*, 146 U. S. 657, 670, 13 Sup. Ct. 224, 228, 36 L. Ed. 1123, the court says: "In order to maintain an action for an injury, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. * * * But such is not

the law of this court. By our law a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." See, also, 16 *Harv. L. Rev.*, No. 1, p. 63 (Nov., 1902). As we have a statute which gives an action for wrongfully causing death, it is not against public policy to enforce such a liability here, although it arose in another jurisdiction. *Stewart v. B. & O. R. R.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. When such a liability is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act, in any degree, is subject to the *lex fori*, with regard either to its quality or its consequences. *Slater v. R. Co.*, 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, 48 L. Ed. 900. In the case last mentioned the court uses this language: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation—an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. 71; *Dennick v. Central R. Co.*, 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith v. Condry*, 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side, as quite inadmissible, the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

The two statutes of North Carolina must be construed together in determining the consequences of the wrongful act. The action in this state is incumbered with all the burdens arising out of either of said statutes. In *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 525, 526, the court thus construes the provision of the Lord Campbell act limiting the time within which the action must be brought: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the

action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun. The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons; and, as more than a year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must therefore be affirmed."

It is well settled in this state that the statute of limitations relates to the remedy, and is enforced according to the *lex fori*. *Sawyer v. Macaulay*, 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations. At common law there was no right of action for death caused by wrongful act. The requirement as to the time of commencing the action is a part of the statute creating this right. It is incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, one of which is that the suit must be instituted within a certain time. In North Carolina the failure to commence the action within one year did not simply extinguish the remedy, but was an extinction of the right conferred by the statute. When such is the case the action cannot be maintained in this state. *Sawyer v. Macaulay*, 18 S. C. 543. The North Carolina decision is in harmony with the principle announced in *Walker v. Chester County*, 40 S. C. 342, 18 S. E. 936. That case was an action under the statute which gave a right of action for damages caused by a defect in the repair of a highway. The statute contained a proviso limiting the right of action to cases, *inter alia*, where the plaintiff had not brought about his injury by his own act or negligently contributed thereto. There was a demurrer to the complaint on the ground that it failed to allege that the plaintiff did not in any way bring about her injury by her own act, or negligently contribute thereto. A county was not liable at common law in an action for injuries received from defects in the repair of a highway. This court held that the demurrer was properly sustained. Mr. Chief Justice McIver concurred on the ground that the conditions upon which the right is conferred must appear in the complaint, as otherwise no right of action is stated. These authorities are conclusive of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(70 S. C. 274)

PARKS v. LAURENS COTTON MILLS.
(Supreme Court of South Carolina. Nov. 29, 1904.)

LANDLORD'S LIEN—ACTION TO ENFORCE—COMPLAINT.

1. In an action by a landlord to recover from defendant, who had purchased cotton from plaintiff's tenant, on which cotton plaintiff held a lien, a complaint alleging the lien, purchase of the cotton, notice of the lien soon after the purchase, and refusal to deliver the cotton on demand, and refusal on the demand of the officer to allow inspection of books required to be kept by law on purchase of cotton, states a cause of action.

Appeal from Common Pleas Circuit Court of Laurens County; J. H. Hudson, Special Judge.

Action by John W. Parks against the Laurens Cotton Mills. From an order dismissing the complaint, plaintiff appeals. Reversed.

J. P. Park and Simpson & Cooper, for appellant. Ferguson & Featherstone, for respondent.

JONES, J. The appeal in this case is from an order sustaining a demurrer to the complaint for insufficiency, and dismissing the complaint. The action was for damages, based upon the following allegations:

"(1) That the defendant is now, and at the times herein stated was, a corporation duly chartered, organized, and doing business under the laws of the state of South Carolina, with its principal place of business at Laurens, S. C., and is engaged in the business of buying cotton from the initial seller, and in the manufacture of cotton goods.

"(2) That the plaintiff is the owner of real estate near Park Station, in Laurens county, and said state, and rented a part of his said land to W. K. McDowell for agricultural purposes for the year 1902; the said rent being payable in the fall of the year 1902.

"(3) That on the — day of November, 1902, the said W. K. McDowell sold to the defendant, Laurens Cotton Mills, one bale of cotton, of the value of forty-five dollars, on which the plaintiff held a lien for his said rent, and the said McDowell failed within ten days thereafter to pay the said rent, or to deposit the amount of the same with the clerk of court for Laurens county.

"(4) That, soon after the sale of the said cotton to the defendant by the said W. K. McDowell, the plaintiff notified the defendant that he held a lien on the said cotton for rent, and requested and demanded of the defendant the possession of the said cotton, and also demanded of the defendant an inspection of its books wherein is kept a record of all cotton bought from the initial seller, which demand and request the defendant willfully, maliciously, and in wanton disregard of the rights of the plaintiff,

and in open violation of the laws of the state of South Carolina, refused. That the plaintiff then applied to Magistrate John M. Hudgens for a warrant of seizure against the said cotton, which warrant was duly and regularly issued, directed to the sheriff of Laurens county, South Carolina. That the said sheriff, by his duly and legally appointed deputy, went to the office of defendant, in the city of Laurens, S. C., for the purpose of executing the said warrant of seizure, and demanded of the president and secretary of the defendant an inspection of its books, wherein is kept a record of all cotton bought by the defendant from the initial seller; but the defendant, through its officers and agents, willfully, maliciously, and in wanton disregard of the rights of the plaintiff, and in open violation of the laws of South Carolina, refused to allow the said deputy to inspect its books, and thereby prevented him from executing the said warrant.

"(5) That by reason of the defendant's refusal to deliver the said cotton to the plaintiff, and its refusal to allow either the plaintiff or the sheriff to inspect its books as aforesaid, the plaintiff has suffered damage to the amount of two thousand dollars."

The specifications of insufficiency were:

"(1) Because the complaint fails to allege that the defendant was in possession of the bale of rent cotton at the time that plaintiff demanded its possession or an inspection of the books, or that defendant was in possession thereof at the time lien warrant was issued, or at the time the action was brought.

"(2) Because the said complaint fails to allege any actual damage sustained by the plaintiff.

"(3) Because the complaint fails to connect the plaintiff with any tort committed by the defendant, or to show that plaintiff was damaged by any tort committed by the defendant."

The exceptions impute error in sustaining the demurrer upon the above grounds.

When a fact is pleaded, whatever inferences of law or conclusions of fact may properly arise from it are to be regarded as embodied in such averment. *Mason v. Carter*, 8 S. C. 103. The following from *Pomeroy on Code Pleading* has been several times approved in our decisions (*Childers v. Verner*, 12 S. C. 1; *Jerkowski v. Marco*, 56 S. C. 241, 246, 34 S. E. 386): "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective—such insufficiency pertaining, however, to the form rather than to the substance—the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the

avements more definite and complete by amendment." Applying this rule in connection with the rule that pleadings should be liberally construed with a view of substantial justice between the parties, we think it was error to sustain the demurrer and dismiss the complaint. In *Graham v. Seignious*, 53 S. C. 132, 137, 31 S. E. 51; *Michalson v. All*, 43 S. C. 459, 21 S. E. 323, 49 Am. St. Rep. 857, and *Drake v. Whaley*, 35 S. C. 187, 191, 14 S. E. 397, it is shown that one who receives and disposes of cotton subject to lien, with notice of the lien, is liable in damages to the lienor. The complaint alleges the plaintiff's lien, the purchase of the cotton by defendant, notice of the lien soon after the purchase, and refusal to deliver the cotton upon demand of plaintiff, and refusal of the demand of the officer having warrant of seizure, to prevent inspection of books, required by law to be kept, containing a record of cotton bought from the initial seller, in willful disregard of plaintiff's rights, thereby preventing the execution of the warrant of seizure. That defendant had possession of the cotton soon after the sale of it to defendant by the lienor, when notice of the lien was given, is a reasonable inference from the purchase of the cotton for manufacturing purposes, and refusal to produce it on demand of the plaintiff, or to permit the use of means provided by law for the identification of cotton purchased. It is not probable that defendant had sold the cotton before notice of the lien, as it was not bought for sale, but for manufacture. If the cotton, after notice of the lien, was sold or used in manufacturing, that would be a conversion, rendering defendant liable in damages. So that it follows, as a reasonable inference from facts alleged, that defendant either had possession of the cotton as purchased soon after the purchase, or had converted it into some manufactured product, in either of which cases, liability in damages would attach after notice of the lien.

The second specification is disposed of by reference to the allegations as to the loss and value of the cotton subject to plaintiff's lien.

That the third specification could not be sustained, follows from what has been already said.

The judgment of the circuit court is reversed.

(70 S. C. 362)

SIMS et al. v. DAVIS et al.
(Supreme Court of South Carolina. Dec. 3, 1904.)

ABATEMENT AND REVIVAL—TRESPASS—DEATH OF DEFENDANT—SUBSTITUTION OF HEIRS—RES JUDICATA.

1. An action for trespass on lands in possession of plaintiff prior to Act 1892 (21 St. at Large, p. 18) did not survive against the heirs of the defendant on his death pending the action.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 257, 282.]

2. Under Code Civ. Proc. 1902, § 142, providing that on the death of a party the court, on motion, within one year or after on supplemental complaint, may allow the action to be continued against the representative or successor in interest, an action against an ancestor for trespass may be continued against an heir more than one year after death of the ancestor, by service of supplemental complaint, without summons, but on rule to show cause.

3. Where a rule to show cause adjudged nothing, it cannot be pleaded as a former adjudication.

Appeal from Common Pleas Circuit Court of Richland County; Townsend, Judge.

Action by James C. F. and Frank E. Sims against George W. Davis. On the death of the defendant the action was continued against his heirs and administrators. Judgment for plaintiffs, and defendants appeal. Reversed.

The plaintiffs commenced an action on September 5, 1891, against the defendant, George W. Davis, for damages for trespass on lands in possession of plaintiffs, and to which they claimed title. Defendant answered, denying the allegations in the complaint, and alleging title in himself to the land. In April, 1899, the following notice of motion and affidavit was served upon Mrs. Mary E. Davis and G. Wilmot Davis, individually, and as administrator of George W. Davis, deceased:

"To Mrs. Mary E. Davis and G. Wilmot Davis, and to G. Wilmot Davis, as administrator of the estate of George W. Davis, deceased: Take notice that Frank E. Sims will apply to the presiding Judge of the Court of Common Pleas for Richland County in open Court, on Monday, April 24, 1899, at 10 A. M., or as soon thereafter as counsel can be heard, for an order granting to said Frank E. Sims leave to serve and file a supplemental summons and complaint reviving said action in his name against you and all of you. The motion will be based upon the original summons, complaint and answer in the cause and upon the affidavit herewith served. Respectfully, Robt. W. Shand, Attorney for Frank E. Sims."

"Affidavit. State of South Carolina, Richland County. Before me personally comes Frank E. Sims, and says on oath that he is one of the plaintiffs in this action; that the action was commenced on the 31st August, 1891, by leaving summons and complaint with the sheriff of Richland county for service, the said complaint being for injury to and trespass upon real estate of the plaintiffs; that the said George W. Davis served his answer to said complaint on June 24, 1892, claiming title in fee to the said real estate; that the said James C. F. Sims died intestate in October, 1891, and deponent has since acquired all the rights, title and interest of all the distributees in and to the land upon which the said trespasses are alleged to have been committed, and to which a title in fee was claimed by said G. W. Davis: that the defendant, George W. Davis, died intestate on July 5, 1895, leaving him surviv-

ing as his heirs at law his widow, Mary E. Davis, and his son, G. Wilmot Davis, and the said G. Wilmot Davis is administrator of his estate; that no settlement nor adjustment of the issues raised by the said pleadings has ever been made, and the case is still on the calendar of this court. Frank E. Sims.

"Sworn to before me, this April 18, 1899. Robt. W. Shand, Notary Public for S. C. [L. S.]"

This motion was heard at the November, 1899, term by his honor, Judge James Aldrich. Messrs. W. D. Melton and J. S. Muller, disclaiming in so doing to represent either Mrs. Mary E. Davis or G. Wilmot Davis, or G. Wilmot Davis as administrator of George W. Davis, deceased, and appearing as amici curiæ only, resisted the motion. On November 8, 1899, Judge Aldrich filed the following order:

"This was a motion for leave to serve and file a supplemental summons and complaint, reviving the above-entitled action in the name of Frank E. Sims, as surviving plaintiff, against Mary E. Davis and G. Wilmot Davis as heirs at law, and G. Wilmot Davis as administrator of the estate, of the defendant George W. Davis, who is alleged to have died in October, 1891. After reading and filing the affidavit of Frank E. Sims and the notice of said motion, and the pleadings on file in said action, and after hearing argument by Robert W. Shand, Esquire, for the motion, and by William D. Melton and J. S. Muller, attorneys, against the motion, it appearing that more than a year has elapsed since the death of said George W. Davis, it is ordered that the said motion be, and the same is hereby, refused, upon the ground that the matter cannot properly be brought before the court by motion. James Aldrich, Presiding Judge. November 8th, 1899."

In August, 1902, the following supplemental complaint was served upon G. Wilmot Davis individually, and as administrator of George W. Davis, deceased, and upon Mrs. Mary E. Davis:

"Frank E. Sims, one of the plaintiffs above named, by way of supplement to and revivor of the action herein below stated, complains and says:

"First. That an action was commenced in this court on 1st September, 1891, by the plaintiffs above named against the defendant above named, the summons wherein was personally served on the defendant on 5th September, 1891, and the complaint whereof was in words and figures as follows:

"The State of South Carolina, Richland County. In the Court of Common Pleas. James C. F. Sims and Frank E. Sims, Plaintiffs, against George W. Davis, Defendant. The plaintiffs, complaining of the defendant, allege:

"(1) That they are tenants in common, are the owners in fee of all that certain tract of land, situate, lying, and being in

the county of Richland and state aforesaid, on the Stateburg or Garner's Ferry Road, about two and one-half miles from the city of Columbia, butting and bounded toward the north on the road from Columbia to Stateburg, east on lands of Dr. Fisher, formerly of the estate of Wade Hampton, south partly on lands of Dr. L. J. Hancock, and partly on lands now or formerly known as the "Race Track Field," which said last-mentioned tract of land now belongs to one Newsum.

"(2) That during the fall of the year 1890, on the ——— day of November therein, while these plaintiffs were in possession thereof as owners as aforesaid, defendant wrongfully and unlawfully entered upon plaintiffs' said land, and without their consent, and after being forbidden so to do, trod down the grass, plowed up the soil, and otherwise injured said premises, to plaintiffs' damage one thousand dollars.

"Wherefore plaintiffs demand judgment against the defendant for the sum of one thousand dollars, and the costs of the action.

"Andrew Crawford,

"Plaintiffs' Attorney.

"31st August, 1891."

"Second. That on 24th June, 1892, the defendant duly served his answer, whereby he asserted and claimed title in fee and right of possession to the parcel of land described in said complaint, and the cause was duly docketed on the calendar of this court.

"Third. That the plaintiff James C. F. Sims died intestate in October, 1891, and his surviving copartner has since acquired by purchase and devise all of the said James C. F. Sims' estate in said parcel of land.

"Fourth. That the defendant, George W. Davis, died intestate on 5th July, 1895, leaving him surviving, as his distributees, his widow, Mary E. Davis, and his son, G. Wilmot Davis, and the said G. Wilmot Davis is the duly appointed administrator of his father's estate.

"Fifth. That no settlement or adjustment of the issues raised by said pleadings has ever been made, and the cause is still on the calendar of this court.

"Wherefore the plaintiff Frank E. Sims prays that the said action may be continued in his name against the said Mary E. Davis and G. Wilmot Davis, as heirs at law of George W. Davis, deceased, and against G. Wilmot Davis, as administrator of the estate of said George W. Davis, deceased, and that he have judgment against said administrator, as prayed for in said original complaint, and against the said Mary E. Davis and G. Wilmot Davis, on the issue raised by the answer of their intestate.

"Robt. W. Shand,

"Attorney for Frank E. Sims.

"August 20, 1902."

At this stage of the proceeding, the case was called up by Mr. Robert W. Shand, plain-

tiff's attorney, before Judge Hudson, as special judge, holding a special term of the court in March, 1903. Mr. Shand moved the court for an order continuing the action in the name of Frank E. Sims against the said G. Wilmot Davis and Mary E. Davis, as heirs at law of George W. Davis, deceased, and against G. Wilmot Davis, as administrator of the estate of George W. Davis, deceased. Mr. J. S. Muller resisted the motion, stating that he had been attorney for the deceased defendant, and disclaiming to represent in so doing either Mary E. Davis or G. Wilmot Davis, or G. Wilmot Davis, as administrator of the estate of George W. Davis, deceased, and appearing as *amicus curiæ* only. Judge Hudson refused Mr. Shand's motion for an order of continuance, and thereupon the following *ex parte* order was applied for by Mr. Shand and granted by Judge Hudson:

"On hearing the supplemental complaint in this case, dated August 20, 1902, signed by Robt. W. Shand, attorney for Frank E. Sims, and served personally on Mrs. Mary E. Davis and G. Wilmot Davis, on 4th September, 1902, as shown by proof of service indorsed thereon, and on application of Frank E. Sims, by his attorney, Robt. W. Shand, it is ordered that the said Mary E. Davis and G. Wilmot Davis show cause before this court, within twenty days after the service of a copy of this order upon them, why the said action should not be continued by Frank E. Sims against them as heirs at law of George W. Davis, deceased, on the supplemental complaint heretofore served upon them as aforesaid. J. H. Hudson, Special Judge. March 23, 1903."

This order to show cause was served upon the parties named, and within the time limited therein the following return was served:

"Mary E. Davis and G. Wilmot Davis, upon whom has been served an order of this court, dated March 23, 1903, requiring them to show cause before this court, within twenty days after the service of a copy of said order upon them, why the said action should not be continued by Frank E. Sims against them as heirs at law of George W. Davis, deceased, on a supplemental complaint heretofore served upon them as aforesaid, appearing by their attorneys, W. D. Melton and J. S. Muller, for the purposes of this return only, for cause why the said action should not be continued against them as aforesaid, respectfully submit: (1) That they are not parties to this action; that the only mode of making them parties to this action is by the service of the summons herein upon them; that they are not named in the original summons herein; that said original summons has never been served upon them, or either of them; and that no amended or other summons has been issued with the said supplemental complaint, or served upon them or either of them. (2) Because the application to continue the said action against these respondents is not based on a proper show-

ing by affidavit, and is wholly unsupported by affidavit. (3) Because the cause of action did not survive or continue. (4) Because, if the cause of action did survive or continue, the action should be continued against the administrator of the said George W. Davis, deceased, only, and not against these respondents as heirs at law. Wherefore they pray that the said rule against them may be discharged. Wm. D. Melton, J. S. Muller, Attorneys for the said Mary E. Davis and G. Wilmot Davis for the purposes of this return only. April 8, 1903."

The proceeding came up before his honor, Judge D. A. Townsend, at the July, 1903, term of the court for Richland county. At this hearing, in addition to the grounds set out in the return, it was urged that the motion of plaintiff had been finally passed upon by the order of Judge Aldrich of November 8, 1899, and was *res judicata*.

On August 1, 1903, Judge Townsend filed the following order:

"In this case the action was commenced 1st September, 1891, by J. C. F. Sims and Frank E. Sims against George W. Davis. The complaint alleged that plaintiffs were owners as tenants in common of a parcel of land, and were in the possession thereof, and that defendant had committed certain alleged acts of trespass thereon; and judgment was demanded for \$1,000. The defendant answered, making a general denial, and alleging further that he was seised in fee of this land, and was entitled to the possession of it. The cause was docketed for trial, but, before trial had, James C. F. Sims died intestate in October, 1891, and the defendant died intestate 5th July, 1895. In August, 1902, the cause being still on the calendar of this court, Frank E. Sims served upon Mary E. Davis and G. Wilmot Davis a supplemental complaint, in which he alleged the above facts, claimed to be now the successor in interest of the share of J. C. F. Sims, deceased, and prayed 'that the said action might be continued in his name against the said Mary E. Davis and G. Wilmot Davis, as heirs at law of George W. Davis, deceased, and against G. Wilmot Davis, as administrator of the estate of George W. Davis, deceased, and that he have judgment against said administrator as prayed for in said original complaint, and against the said Mary E. Davis and G. Wilmot Davis on the issue raised by the answer of their intestate.' This supplemental complaint was not verified. The matter was brought up before Judge Hudson, as special judge, holding a special term of the court of common pleas for Richland county, in March, 1903. At the hearing Mr. J. S. Muller appeared in opposition, declaring that he did so not as attorney for Mrs. Davis and her son, but only as *amicus curiæ*. After argument, Judge Hudson passed the following order [already set out herein]. The respondents, Mary E. Davis and G. W. Davis, having been served with copies

of Judge Hudson's order, made return, 'appearing by their attorneys, W. D. Melton and J. S. Muller, for the purposes of this return only, for cause why the said action should not be continued against them as aforesaid' [which return is previously set out herein in full]. Upon these papers the case was heard before me at the July term of the Richland court. The first ground of the return objects that the action could not be continued against the heirs of Geo. W. Davis without the issue and service of an amended summons. In the case of a supplemental complaint where the parties are all living, no additional summons is required, because the parties are already in court. To revive an action against the heirs of one deceased, Code, § 142, requires the service of a supplemental complaint, but says nothing about serving an amended summons. If the action descends ipso facto to the heirs of one deceased, so that no summons is necessary within a year to make them parties to the cause, for the reason that they are already parties, I cannot see how they cease to be parties at the expiration of a year. But however that may be, notice was given to these respondents that the action would be pressed against them, and application made to the court for judgment under the supplemental complaint. Without any appearance by them, but after hearing Mr. J. S. Muller, contra, as the professed *amicus curiæ*, Judge Hudson passed the order above quoted. It certainly was not passed without full notice to them, and from it no appeal has been taken. Besides, as said by the court in *Lyles v. Haskell*, 35 S. C. 403, 14 S. E. 832: 'We find no express requirement that in a case continued by order there must also be a summons; and as the order as served contained substantially all the elements of a summons, we cannot say that the absence of a formal summons was a jurisdictional defect.' While, therefore, I think Judge Hudson was right in granting this order, I am sure that it is too late now to object, and that I am without power to treat his order as a nullity on the return now under consideration. And that order disposes of all the objections raised by the return of the respondents. I will add, however, that I think the cause of action survived. In an action for trespass to real estate, the plaintiff is required to prove title or possession according to the nature of the defense. If the defendant does not raise the issue of title, plaintiff need prove only possession and the trespass; but if defendant raises the issue of title by denial or affirmation, then the plaintiff is bound to prove title as a part of his cause of action, as stated in his complaint, and a judgment in such action settles the question of title. The plaintiffs alleged title in themselves; the original defendant denied this allegation and claimed title, and made it an issue in the cause, tendered by the plaintiffs, with the burden of proof on plaintiffs, and thus a

part of plaintiffs' cause of action. This interest in the title descended by operation of law to the respondents, and is the subject of this action. It is therefore ordered that the return of the respondents is insufficient, and is hereby overruled, with leave to them to make proper answer to the allegations contained in the supplemental complaint within twenty days from notice of the filing of this order."

From this decree defendants, G. Wilmot Davis, in his own right and as administrator, and Mary E. Davis, appeal.

W. D. Melton and J. S. Muller, for appellants. R. W. Shand, for respondents.

WOODS, J. The pleadings and the several notices and orders which are involved in this appeal are set out in full in the report of the case. The exceptions will not be considered in detail. The two main questions involved are: First, Did the cause of action stated in the complaint survive or continue against the heirs of the defendant upon his death during the pendency of the action? Second, If it did survive, was it necessary, upon the filing of a supplemental complaint more than one year after the death of the defendant, to issue a new summons directed to the heirs, in order to continue the action against them?

It is clear that at the time of the death of the ancestor, in 1891, no judgment for damages could be recovered against the heir on account of the trespass of the ancestor. *Huff v. Watkins*, 20 S. C. 477; *Jenkins v. Bennett*, 40 S. C. 397, 18 S. E. 929. The act of 1892 (21 St. at Large, p. 18) establishing a different rule has no retroactive effect, and hence does not affect this case. If this complaint were for the recovery of real estate, it would then be founded on a cause of action which would survive; and the action would be continued against the heirs of defendant, because they would, by operation of law, have the ancestor's claim to the land, the title to which would be adjudicated by the result of the action. But the complaint is not for the recovery of real estate, but for a distinct trespass alleged to have been committed on the land in the possession of the plaintiff. It is therefore an action of trespass *quare clausum fregit*. It is quite true, when the plaintiff alleged that he was not only in possession, but was the owner of the land at the time of the trespass, and the defendant denied this allegation, the question of title was raised, and, if the defendant had lived to have a verdict and judgment for damages entered against him, the question of title would have been effectually determined. *Parker v. Legett*, 12 Rich. Law, 200; *Parker v. Leggett*, 13 Rich. Law, 172; *Heyward v. Farmers' Company*, 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702. But neither a verdict nor a judgment for the recovery of the land could

have been entered. The adjudication of the title would not have been direct, but it would have followed by necessary implication from the fact that the plaintiff recovered a judgment for damages for a trespass, the judgment for damages depending on his claim of title which the defendant denied. "A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or different." 2 Black on Judg. § 504. No judgment could be recovered in this action except for damages, and damages cannot be recovered against the heirs for the trespass of the ancestor, merely because the result of the action, as it originally stood, would have incidentally involved the title. On this ground the judgment of the circuit court must be reversed. This is decisive of the case, but the other question concerns an important matter of practice, and is therefore considered.

The supplemental complaint was filed more than a year after the death of the defendant, under the following provision of section 142 of the Code of Civil Procedure of 1902: "In case of death, marriage or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. * * *" In *Arthur v. Allen*, 22 S. C. 432, 444, the court says: "But it is said that there was no necessity or authority for issuing a summons with such supplemental complaint. The object was to make the representatives of the deceased persons parties to the action, and as the only mode of effecting that object is by the service of a summons, unless in the case where the application is made by motion within a year from the death of such parties, it would seem to follow necessarily that a summons must issue, or such representatives never would become parties. It does not appear, therefore, that the objections urged to the validity of the summons of June, 1882, and the supplemental complaint issued thereon, can be sustained. More than a year had elapsed from the death of the several parties, and hence the action could not be continued by motion, and only by supplemental complaint, for the filing of which no leave of the court was necessary, as we have seen." It was insisted in argument that this conclusively establishes the proposition that a summons must always be issued when a supplemental complaint is filed under section 142. It will be observed in the case of *Arthur v. Allen*, *supra*, upon filing the supplemental complaint the summons was issued and served, and the defendants moved to set aside the services on the ground that section 142 does not contemplate the service of a summons

when a supplemental complaint has been filed, and that such service was not effectual to require those against whom the action was continued to answer the complaint. The issuing and service of a summons was held to be sufficient and proper. The point was not involved in that case whether an order to show cause would not have been equivalent to a summons, or sufficient notice to the heirs to require them to answer. Whether we regard the continuance of the action against the heirs as bringing in entirely new and independent parties, or merely a substitution of the heirs in the stead of the ancestor whose rights have descended to them, it is manifest in either case the summons would be proper and sufficient. In the one case it would be necessary to commence the action against the heir, and in the other it would be adequate notice to him to answer the supplemental complaint. We do not think, however, the proceeding is to be regarded as a new action or as bringing in independent parties, but as the continuance of the old action against the heir in right of his ancestor. It is to be observed that the statute does not require the service of a formal summons, and it would be carrying technicality to its utmost limit to hold that an order of the court giving notice of the supplemental complaint and requiring the heir to answer would not suffice to bind the heir and give the court jurisdiction, in the absence of an express provision requiring a formal summons. Taking this view, it was said in *Lyles v. Haskell*, 35 S. C. 891, 402, 14 S. E. 829, 832, after quoting the provision of the Code of Procedure here under consideration: "This was done within a year by Judge Hudson's order of June 7, 1883, and a copy of the same was served on each of the heirs, with a notice that, if they did not within twenty days appear and answer the complaint, the plaintiff might apply to this court for an order appointing a guardian ad litem for the infants, etc. It is contended, however, that a summons was indispensable. We find no express requirement that in a case continued by order there must be also a summons, and, as the order served contained substantially all the elements of a summons, we cannot say that the absence of a formal summons was a jurisdictional defect." It is true that there the cause was continued by order, the defendant not having been dead more than one year, while in this case a supplemental complaint was necessary, more than a year having elapsed after death. But in neither case is a formal statutory summons expressly required, and therefore the views expressed by the court apply in one case as well as the other. The order of Judge Hudson only required the parties to show cause why the action should not be continued against them "on the supplemental complaint heretofore served upon them." It adjudged nothing. Upon the coming in of the return, Judge Townsend ordered the case to be continued against the heirs,

with leave to answer within 20 days. All this must be regarded sufficient, in the absence of an express requirement for the service of a summons.

On the first ground above stated, the judgment of the circuit court is reversed.

(70 S. C. 303)

JONES et al. v. BOYKIN.

(Supreme Court of South Carolina. Nov. 30, 1904.)

ACTION TO RECOVER LAND—TAX DEED—COMPLAINT—LIMITATIONS—INFANCY.

1. In an action to recover land, the complaint alleged that defendant claimed under a tax deed based on a sale of taxes under circumstances rendering the deed null and void for fraud. Held not to render the complaint demurrable for insufficiency.

2. Code 1902, § 426, provides that a sheriff's deed shall be prima facie evidence of good title in the holder, and that all proceedings have been regular, and that no action to recover land sold by the sheriff shall be brought after two years. Held a pure statute of limitation, and affected by the disability of infancy of plaintiffs.

Appeal from Common Pleas Circuit Court of Kershaw County; Klugh, Judge.

Action by Mary L. Jones and others against Burrell H. Boykin. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

A. B. Stuckey, for appellants. Kirkland & Moore, for respondent.

JONES, J. The plaintiffs in this case appeal from an order of Judge Klugh sustaining a demurrer to the complaint for insufficiency, in so far as it attempted to set up a legal cause of action for the recovery of land. The complaint is as follows:

"First. That many years since, James Ammons, of said county and state, departed this life intestate, seised and possessed and being the owner in fee of all that tract of land situate in said county and state, containing seventy-two acres, more or less, bounded by lands owned by persons now or formerly, as follows: * * * That Mrs. M. A. Ammons departed this life intestate on the 11th day of June, 1900, leaving the three daughters of the said James Ammons, deceased, being also her daughters, as her sole heirs at law. That the said Janie Boykin also departed this life intestate on the — day of April, 1902, leaving as her sole heirs at law her husband, the plaintiff Ellie Boykin, and her son, the plaintiff Otis A. Boykin, the latter being an infant under the age of twenty-one years. His father, the said Ellie Boykin, has been appointed his guardian ad litem for the purposes of this action by L. A. Wittkowsky, Esq., the master for said county.

"Second. That the plaintiffs herein are seised in fee and entitled to the immediate possession of the tract of land above described.

"Third. That the defendant, Burrell H. Boykin, is in possession of said tract of land, and unlawfully withholds the same from the plaintiffs, to their damage in the sum of one hundred dollars.

"Fourth. Plaintiffs further allege that in or about the year 1887 the said Mrs. M. A. Ammons, being then in possession and control of said tract of land, each of her daughters aforesaid being under the age of twenty-one years, placed the defendant in possession of said premises under an agreement to collect the rents, account to her for the same, and pay the taxes upon said premises; that the said defendant continued for one or two years to collect the rents and account to the said Mrs. M. A. Ammons therefor, and paid the taxes upon said premises; that afterwards, while he was thus in possession, and while it was thus his duty to pay the taxes upon said premises, the defendant neglected and failed to pay the same, and, although the said land had been duly assessed, prior thereto on the taxbooks of said county in the name of the said Mrs. M. A. Ammons, the auditor for said county neglected and failed to bring the same forward on the books as an assessment against Mrs. M. A. Ammons, but procured the said land to be advertised and sold for delinquent taxes as belonging to person or persons unknown; that under such sale the defendant herein became the purchaser, well knowing that the said tract of land was known to belong to the said Mrs. M. A. Ammons and her daughters aforesaid, and while he was in possession of the same, and while it was his duty to pay the taxes thereon, and he received a deed therefor from the sheriff of said county, dated June 23, 1892; that said defendant neglected and failed to record the said deed in the office of the clerk of the court for said county until the present year, 1902, soon after the plaintiffs required of him the possession of said lands; that the said tax sale, the assessment of said taxes, and the said deed executed to the defendant are null and void under the law.

"Fifth. That the defendant has received and enjoyed all the rents, incomes, and profits from the said premises since June 23, 1892, aggregating the sum of two hundred dollars, and should be required to pay the same to the plaintiff.

"Wherefore the plaintiffs demand judgment against the defendant (1) for the possession of said property; (2) for the sum of one hundred dollars damages against the defendant for his unlawful withholding the same from the plaintiff; (3) that said sheriff's tax deed may be canceled and set aside; (4) for the sum of two hundred dollars, the rents and profits unlawfully received and enjoyed by the defendant; (5) for such other relief as may be just and for costs."

The order appealed from is as follows:

"This cause was called for trial, jury impaneled, and pleadings read. Upon motion

of defendant's attorneys, the trial by jury was confined to the legal cause of action alleged, and the equitable issue reserved for subsequent disposition. The defendant's attorney then interposed a demurrer, with written specifications, upon the ground that the complaint, as to the legal cause of action, failed to state facts sufficient to constitute a cause of action. The demurrer was sustained for the reason that the complaint showed upon its face that the plaintiffs had no right to recover the land, which was alleged therein to have been sold by the sheriff for taxes delinquent between 1887 and 1892, and title deed thereto made by the sheriff to B. H. Boykin, June 23, 1892. It also appeared by the complaint that B. H. Boykin had been in possession of the land since 1892 under the sheriff's deed. All presumptions of validity of prerequisites are by statute in favor of the sheriff's tax deed and title thereunder, and after the lapse of two years, with possession under such deed, all presumption became absolute and conclusive. The two-years limitation as to tax title is not as the ordinary or Code limitations. No disability is made an exception in this special limitation, which is a limitation upon the right and title, rather than of the remedy and right of action.

"The causes of action being mingled in the complaint, it may be read and taken as a whole as to each cause of action. The legal cause being separated for trial, the demurrer applies to that cause, and as to that it is sustained. The equitable cause is left for future consideration and determination."

The exceptions, seven in number, impute error in the action of the court, and in the several reasons assigned therefor.

We think the order must be reversed. The first three paragraphs unquestionably state a cause of action for recovery of land, and damages for unlawfully withholding the same. While it is true that a complaint may state facts sufficient to constitute a cause of action, and then state other facts which in law defeat a recovery, so as to make the complaint demurrable for insufficiency (*Jarrell v. R. Co.*, 58 S. C. 491, 36 S. E. 910), we do not think such has been done in this case. The fourth paragraph of the complaint does state that the defendant received a deed from the sheriff under a tax sale of said land dated June 23, 1892, and it is true that under section 426, Civ. Code 1902, vol. 1, such a deed is prima facie evidence of a good title; but the same paragraph proceeds to state other facts, which, if established (and on demurrer they are to be treated as admitted), must overthrow such prima facie evidence, and make the deed null and void for fraud, or estop the defendant from asserting his deed against the plaintiffs. *Association v. Waters*, 50 S. C. 460, 27 S. E. 948. It must be remembered

that courts of law have concurrent jurisdiction with courts of equity in matters of fraud, and it is accordingly well settled that in an action to recover real estate a party may, on the trial of the legal issues, attack for fraud a deed relied on by his antagonist. *McCreery Land Investment Co. v. Myers*, 49 S. E. 848. The plaintiffs here may have done this in reply to defendant's tender of the sheriff's deed, without specially pleading the fraud. If so, the mere allegation of the sheriff's deed as defendant's claim of title, coupled with facts which, if true, would overthrow it as a defense, could not operate to destroy plaintiff's cause of action, whatever effect such allegations may have in shifting the burden of proof in the first instance.

Nor do we think that plaintiff's cause of action for the recovery of the land in question is defeated by the allegation that defendant received the sheriff's deed under tax sale in June, 1892; the action having been commenced in May, 1902. Section 426, Civ. Code 1902, vol. 1, provides as follows: "In all cases of sale, the sheriff's deed of conveyance, whether executed to a private person, a corporation, or the sinking fund commission, shall be held and taken as prima facie evidence of a good title in the holder, and that all proceedings have been regular, and all the requirements of the law have been duly complied with. No action for the recovery of land sold by the sheriff under the provisions of this article, or for the recovery of the possession thereof, shall be maintained unless brought within two years from the date of said sale." It is asserted with reference to this statute that the two-years limitation is a limitation affecting the right and title, rather than the remedy and right of action, and that, after two years' possession under the sheriff's deed, all presumption that prerequisites have been complied with is conclusive. "Where time is of the essence of the right created, and the limitation is an inherent part of the statute, there is no right of action independent of the limitation. Such special limitation extinguishes the right, rather than affects the remedy." 19 Ency. Law (2d Ed.) 151, and cases cited in note 6; *Dennis, Adm'r v. Atlantic Coast Line Co.*, 49 S. E. 869. This distinction, however, does not apply to the statute quoted. The statute creates no right of action, but is a mere limitation on the assertion of a right of action existing at common law and independent of the statute. Hence the statute is a pure statute of limitation, affecting the remedy, not the right, and must be affected by the disability of infancy of plaintiffs, as alleged in the complaint.

These views render it unnecessary to further consider the grounds of appeal.

The judgment of the circuit court is reversed.

(70 S. C. 315)

HYLAND v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of South Carolina. Dec. 2, 1904.)

OPINION EVIDENCE—HARMLESS ERROR—OBJECTIONS WAIVED—MORTALITY TABLE—INJURY TO SERVANT—SAFE APPLIANCES—ASSUMPTION OF RISK—FELLOW SERVANT.

1. A nonexpert witness may testify that after examination he thought a person was seriously hurt and knocked senseless.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig., Evidence, §§ 2167, 2238, 2239.]

2. The admission of hearsay evidence is harmless where the same fact is established by competent evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig., Appeal and Error, §§ 4161, 4165, 4172.]

3. Where evidence is brought out by the suggestion of appellant's counsel, he cannot object thereto.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig., Appeal and Error, § 3597.]

4. Where no objection is made to incompetent evidence, and other witnesses testify to the same fact, it becomes competent.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig., Trial, § 261.]

5. Where a witness testified to knowledge of a custom, and stated what it was, an objection thereto cannot be first raised on appeal.

6. Under 24 St. at Large, p. 96, establishing a mortality table, it is admissible in all cases when necessary to establish the expectancy of the life of any person from any period of his life, whether he be living at the time or not. *Held*, that such table is admissible in evidence as to expectancy of life in an action for injuries to a living person where there is any evidence that the injuries are permanent.

7. An indefinite exception will be overruled.

8. The duty of a master to furnish proper tools and appliances so far as appliances are concerned embraces human instrumentalities as well as mechanical devices.

9. A servant does not assume the risk of negligence of the master in conducting the work nor in selecting servants.

10. Where a master has exercised due care in the employment of a fellow servant, and the negligence of such servant results in an injury to the plaintiff, his fellow servant, the master is not chargeable therewith.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig., Master and Servant, §§ 836, 352.]

Appeal from Common Pleas Circuit Court of Richland County; Jos. A. McCullough, Special Judge.

Action by Philip H. Hyland against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff, defendant appeals. Affirmed.

Nelson & Nelson and Hunt Chipley, for appellant. Thomas & Gibbs, for respondent.

POPE, C. J. The following statement of the action is made by the plaintiff, which we adopt as a proper statement of the issues, thus presenting a copy of the pleadings: "This is an action for the recovery of damages for personal injuries sustained by the plaintiff while in the employment of the

defendant on the 20th day of March, 1902. In the afternoon of the said day the plaintiff, with several other workmen, was engaged, under the direction of a foreman, in erecting poles, stringing wires, and doing other work incident to the construction of a telephone line for the defendant along the southern side of Gervais street, a public highway much traveled by pedestrians, bicycles, and vehicles, near its intersection with Pine street, in the eastern suburbs of the city of Columbia, about one square beyond the corporate limits. At this point a private telephone line had been constructed along Pine street and across Gervais street, and in order to facilitate the stringing of the wires of the defendant's proposed line the defendant's foreman had caused the wires of the private line to be cut and lie across Gervais street. The wires of the defendant's proposed line having been strung across Pine street, the foreman directed the plaintiff, who was just then returning to his work from the city of Columbia, whither he had gone on an errand for the defendant, to reconnect the said wires of the private line across Gervais street. This the plaintiff undertook to do, and with that end in view had climbed the telephone pole, upon which the desired connection was directed to be made, to a height of about 25 feet above the ground, carrying one of the said wires coiled about his right arm and shoulder, when a bicyclist, approaching the city on his bicycle along Gervais street, ran against and became entangled with the said wire, causing the plaintiff to be precipitated from his position on the pole to the ground with great force, whereby the plaintiff's collar bone was broken, his shoulder and back wrenched, bruised, and strained, and his person otherwise seriously injured. It is alleged in the complaint that the said injuries were caused by the negligence and recklessness of the defendant in failing to provide and put in charge of the work of constructing said line, with plaintiff, careful and competent workmen, and in providing and putting in charge of the work careless, ignorant, and incompetent workmen, and in failing to furnish safe, suitable, and proper tackle, tools, implements, and appliances to raise, or enable plaintiff to raise, said wire to said pole, and in requiring plaintiff to carry said wire up said pole as aforesaid with the end thereof looped about his arm and shoulder, and in requiring plaintiff to raise and attach said wire in the manner aforesaid while the slack thereof lay upon and was suspended over said Gervais street, in imminent peril to plaintiff and to passengers along said street, and in failing to take proper precautions or keep a proper lookout to prevent such passengers from colliding with said wire, and in causing and permitting said bicycle and its rider to run into and become entangled with said wire as aforesaid.' The answer, for a first defense,

denies the negligence, recklessness, and extent of injuries as alleged; and for a second defense avers that the alleged accident and injuries to the plaintiff were caused by his contributory negligence in not exercising due care and caution, and, if there was any risk connected with the work in which plaintiff was engaged at the time of his alleged injuries, he (the plaintiff) voluntarily assumed the same."

Upon these issues the action was tried before Special Judge Joseph A. McCollough and a jury at the fall term of the court of common pleas of Richland county, at Columbia, S. C., and resulted in a verdict for the plaintiff. After entry of judgment upon said verdict, the defendant appealed to this court upon the following grounds, to wit:

"(1) Because, against the objection of defendant, his honor admitted in evidence the statement of the witness Hiller L. Leadford in the words: 'He [the plaintiff] seemed to be very seriously hurt, was knocked senseless, and, I understood, had his collar bone broken, and was otherwise injured;' such statement being incompetent, because: First, it embodied a mere opinion of a non-expert witness; and, second, it was hearsay.

"(2) Because, against the objection of defendant, his honor admitted in evidence the statement of the witness Philip H. Hyland in the words: 'I took them [the defendant's employes] to be experienced men; that is, for all-round workmen;' such statement being incompetent, because it embodied a mere opinion of a nonexpert witness.

"(3) Because, against the objection of defendant, his honor admitted in evidence the statement of the witness Philip H. Hyland in the words: 'The practice is to leave a man on the crossing, and to guard them, to look out for wagons and whatever may be the traffic;' such statement presenting to the jury a practice or custom as a rule of conduct in a matter in which, according to law, the practice or custom raises no rule of conduct.

"(4) Because, against the objection of defendant, his honor admitted in evidence the statement of the witness Wm. Perry in the words: 'It is the custom, when wires block either the street or sidewalk, to have somebody there to notify people coming along, either pedestrians or vehicles;' such statement presenting to the jury a practice or custom as a rule of conduct in a matter in which, according to law, the practice or custom raises no rule of conduct.

"(5) Because, against the objection of defendant, his honor admitted in evidence the statement of the witness Wm. Perry in the words: 'I have noticed other people and vehicles being stopped on account of wires across the street; have been stopped myself;' such statement constituting no evidence competent to establish practice or custom.

"(6) Because, against the objection of defendant, his honor admitted in evidence the

mortuary table passed by the General Assembly of South Carolina (24 St. at Large, p. 96); such table being incompetent in a case where the wrong complained of did not result in the death or total disability of the party injured.

"(7) Because, against the objection of defendant, his honor admitted in evidence the opinion of the witness R. H. Smith as to the duty of the defendant's foreman in a given case; such opinion being incompetent, because, first, it related to a matter in which opinion evidence is not competent; second, and witness gave no reason for his opinion; and, third, it purported to establish the relations of parties to a contract to which the witness was a stranger, and of which he had no knowledge.

"(8) That his honor charged that the master must furnish the servant with appropriate and suitable tools and appliances; such unqualified statement being erroneous in its application to this case, for the reason that the undisputed proof on the trial was that the plaintiff had contracted with the defendant to furnish himself the tools and appliances needed in the work in which he was, when injured, engaged as an employé of the defendant.

"(9) For that his honor submitted to the jury the question, 'Did the master discharge that duty in furnishing safe, suitable, appropriate appliances?' the undisputed proof on the trial being that the plaintiff had contracted with the defendant to furnish himself the tools and appliances needed in the work in which he was, when injured, engaged as an employé of the defendant.

"(10) For that his honor refused to charge that 'a servant having consented to serve in the way and manner in which the business was being conducted, has no ground of complaint, even if reasonable precautions have been neglected; and will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which to a person of his experience and understanding are, or ought to be, obvious'—the proposition thus rejected being correct in law, and applicable to the issues herein.

"(11) For that his honor refused to charge that, 'To show negligence in the defendant, it must be made to appear that the danger was such that the plaintiff could not be presumed to know it, and that the defendant did not give him information of it. If he knew and appreciated the danger, he cannot recover'—the proposition thus rejected being correct in law and applicable to the issues herein.

"(12) For that his honor refused to charge that: 'If the place is obviously unsafe, so as to charge the servant with knowledge thereof, and he nevertheless enters upon the work, he assumes the risk. As a general rule, if the servant injured knows that the force for work is insufficient, he will

be held to have assumed the risk, and waived the obligation of the company in this respect as to himself, and if injured by means of such delinquency he is without remedy—the propositions thus rejected being correct in law, and applicable to the issues herein.”

We will now consider defendant's ground of appeal, and will adopt the grouping of these exceptions. We will therefore divide the exceptions into two or three classes, viz., 1 to 7, inclusive, relating to alleged errors of the circuit judge in relation to the admission of testimony; second, 8 and 9, relating to alleged errors in the circuit judge's charge to the jury; and, third, the tenth, eleventh, and twelfth exceptions relating to alleged errors of the circuit judge in refusing to charge certain requests to charge.

1. (a) Objection to Hiller L. Leadford's testimony: We do not attach much attention to this allegation of error. The witness saw plaintiff immediately after his fall. He examined him, and found him in a senseless condition. So far, no error. The witness thought him seriously hurt. No objection to this. He heard that plaintiff's collar bone was broken and was otherwise injured. This was hearsay. But no harm resulted to the defendant therefrom. Dr. R. A. Gibbs, an expert, told the same facts in his testimony, and the plaintiff explained his injuries in his testimony. *Garrick v. R. R. Co.*, 53 S. C. 451, 31 S. E. 334, 60 Am. St. Rep. 874; *Rakestraw v. Floyd*, 54 S. C. 293, 32 S. E. 419; *Perry v. Jefferies*, 61 S. C. 304, 39 S. E. 515; *Watts v. R. R. Co.*, 60 S. C. 70, 38 S. E. 240; *Mathis v. R. R. Co.*, 53 S. C. 246, 31 S. E. 240; *Youngblood v. R. R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824, and *Smith v. Brabham*, 48 S. C. 340, 26 S. E. 651.

(b) Objection to testimony of plaintiff for the reason that he testified that he took his fellow workmen to be experienced men—that is, for all-round workmen—"such statement being incompetent because it embodied a mere opinion of a nonexpert witness." Now, here is what occurred when the witness testified: "Can you tell the jury whether they [the hands] were old, experienced men, or whether new hands? Mr. Nelson: We object. He says he does not know how long they were at work. He can testify as to whether they did work in a workmanlike manner and as men of experience. The Court: He can tell whether they worked as an experienced man. Answer: I took them to be experienced men; that is, for all-round workmen." Nothing was said by defendant's attorneys after this answer. Other testimony of a similar character was given by defendant's witnesses. We see no objection to this examination of the witness. It was caused by the suggestion of Mr. Nelson, and was in favor of his client, the defendant.

(c) So far as this ground of appeal is concerned, we cannot support it, because Hyland testified that it was the practice and custom to leave a man on the crossing to guard

them, to look out for wagons and whatever may be the traffic. No objection was taken as to this testimony. It was thus made competent in this case. On pages 9 and 10, the whole matter is made clear. Besides, other witnesses testified as to this custom. See, also, 27 Ency. of Law, pp. 899 to 902; 20 Ency. of Law (2d Ed.); 21 Ency. of Law (2d Ed.) at page 524. Our own case of *Bodie v. R. R.*, 61 S. C. 488, 39 S. E. 715, and 66 S. C. 303, 44 S. E. 943, seems to be conclusive.

(d) The objection to the testimony of Wm. Perry is of a kindred nature. This witness testified that he knew the custom, and no objection was taken. This ground of appeal is untenable.

(e) The objection here raised as to the testimony of witness Wm. Perry is to the same effect as that to which we have already ruled. The question was competent.

(f) This objection relates to the competency of the mortuary table provided by the General Assembly of this state. 24 St. at Large, p. 96. It was objected to on the ground that this act only related to cases where there was loss of life, and not applicable where the person injured is still living. By the express language of the statute it is admissible in all cases in which "it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, *whether he be living at the time or not.*" (Italics ours.) In 20 Enc. Law (2d Ed.) at page 883, this language is used: "Mortality tables are admissible in evidence whenever the probable duration of a person's life is a material issue in a case. Thus, in actions for personal injuries, when the injury is of a permanent character, and in actions for death by wrongful act, in estimating damages, the expectancy of life of the person injured is an essential element, and to show such expectancy standard mortality tables are admissible in evidence." The United States Supreme Court, in *Vicksburg Railroad Company v. Putnam*, 118 U. S. 545, 555, 7 Sup. Ct. 1, 30 L. Ed. 257, held: "In the present case it was not suggested by the defendant at the trial that the life tables admitted in evidence were not standard tables, or not duly authenticated. The only ground assigned for the objection to their competency was that 'the plaintiff has not shown a case in which such evidence is admissible, the plaintiff not having been killed or permanently disabled.' It is a sufficient answer to this objection that there was evidence from which the jury might conclude that the plaintiff's disability was permanent." We overrule this ground of appeal.

(g) This exception is too indefinite. "In a given case"—what case is given or meant? It is therefore overruled.

2. Exceptions 8 and 9 relate to alleged errors in judge's charge. Eight refers to the charge of his honor touching the duty of the master in supplying the servants with ap-

propriate tools and appliances. It was only in proof here that the servant who was required himself to possess certain tools; not, however, "hand ropes" or appliances. In the two cases—*Bodie v. R. R. Co.*, supra, and *Hicks v. R. R. Co.*, 63 S. C. 560, 41 S. E. 753—it has been held that tools and appliances, so far as appliances are concerned, embrace or include human instrumentalities as well as mechanical devices. The duty of the master to the servant is elementary law. We cannot, therefore, sustain the eighth exception. Exception 9, from the foregoing views, is untenable, for under the issues here raised it was the duty of the circuit judge to submit this question to the jury, "Did the master discharge that duty in furnishing safe, suitable, appropriate appliances?" See our views expressed under eighth ground of appeal. It is overruled.

3. This division refers to the tenth, eleventh, and twelfth grounds of appeal. "(10) A servant, having consented to serve in the way and manner in which the business was being conducted, has no ground of complaint, even if reasonable precautions have been neglected, and will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which to a person of his experience and understanding are, or ought to be, obvious." The judge said: "I can't charge you that way, because it is a question for you to determine, under the charge as I have given you, whether or not the risk was assumed under the particular circumstances of the case." Now, what had the presiding judge said to the jury? "There is another defense. The telephone company says, 'You assumed this risk.' What does that mean? That means when the servant enters the employment of the master there are certain risks necessarily incident to that employment, certain hazards he must necessarily run. The law says he assumes those risks, and it says, furthermore, if there are patent, glaring hazards, obvious dangers, and the servant enters upon the employment of the master with knowledge of these hazards—knowledge of these dangers—and continues in his employment, the jury may say, under these facts, that the servant, while he may not have expressly agreed to do so, but by his conduct tacitly agreed to relieve the master of the consequences of the defects. In other words, the question of waiver, the question of assumption—that the servant has assumed these risks: 'I knew of these dangers; I knew of these defects; I, by my conduct, agreed to assume the dangers necessarily incident to this employment.' If he does that, he cannot complain. It is an assumption of risk. The telephone company says, 'You are injured by the negligence of a fellow servant, and I did not agree to guaranty you against the result of the negligence of a fellow servant.' What does that mean? It means this: Here are two men engaged in an ordi-

nary avocation of duty under charge of a superior. Now, these two men, when they are thus engaged, are fellow servants; and common sense comes in there. One of these servants knows that the master is not responsible for the act of negligence of a fellow servant. If the master has exercised due care in the employment of the fellow servant, if he has discharged his duty there, then the negligence of the fellow servant, if it result in injury to the other servant, the master is not chargeable with. But, gentlemen, that 'fellow servant' means one servant does not assume the risk of another servant if not engaged in the business for which he was employed; neither is he responsible for it; neither is he responsible for the negligence of the person who represents the master—the man who has the right to control and direct the services of the injured party; in other words, that person, like a centurion, says to this man, 'Go, and he goeth;' 'Come, and he cometh;' 'Do this, and he doeth it.' If such person had that kind of authority, his negligence—the servant does not assume the consequences of his negligence." It seems to us the circuit judge made no mistake in his charge. This exception is overruled.

(11) The circuit judge, in his charge to the jury, correctly laid down the law as referred to in this exception, and it is therefore overruled.

"(12) For that his honor refused to charge that, if the place is obviously unsafe, so as to charge the servant with knowledge thereof, and he nevertheless enters upon the work, he assumes the risk. As a general rule, if the servant injured knows that the force for work is insufficient, he will be held to have assumed the risk and waived the obligation of the company in this respect as to himself, and, if injured by means of such delinquency, he is without remedy." There is no necessity to consider this exception at any length, for there are no facts developed in the testimony which bear even remotely upon this proposition of law. If there is no testimony supporting this proposition of law, the circuit judge had no business making any such charge. The issues in this action are clear cut, but amongst those issues the one now referred to does not appear. This ground of appeal is overruled.

It is the judgment of this court that the judgment of the circuit court is affirmed.

(137 N. C. 383)

LEWARK et al. v. NORFOLK & S. R. CO.
(Supreme Court of North Carolina. Feb. 21, 1905.)

CARRIERS—LOSS OF GOODS—MEASURE OF DAMAGES.

1. In an action against a carrier for loss of a consignment of ice shipped by plaintiffs to themselves, plaintiffs were not entitled to recover for the loss of fish, for the packing of which they intended to use the ice, in the absence of

any evidence that the carrier knew or should have known that the ice was intended for that purpose; the damages being limited to the value of the ice at destination at the time it should have arrived.

Appeal from Superior Court, Currituck County; E. B. Jones, Judge.

Action by H. Lewark and others against the Norfolk & Southern Railroad Company. From a judgment in favor of plaintiffs for less than the relief demanded, they appeal. Affirmed.

E. F. Aydlett, for appellants. Pruden & Pruden, for appellee.

BROWN, J. On November 14, 1902, the plaintiffs had shipped from Norfolk, Va., to themselves, at Church Island, N. C., two tons of ice, over the defendant's line. The ice was never delivered, although, by due course, it should have reached Church Island the same day it was shipped. It was admitted the plaintiffs were dealers in fish, and desired the ice for their own use. The sole exception in the record presents the question as to the measure of damages. His honor in the court below charged the jury that the measure of damages was the value of the ice at Church Island on November 14, 1902. To this instruction the plaintiffs excepted. We find no error in the instruction. The general rule for the measure of damage is tersely stated in *Ashe v. De Rosset*, 50 N. C. 299, 72 Am. Dec. 552: "When one violates his contract, he is liable only for such damages as are caused by the breach, or such, as being incidental to the act of omission or commission, as the natural consequences thereof may reasonably be presumed to have been in the contemplation of the parties when the contract was made." In the well-known case of *Hadley v. Baxendale*, 9 Ex. 341, the plaintiff sought to recover damages which grew out of the special circumstances under which the contract was made, i. e., the stopping of plaintiff's mill in consequence of the non-delivery of a shaft which was necessary to, and was ordered for, its operation. This was refused, and the court says in respect to it: "If the special circumstances under which the contract was made were communicated to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract in the special circumstances so known and communicated. But on the other hand, if these special circumstances were unknown to the party breaking the contract, he, at most, could only be supposed to have had in contemplation the amount of injury which would arise generally and in the great number of cases, not affected by any special circumstances, from such a breach of contract." See, also, *Boyle v. Reader*, 23 N. C. 607; *Foard v. Railroad*, 53 N. C. 235, 78 Am. Dec.

277. The plaintiffs' contention is that the measure of damage is the loss on fish. Such damages are too remote, and could not have reasonably been within contemplation of the defendant company when it accepted the ice for shipment. "If every one were answerable for all the consequences of his acts, no one could tell what were his liabilities at any moment." 3 Parsons on Cont. (5th Ed.) 179. "Every defendant shall be liable for those consequences which might have been foreseen and accepted as the result of his conduct, and not for those he could not have foreseen, and therefore was under no moral obligation to take into his consideration." Id. 5. When the defendant accepted the ice at Norfolk for shipment, it could not foresee that the plaintiffs' fish would be spoiled, or that the ice could be used for packing fish. The defendant did not know that plaintiffs had any fish at the time the ice was shipped, nor is there any evidence that defendant knew it at any time. If the plaintiffs had shown by evidence that the defendant knew or should have known, from facts and circumstances connected with the shipment, or otherwise, that the ice was intended by the plaintiffs for packing fish, the plaintiffs would have brought their case within the exception to the general rule. We have examined the evidence with care, and fail to find any which could reasonably bring to the defendant's knowledge the fact that the shipment was other than an ordinary shipment. It had no knowledge of the special purpose. *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 65 Am. St. Rep. 697, pressed upon our attention by the plaintiffs' counsel in his brief and oral argument, differs materially from the case at bar. Tobacco flues are different commodities. Ice is something of general, everyday use all the year round, and required for many different purposes. Persons living in localities where tobacco is cultivated are presumed to know what a tobacco flue is intended for, and that, if tobacco is not cured promptly when cut, serious loss will result. In *Sledge v. Reid*, 73 N. C. 440, Mr. Justice Bynum says: "The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. * * * The value of the mule taken, and the hire of another, is the measure of the plaintiff's damage. Anything beyond this would be too remote and conjectural, and would lead the courts into a boundless field of investigation." See, also, *Wood's Mayne on Damages*, §§ 26, 40. It is useless to multiply authorities, as the measure of damages in contracts for the sale or delivery of personal property has been discussed in many cases in the recent Reports of this court, and we find nothing in any of them to support the plaintiffs' contention.

The judgment of the superior court is affirmed.

CONNOR, J., concurs in result.

(137 N. C. 397)

WARD v. GAY.

(Supreme Court of North Carolina. Feb. 21, 1905.)

EVIDENCE — WRITTEN INSTRUMENTS — ALTERATION — EXPLANATION — PAROL TESTIMONY — QUESTIONS FOR JURY.

1. A contract conveying standing timber is a contract concerning realty, which must be in writing, and which cannot be altered or added to by parol testimony.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 117.]

2. Descriptive words in a contract for the sale of timber, "All the pine, poplar and cypress trees now standing and growing on in the swamp on the following lands," situated in a certain township and county, and containing a certain number of acres, while sufficient to pass the property, are so indefinite in relation to an island in the swamp as to require the aid of parol testimony in order to ascertain and declare their true meaning.

3. Where descriptive words in a contract conveying timber are sufficient to pass the property, but are so indefinite as to require parol testimony to ascertain their true meaning, the question as to what is actually conveyed is one for the jury.

Appeal from Superior Court, Gates County; E. B. Jones, Judge.

Action by A. J. Ward against John L. Gay. From a judgment for plaintiff, defendant appeals. Reversed.

On the 7th of April, 1900, the plaintiff, by writing, sealed and delivered, conveyed to the defendant all the timber trees standing and growing in a certain swamp, "down to and upwards of 12 inches across the stump." This swamp contained about 50 acres, and within the boundary of the swamp was an island from $1\frac{1}{2}$ to 4 acres, on which, and above high-water mark, were growing trees of the above dimensions, sufficient to make from 19,000 to 21,000 feet of lumber. The defendant, claiming to act under this deed, cut the timber growing in the swamp, including that growing on the island above high-water mark, and appropriated the proceeds to his own use. Plaintiff then instituted the present action, and filed his complaint, alleging that it was not the contract between the parties that the timber on the island growing above high-water mark should pass, and that the clause excepting such portion of the timber was omitted from the deed by mistake; second, that, in any event, the portion of the timber on the island above high-water mark was wrongfully cut and carried away by the defendant, because, by the terms of the deed, as it stood, this portion of the timber was excepted. The defendant, admitting the conveyance, denied the allegation of mistake, and claimed the right under the contract to cut all the timber within the swamp, including the timber on the island. On the pleadings three issues were submitted to the jury: (1) Was the provision excepting the trees on the ridges omitted by mutual mistake of the parties, or by mistake of the draftsman? (2) Did defend-

ant wrongfully cut timber from lands of plaintiff not included in the contract? (3) If so, what damage has plaintiff sustained? Both parties introduced evidence, and, under the charge of the court, the jury, as appears from the record, responded to the first issue "No," and to the second "Yes," and to the third "\$57." The defendant excepted to the charge of the court on the second issue, and moved for a new trial for the alleged error. Motion was overruled, the defendant again excepting. There was judgment on the verdict for the plaintiff, and the defendant appealed.

L. L. Smith, for appellant. W. M. Bond, for appellee.

HOKE, J. (after stating the case). The descriptive words of the instrument are as follows: "All the pine, poplar and cypress trees now standing and growing on in the swamp on the following lands, situated in Mintonville Township, Gates County, State of North Carolina, and known as a part of the Jordan lands in the swamp bounded by the lands of Leander Howard and Elijah Modlin, leading from said A. J. Ward's grist mill to Old Town on Cathron Creek, and others, and containing 50 acres, more or less." The jury, having answered the first issue "No," and thereby found that there was no mistake in the deed, the question of the defendant's liability was made to turn on the instrument as now written. In that aspect of the case, and in his charge to the jury on the second issue, the court instructed them that "the timber growing on the island above high-water mark did not pass under the contract, and that the defendant would be liable for timber cut, unless it was agreed between the parties that the timber on the island was to be included under the contract," and to this instruction the defendant excepted.

In this charge, as we understand it, the court instructed the jury that by the terms of the instrument, as now expressed, the timber on the island above high-water mark would not pass to the defendant, and that, if such timber did pass, it must do so by an agreement to that effect between the parties not now contained in the written agreement, and in this we think there was error to the prejudice of the defendant, which entitles him to a new trial. Where parties have reduced their contract to writing, and the instrument contains their entire agreement, it is not permissible for them to alter or add to same by parol testimony of contemporaneous expressions, or alleged contemporaneous agreements, which change or conflict with their written agreement. Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties, and attendant facts and circumstances, may be heard to aid in ascertaining the correct meaning of the terms

used, but not to alter or add to what has been written. In the present case the verdict of the jury finds, in response to the first issue, that there was no mistake in the terms of the contract. Apart from this, the contract itself, conveying, as it does, the timber standing and growing on the ground, is a contract concerning realty, its terms are required to be in writing, and it was not permissible to alter or add to these terms by parol evidence. This doctrine on contracts concerning realty is very clearly expressed in the case of *Miles v. Barrows*, 122 Mass. 581. In this case the court said: "A conveyance of land can only be by deed, and parol evidence is not admissible to control or vary a deed. If the description in it is certain and unambiguous, it is not competent to prove that the parties had any intention different from that expressed. But if, upon applying the deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words they have used." An interesting discussion of the general question will be found in the opinion of Mr. Justice Walker in the case of *Cobb v. Clegg*, 137 N. C. —, 49 S. E. 80.

Again, the descriptive words, "All the pine, poplar, cypress trees," etc., as set out in the beginning of this opinion, while sufficient to pass the property and permit parol testimony in order to aid in their interpretation, are at the same time so indefinite as to require the aid of such testimony in order to ascertain and declare their true meaning. They are ambiguous and uncertain, and present a case for the jury to determine what the deed conveys, after hearing all the pertinent facts and attendant circumstances. *Rowe v. Lumber Co.*, 133 N. C. 433, 45 S. E. 830; *Brooks v. Britt*, 15 N. C. 481. Similar decisions on ambiguous terms of like import will be found in *Sargent v. Adams*, 3 Gray (Mass.) 72; a. c., reported in 63 Am. Dec. 718; also in *Doolittle v. Blakesley*, 4 Day (Conn.) 265; a. c., 4 Am. Dec. 218. In telling the jury that the timber growing on the island did not pass under the contract, his honor withdrew from the jury the very question they should have been required to determine.

There will be a new trial on all the issues arising on the pleadings, with the words "not included in the contract" eliminated from the second issue, and in case it is again found that there was no mistake in the deed, and the question of the defendant's responsibility is again submitted on the contract as now written, it must be left to the jury to determine on all the pertinent facts and circumstances whether the timber in dispute was included in the descriptive terms of the deed.

New trial.

(137 N. C. 392)

BREWSTER v. ELIZABETH CITY.

(Supreme Court of North Carolina. Feb. 21, 1905.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS
—INJURIES—PEDESTRIANS—CONTRIBUTORY
NEGLIGENCE—PROXIMATE CAUSE.

1. In order to show contributory negligence, both the commission of a negligent act and a connection of that act with the injury as the proximate cause thereof must concur.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 83, 112-114.]

2. One approaching a bridge on a highway is not guilty of contributory negligence, as a matter of law, in stepping on the bridge, where the planking was defective, while looking to one side observing a workman cutting down a tree; but whether he is guilty of negligence in so doing, or not, is a question for the jury.

3. Whether the act of a pedestrian in stepping on a defective bridge in the highway while looking to one side watching a workman cutting down a tree was the proximate cause of injury to her, held, under the evidence, a question for the jury.

Appeal from Superior Court, Pasquotank County; E. B. Jones, Judge.

Action by Matilda Brewster against Elizabeth City. From a judgment for defendant, plaintiff appeals. Reversed.

E. F. Aydlett and J. C. B. Ehringhaus, for appellant. J. Heywood Sawyer and R. W. Turner, for appellee.

BROWN, J. The plaintiff sued the defendant to recover damages for an injury alleged to have been sustained in crossing a bridge which was out of repair, and which constituted a part of a public street of the defendant. Among other defenses, contributory negligence is pleaded, and all of the plaintiff's exceptions relate to the charge of the court upon that issue. The evidence was in substance as follows: The plaintiff lives in Danielson, Conn., and is 72 years of age. While in the defendant town on a visit, she was walking along Cypress street on the 22d of April, 1903, with two other ladies, and they came to a bridge at the corner of Cypress and Road streets. One of her companions was in the middle, the other on the outside, and the plaintiff was on the inside of the sidewalk leading up to the bridge. Her companion who was on the outside stepped on the end of the middle plank of the bridge, the other end flew up and tripped the plaintiff, and she fell and injured herself. The bridge was composed of three stringers and three planks, each an inch thick, about eight inches wide, and eight feet long. The bridge, according to the finding of the jury, though there was evidence on both sides of that question, was out of repair and in an unsafe condition. The plaintiff was seriously injured. At the time of the injury a tree was being cut down in a yard adjacent to the bridge. The plaintiff and her two companions were coming down Cypress street towards the bridge, and all three of them were looking away at the tree

being cut down, when her outside companion stepped on the end of the middle plank of the bridge and tipped up the other end, which tripped the plaintiff, and she fell and was seriously injured.

The jury answered the issue as to negligence "Yes," and the second issue as to contributory negligence "Yes." The court gave five separate instructions upon the second issue, to all of which the plaintiff excepted. The plaintiff offered no requests for particular instructions, and therefore cannot well complain of "errors of omission."

The court instructed the jury: (1) "If you find by the greater weight of evidence that the plaintiff in crossing the bridge, even though you find that the bridge was unsafe and defective, failed to exercise that caution and care which a person of ordinary prudence should, and which it is their duty to do, in using the streets and sidewalks of the city, and because of her failure to exercise this caution and prudence she was injured, then she would be guilty of contributory negligence, and you would answer the second issue 'Yes.'" (3) The court further instructed the jury that "if the plaintiff could have passed over the bridge safely by exercising ordinary care, or could have stopped in time to avoid the injury, and failed to do so, then her injury was caused by her own negligence, and the plaintiff cannot recover."

We find error in the above instruction numbered 3, as well as in Nos. 2, 4, and 5, for which a new trial must be granted. Had his honor given instruction No. 1, with the addition that the jury must find that the plaintiff's negligence was the immediate or proximate cause of the injury, and explain what is meant by proximate cause, such instruction would have been plainly within the rule of the "prudent man," as laid down in *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426, *Ellerbe v. Railroad*, 118 N. C. 1024, 24 S. E. 808, and *Sheldon v. Asheville*, 119 N. C. 610, 25 S. E. 781. The third instruction given above is erroneous, in that it assumes that if the plaintiff failed to exercise reasonable care, then her neglect was the proximate cause of her injury.

In order to constitute contributory negligence, the plaintiff must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. The two must concur, and be proved by the defendant by the clear weight of evidence. A failure to establish proximate cause, although negligence be proved, is fatal to the plea. That walking on a bridge, a part of a public street, with the head momentarily turned, observing workmen trimming a tree, is per se negligence, we are not prepared to hold. It is exceedingly difficult for a court to define and prescribe every act which one, using the public thoroughfares of a city, may do without being guilty of such carelessness as constitutes negligence, and

it is equally difficult to determine what acts such persons may not do. "It is essentially the province of the jury to pass on such conduct under proper instructions, and to such acts it is best to apply the rule of the 'prudent man,' unless only one inference can be drawn. * * * When the negligence is not so clearly shown that the court can pronounce upon it as matter of law, the case should go to the jury with proper instructions." *Walker, J., in Graves v. Railroad*, 136 N. C. 3, 48 S. E. 503. Where reasonable minds may come to different conclusions upon considering the facts in evidence, the jury are at liberty to apply the rule of the "prudent man." *Sheldon v. Asheville*, supra. The court below practically charged that the plaintiff's alleged conduct was the immediate cause of her injury. That was erroneous.

The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury. *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482. The proximate cause is the last negligent act without which the injury would not have resulted. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914. Assuming that the plaintiff was looking back at the moment the defective plank flew up and, by tripping her, caused her to fall, how could his honor determine that if she had been looking ahead she would not have been injured? She had a right to assume that the bridge was safe and in good repair when she entered on it. The entire evidence shows the three ladies were walking side by side; that Mrs. Wilson stepped on the end of a defectively fastened plank; that instantly the other end flew up and threw the plaintiff down just at the moment she had lifted her foot and was about to step on that end of the plank. Suppose the plaintiff had been looking the usual distance ahead that prudent persons generally look when walking, is it probable she would have seen the end of the plank "pop up" at her feet in time to have prevented being thrown to the ground? Where there were no guard rails to a bridge, and injuries resulted to a runaway mule and its driver by falling from the bridge, it was held that the absence of guard rails, and not the conduct of the driver or the running away of the mule, was the proximate cause of the disaster. *Augusta v. Hudson*, 94 Ga. 135, 21 S. E. 239. There is no evidence of facts or circumstances from which we can infer that the injury would probably not have resulted from the "popping up" of the defective plank had the plaintiff walked with "Argus eyes," looking forward, and had not turned her head to observe the workmen trim the tree. It is highly probable that many prudent persons

would have done just what the plaintiff did, in the confident belief that the highways of the city were kept in safe condition. The most active and alert of men, much less an aged lady, may have stepped on that bridge with most vigilant outlook for obstacles ahead, and yet have been unable to observe the plank "pop up" at the feet, just as he was about to step on it, in time to avoid injury.

Tested by the definition given, as well as by the general principles of the law of negligence and by everyday experience, we are unable to see how the plaintiff's conduct was necessarily the proximate cause of her injury. In practically so charging, the court below erred, for which reason there must be a new trial.

New trial.

(137 N. C. 287)

BRAY v. WILLIAMS et al.

(Supreme Court of North Carolina. Feb. 21, 1905.)

PENALTIES—RELEASE BY LEGISLATURE—CONSTITUTIONALITY OF ACT—ESTOPPEL—STATUTES—PASSAGE—CONSTITUTIONAL FORMALITIES—COSTS.

1. The court will not hear testimony showing a noncompliance with Const. art. 2, § 12, forbidding the General Assembly to pass any private law unless 80 days' notice of application for the law shall be given; but testimony showing noncompliance by the Legislature with the provisions of the Constitution in the passage of bills will be heard only in the case of bills pledging the faith and credit of the state, and imposing, or permitting municipalities to impose, taxes, which article 2, § 14, requires to be read three several times on three different days in each house.

2. It is always within the power of either branch of the General Assembly to suspend its rules, and pass ordinary bills through their several readings on the same day.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 12, 13.]

3. Where a special bill for the relief of a defendant in an action for a penalty was introduced in the Legislature, it was not necessary for either defendant or the General Assembly to notify the plaintiff in the action of the introduction of the bill.

4. Defendant in an action for the penalty prescribed by Code, §§ 1818, 1819, on a register of deeds who fails to record marriage licenses, procured, through his attorney and the representative from his county in the General Assembly, the passage of a special act (Pub. Laws 1903, p. 132, c. 108) releasing him from all penalties imposed by such sections. *Held*, that the fact that the act was prepared by defendant's attorney, and given to the county representative, and passed under an agreement that it was to be introduced and passed through its several readings on the same day, and sent to the Senate and passed on the following day, and that plaintiff in the action should have no time to be heard, did not estop defendant from pleading its provisions or availing himself of its benefits.

5. Pub. Laws 1903, p. 132, c. 108, releasing and discharging a register of deeds from penalties incurred by his failure to comply with Code, §§ 1818, 1819, requiring that official to record marriage licenses, is not violative of Const. art. 1, § 7, providing that no man is entitled to ex-

clusive emoluments or privileges from the community except in consideration of public service, nor of any other constitutional provision.

6. Plaintiff sued a register of deeds for penalties incurred for failure to comply with Code, §§ 1818, 1819, requiring such official to record marriage licenses. After the institution of the action defendant procured the passage of Pub. Laws 1903, p. 132, c. 108, releasing him from the penalties incurred for his noncompliance with such sections. *Held*, that plaintiff was not entitled to recover the costs in the action which had accrued prior to the passage of the act.

Appeal from Superior Court, Currituck County; E. B. Jones, Judge.

Action by W. H. Bray against G. W. Williams and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was instituted for the recovery of \$12,800 alleged to be due the plaintiff by the defendant, register of deeds of Currituck county, by reason of his failure to comply with the provisions of sections 1818 and 1819 of the Code. By the first of these sections the register is required to make a record of marriage licenses and returns thereto. For failing to make such entry within 10 days after the return of the license he forfeits a penalty of \$200 "to any person who shall sue for the same." The plaintiff alleged that the defendant failed to make entry of 59 marriage licenses and the returns thereon within the time prescribed. The defendant, among other defenses, pleaded specially an act of the General Assembly ratified on the 12th day of February, 1903, entitled "An act for the relief of G. W. Williams, register of deeds of Currituck county." The terms of the act are:

"Whereas G. W. Williams, who was register of deeds of Currituck county, N. C., for the term ending December, 1902, and is now serving as such by re-election during his term of office now expired, by inadvertence and oversight failed to record the marriage licenses issued by him, within ten days, as required by section 1819 of the Code, and may have failed in other respects to comply strictly with sections 1818 and 1819 of said Code, and by such failures and omissions incurred the penalties prescribed by said sections; and whereas said Williams carefully filed and preserved in his office such licenses and recorded the same during each year in a book furnished him for that purpose by the commissioners of said county, and no harm has come to any one because of any such failure and omission; and whereas action has been brought by W. H. Bray against said Williams and his sureties to recover of them the penalties prescribed by said sections, aggregating a large sum, which action is now pending in the superior court of Currituck county, but in which no judgment has been rendered: Therefore the General Assembly of North Carolina do enact:

"Section 1. That G. W. Williams and his sureties on his official bond for the term ending December, 1902, and each of them,

be and they are hereby released and discharged from any and all penalties imposed by said sections, for failure to comply with the provisions of said sections and any amendments to the same during the term of said Williams now expired.

"Sec. 2. That this act shall be in force from and after its ratification and shall apply to actions now pending and which may be brought to enforce such penalties." Pub. Laws 1903, pp. 132, 133, c. 108.

This action was instituted on November 18, 1902. The plaintiff introduced testimony tending to show that the defendant failed to enter the licenses, etc., within 10 days. The defendant introduced the statute and rested. The plaintiff proposed to show by the representative from said county in the General Assembly at the session of 1903 that the statute was prepared by the defendant's attorney, and given to the witness; the agreement that it was to be introduced and passed through its several readings, if possible, on the same day, and sent to the Senate and passed on the following day; that the plaintiff should have no time to be heard; and that the statute was passed in accordance with the agreement. Upon defendant's objection the testimony was excluded, and plaintiff excepted. Judgment for defendant, to which plaintiff excepted and appealed.

E. F. Aydlett and Shepherd & Shepherd, for appellant. Pruden & Pruden and A. M. Simmons, for appellees.

CONNOR, J. (after stating the case). The learned counsel for the plaintiff concede that the validity of the statute of 1903 may not be called into question collaterally, and that the testimony offered was not competent for such purpose. They say, however, that the purpose of the proposed testimony was to show that by reason of the conduct of the defendant in procuring its introduction and passage he is estopped from pleading its provision or availing himself of its benefits. For this proposition they cite Bigelow on Estoppel, § 689. Mr. Bigelow, referring to the case in which it is held that persons who have procured the passage of an act of the Legislature, under which they have acted and obtained benefits, are estopped to show that the statute is unconstitutional, says that it is "a remarkable case, and to be received with hesitation." *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 850. It must be conceded that cases may be found in which it is held that parties are estopped from averring the unconstitutionality of a statute after accepting and appropriating the benefits conferred by it. They are, however, of very narrow scope and application. The general rule is otherwise. While not in all respects in point, the language of Bradley, J., in *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154, states the general principle:

"That which purports to be a law of a state is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow." Without undertaking to review the authorities, we are of the opinion that the case before us does not come within the principle upon which the cases cited by Mr. Bigelow are based. There was no misrepresentation of any fact to the General Assembly, nor was the act, so far as the record shows, passed in violation of any constitutional provision. It has been frequently held that, except in the case of bills coming within the provisions of section 14, art. 2, this court will not hear testimony for the purpose of showing that the notice required by Const. § 12, art. 2, was not given. *Brodnax v. Groom*, 64 N. C. 244; *Gatlin v. Tarboro*, 78 N. C. 119; *Wilson v. Markley*, 123 N. C. 616, 45 S. E. 1023. It is always within the power of either branch of the General Assembly to suspend its rules and pass ordinary bills through their several readings on the same day. Unless objection is made, it is usual to do so. The fact proposed to be shown, that the member introducing the bill agreed that the plaintiff should not be notified, was a matter between him and his constituents. There was no duty imposed upon the defendant or the General Assembly to notify the plaintiff. The testimony was properly rejected.

The effect of the statute upon the plaintiff's right to proceed with his action was considered and settled by this court in *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177. We can add nothing to what was said in that case by Mr. Justice Douglas. The question is discussed and the authorities reviewed in an able argument by Mr. Chase in *Norris v. Crocker*, 54 U. S. 429, 14 L. Ed. 210.

It is suggested that the act violates section 7, art. 1, of the Constitution. Such legislation is not in harmony with the genius of our Constitution, but we find no express provision prohibiting the General Assembly from passing such statutes. In *Dyer v. Ellington*, supra, this court upheld an act substantially like the one before us. The defendant presented a hard case to the General Assembly. That it should have given the relief is not surprising.

The plaintiff contends that, in any point of view, he is entitled to the costs which accrued prior to the passage of the act. We find no direct authority upon the question. The language of Mr. Justice Douglas in *Dyer v. Ellington*, supra, indicates an opinion against the plaintiff's contention. The act makes no reference to costs. The recovery of costs is regulated by statute. The plain-

tiff brought his suit knowing that the Legislature had the power to destroy his cause of action at any time before judgment. He took chances, and must abide the result. The judgment must be affirmed.

(137 N. C. 402)

PERRY v. GREENWICH INS. CO.

(Supreme Court of North Carolina. Feb. 21, 1905.)

ARBITRATION—INADEQUACY OF AWARD — SUFFICIENCY OF EVIDENCE—INSURANCE—WAIVING PROOF OF LOSS.

1. All that is required to justify the setting aside of an award of arbitrators on the ground of fraud, bias or undue influence is that the evidence satisfies the jury of the truth of the allegations in the complaint.

2. An agreement to arbitrate the loss under a policy of insurance is a waiver of the want of due proofs of loss.

3. Where the verdict of a jury of \$750 for loss under a policy of insurance is supported by sufficient evidence, an award of \$73.50 by arbitrators for the same loss is so grossly inadequate as to require setting the same aside.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by E. A. Perry against the Greenwich Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Busbee & Busbee, for appellant. E. L. Travis, Claude Kitchin, W. E. Daniel, and Howard Alston, for appellee.

BROWN, J. This is a civil action to recover a loss upon a policy of insurance on account of damage to plaintiff's dwelling by lightning, and to set aside an award of arbitrators because of fraud, corruption, bias, and undue influence. These issues, which were submitted to and answered by the jury, sufficiently disclose the nature of the action: "(1) Has there been an arbitrament and award as to the amount of damages to which plaintiff is entitled under the insurance policy attached to the complaint? Yes. (2) Was the appraiser Ellington, at the time of the alleged arbitration, disinterested? No. (3) Was the appraiser Faucette unduly, fraudulently, and corruptly influenced and controlled in the interest of the defendant by said Ellington? Yes. (4) Were said appraisers partial to and strongly biased and prejudiced in favor of the defendant? Yes. (5) Did plaintiff file with defendant notice and proof of loss as required by said policy? No. (6) Did defendant waive notice and proof of loss? Yes. (7) What were the damages done by lightning and fire to the property included in the policy? \$750, with interest from the time it was due until paid." The defendant appealed from the judgment rendered, and assigned 18 exceptions in the record as error.

Exceptions 1, 2, and 3 relate to the admission of evidence, and, in our opinion, are without merit. *Boggan v. Horne*, 97 N. C.

270, 2 S. E. 224. The contentions of defendant (appellant), as summarized from the numerous exceptions, are: (1) That in this case the plaintiff must establish the allegations of the complaint by clear, strong, and convincing testimony before the award can be set aside. (2) That, it being admitted that no proof of loss has been furnished defendant by plaintiff, he cannot maintain this action. (3) That there is no evidence in the record sufficient to go to the jury upon the issues 2, 3, and 4 relating to the fraud, interest, and bias of the arbitrators.

The first contention cannot be sustained. In this state the degree or intensity of proof required in civil actions has been divided into two classifications only: (1) Those facts which must be established by a preponderance of the evidence or to the satisfaction of the jury. A jury is not justified in finding any fact unless the evidence is sufficient to satisfy their minds of its truth, or, what is equivalent and practically the same thing, creates in their minds a belief that the fact alleged is true. This we take to be substantially what is said by Chief Justice Pearson in *Lee v. Pearce*, 68 N. C. 77. (2) Those facts which must be established to the satisfaction of the jury by clear, cogent, and convincing proof. *Ely v. Early*, 94 N. C. 1. We take those to be the two classifications of evidence applicable to civil actions, as settled by numerous decisions of this court. *Lee v. Pearce*, supra, and *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, represent the first named class, and *Ely v. Early*, supra, and many other similar cases, represent the second. That class of cases wherein it is sought to set aside deeds, decrees of judicial tribunals, and awards of arbitrators upon the ground of fraud, belongs to the first class. "In order to establish fraud, it is not necessary that direct affirmative or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required. Like much of human knowledge, fraud may be inferred from facts established. This means no more than that the proof must create a belief, and not merely a suspicion." *Kerr on Fraud & Mistake*, pp. 384, 385. This subject is discussed with great clearness and learning by *Avery, J.*, in *Harding v. Long*, supra, which case is cited and approved in many subsequent opinions. We would be but "threshing old straw" to discuss this contention of the defendant further.

The second contention cannot be maintained. We admit that it is settled law that an action for damages for loss on a "standard" fire insurance policy cannot be maintained unless it is alleged and proved that proof of loss has been made before action brought, in accordance with the terms of the policy. But proof of loss can be waived. We are of opinion that it has been, in this case, by the

agreement to arbitrate, and that his honor was correct in so charging the jury. It has been generally held that a provision in a policy requiring proof of loss before commencing action is a reasonable one. The object is to give the insurer notice of the loss, and of its extent and character, so the insurer may have an opportunity to investigate and settle the loss without being subjected to an action. When the insurer agrees to arbitrate, it is presumed he has investigated and is unwilling to pay the loss as claimed by the insured. In this case there was not only an agreement to arbitrate, but an actual award of arbitrators, one of whom was selected by the defendant. If the award is abortive, it is not the fault of the plaintiff. In Pretzfelder's Case such a defense is characterized by the present chief justice as "technical, and not meritorious." 123 N. C., at page 166, 31 S. E. 470, 44 L. R. A. 424. In Insurance Co. v. Holking, 115 Pa. 416, 8 Atl. 586, it is held that, where arbitrators fail to agree upon an award, the plaintiff is not compelled to submit to another arbitration, but may forthwith bring his action in the courts. Where the insured claims that arbitration has failed because of fraud, there is no reason whatever why he should be required to go through the empty form of filing a proof of loss before he can commence his action to establish the fraud and recover his damages. The Holking Case is approved in Pretzfelder's Case, and we again give the decision the indorsement of this court.

The third contention: After a careful examination of all the evidence, we agree with the defendant that there is no sufficient evidence that Ellington had any interest in the subject-matter of the award. There is no sufficient evidence that Faucette was corruptly influenced and controlled by Ellington in the interest of the defendant. Prayers for instructions numbered 10 and 12, directed to the second and third issues, should have been given. But these are not reversible errors.

We are of the opinion that there was evidence proper to be submitted to the jury upon the fourth issue, and that the finding of the jury upon that issue is amply sufficient to support the judgment rendered by the court setting aside the award. There are two kinds of fraud which will vitiate an award—positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the fact of its existence to be clearly indicated. "A common case of inferential fraud is when the award is obviously and extremely unjust." Morse on Arbitration & Award, 539. "Where there is a charge of fraud or partiality made against an award, the fact that it is plainly

and palpably wrong would be evidence in support of the charge, entitled to greater or less weight, according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators." *Goddard v. King*, 40 Minn. 184, 41 N. W. 639. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but, if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias. *Ostrander on Fire Insurance* (2d Ed.) 596; 8 Cyc. 749; *Bispham, Eq.* (6th Ed.) 312; *Dorsett v. Mfg. Co.*, 131 N. C. 260, 42 S. E. 612.

The jury have assessed the damage to the house at \$750. The arbitrators, Ellington and Faucette, assessed the damage at \$73.50—not one-tenth of the sum awarded by the jury. Dr. Perry, one of the plaintiffs, testified that he had known Faucette 12 or 15 years; that Faucette advised witness to take him as an arbitrator; that Faucette is a good contractor and builder, and had examined the house, and told witness that the damages were \$750, and advised witness not to take less, and for this reason the witness selected him. There was evidence offered by plaintiff tending to prove that the actual damage to the house was fully \$750. The court below charged the jury that the award is presumed to be legal and valid; "that, if the award is so grossly and palpably inadequate—that is, so grossly and palpably small and out of all proportion to the amount of actual damage—as to shock the moral sense and conscience and to cause reasonable persons to say 'he got it for nothing,' then the jury may consider this as evidence tending to show fraud and corruption or strong bias and partiality on the part of the arbitrators." This charge is not only sustained by the law, but is expressed in well-chosen language, for the use of which his honor has the authority of the great names of Pearson and Thurlow. "An inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it," are the words in which Lord Thurlow expresses the idea (*Gwynne v. Heaton*, 1 Bro. O. C. 8; *Bispham, Equity* [6th Ed.] 312); and many cases cited by that author in the notes sustain his honor's clear and well-expressed language.

The judgment is affirmed.

(137 N. C. 408)

VINSON v. KNIGHT.

(Supreme Court of North Carolina. Feb. 21, 1905.)

APPEAL FROM JUSTICE'S COURT—RETURN—NATURE OF ACTION — TRESPASS OR TROVER — PLEADING—QUESTIONS INVOLVED—TITLE TO PROPERTY—BURDEN OF PROOF.

1. The statement of the testimony heard by a justice of the peace in a trial before him is no part of his return on appeal.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 611.]

2. A justice's summons stating the cause of action to be "for the recovery of the possession of one steer" this day forcibly taken by defendant from plaintiff's servants "of the valuation of \$20, alleged by plaintiff to be in the possession of defendant, and unlawfully detained by him from plaintiff," etc., and an oral complaint alleging practically the same facts stated in the summons, states a cause of action in trover or detinue, and not in trespass.

3. Where plaintiff alleged in justice's court that defendant forcibly and with violence took a steer from plaintiff's servants, an answer denying "plaintiff's title to this steer and his right to recover possession of the same or its value," is sufficient to put plaintiff on notice that the real issue on the trial would be one of title, and not the trespass in taking possession.

4. To sustain an action in trover or detinue, plaintiff must allege and prove title to the property.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, § 5; vol. 47, Cent. Dig. Trover and Conversion, § 119.]

5. In trover or detinue, if defendant denies plaintiff's title to the property he may set up title in a third person.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, § 14; vol. 47, Cent. Dig. Trover and Conversion, §§ 121, 166.]

6. In trover or detinue, defendant has the burden of disproving plaintiff's title.

Appeal from Superior Court, Hertford County; Hoke, Judge.

Action by J. C. Vinson against M. J. Knight. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff in the summons stated the cause of action to be "for the recovery of the possession of one red steer, * * * it being the steer the defendant took from Jacob Everett and Jordan Hill on the road to-day, of the value of \$20, alleged by the plaintiff to be in the possession of the defendant, and unlawfully detained by him from the plaintiff; the plaintiff further claiming to be entitled to the immediate possession of said property." The cause was heard by a justice of the peace, who in his return upon the appeal stated that "the plaintiff complained for the possession of one red steer, described in the summons, of the value of \$20, and alleged that the said steer was in his actual possession, and that the defendant * * * forcibly took said steer by force and violence from * * * the servants of the plaintiff on the public highway in N—— county, and that said defendant unlawfully detained the possession of said steer from the plaintiff." The de-

fendant, answering the complaint, "denied the plaintiff's title to the steer, and his right to recover possession of the same, or its value." The defendant, in testifying, admitted that the steer was not his, and that he claimed no interest in it, and that he, with his son, forcibly took the steer from the possession of the plaintiff's servants on the public highway. The plaintiff in the superior court moved for judgment upon the return of the justice of the peace. The motion was denied, and the plaintiff excepted. Without objection the court submitted the following issues to the jury: "(1) Is the plaintiff the owner of the steer sued for? Ans. No. (2) Does defendant wrongfully detain said steer from plaintiff? Ans. No. (3) What is the value of the steer? Not answered. (4) What damage has plaintiff sustained by wrongful detention of same by defendant? Not answered." There was judgment, for the defendant, and the plaintiff appealed.

Winborne & Lawrence, for appellant. D. C. Barnes and L. L. Smith, for appellee.

CONNOR, J. (after stating the case). The plaintiff's motion for judgment upon the return of the justice is based upon the oral pleadings. The statement of the testimony heard by him is not properly a part of his return. Considered from this point of view, it becomes necessary to inquire whether the summons and complaint, construed together, set forth a cause of action in trespass, or whether, by the allegations, it is confined to an action for the recovery of the possession of the property. The plaintiff's contention that in an action for trespass—an injury to his possession—the question of title is not involved, save on the quantum of damages, is sustained by the authorities cited in his brief. The difficulty confronting him, however, is that he has stated a cause of action in trover or detinue, and not in trespass. The action is for the possession of the property or its value; that was the judgment which he recovered before the justice. There is nothing in the summons, pleadings, or return of the justice, or in his motion, to indicate that he was asking any other relief. While it is well settled that under the Code system, wherein forms of action are abolished, the plaintiff may have such judgment as, upon the facts stated, he is entitled to, it is equally true that the facts must be so stated that the defendant and the court may see what relief the plaintiff seeks. The plaintiff expressly tells the court that he is complaining "for the possession of one red steer," and that such possession is unlawfully detained by the defendant. It is true he says that the property was forcibly taken from the possession of his servants. The character of the action and of the relief sought is fixed by the language used in both the summons and complaint. In *Clark v.*

Langworthy, 12 Wis. 444, it is said: "The trespass, if one is relied on, should be so distinctly set forth that it may be seen with reasonable certainty what is the principal act complained of, and not of facts which might furnish ground for several different actions, stated in one count, leaving it impossible for the other party to know which to reply to." The trespass should not be laid by way of recital. 21 Enc. Pl. & Pr. 810. It is evident from an inspection of the entire record that the plaintiff believed the steer to be his. He says that it is in his mark. His declared purpose is to recover the possession of the property. The answer of the defendant put him upon notice that the real issue was the question of title. He does not deny the trespass. The plaintiff takes his judgment before the justice in strict accordance with the summons and complaint. There can be but one reasonable construction put upon the record. His honor would have permitted him either to amend his complaint or make it more definite, if he had so requested. Our view is strengthened by the fact that, after the refusal of the judge to render judgment upon the pleadings, he submitted issues, without objection, appropriate to an action in the nature of trover or detinue. His honor properly denied the motion.

The plaintiff objected to the introduction of testimony by the defendant tending to show the property in a third person. He says to do so would permit the defendant to take advantage of his own wrong. This assumes the very fact in controversy. If the steer was not the property of the plaintiff, the wrong done was in the trespass, and for this he could only recover such damage as he sustained in that respect. For the purpose of showing his actual damage, the question of title was material; but, as we have seen, the action being in trover or detinue, it is well settled by a long line of authorities that he must allege and show title. *Russell v. Hill*, 125 N. C. 470, 34 S. E. 640, in which the authorities are reviewed. It was open to the defendant upon this issue to show that the property belonged to a third person, otherwise he might be subjected to an action for conversion by the true owner. This principle is elementary, and recognized and enforced in this state since the case of *Laspeyre v. McFarland*, 4 N. C. 620, 7 Am. Rep. 705. The plaintiff says that the defendant should have set up in his answer the outstanding title. We have examined the cases cited to sustain this proposition. *Rowland v. Mann*, 28 N. C. 38, was an action of replevin, in which the defendant pleaded the general issue. *Nash, J.*, said: "Under the plea of non cepit, all that the plaintiff has to do is to prove the taking or having the goods, or part of them, in the place specified. As the defendant under this plea merely denies the taking, he cannot controvert the

plaintiff's title." In the case before us the defendant expressly denied the plaintiff's title. The distinction is obvious. In *Craig v. Miller*, 84 N. C. 375, *Ruffin, C. J.*, clearly points out the distinction between a case wherein it did not appear that the property belonged to a third person, as in *Armory v. Delamirie*, 1 Str. 505 (1 Smith, L. C. 631), and where it was shown that the title to the property was in a third person. In *Barwick v. Barwick*, 33 N. C. 80, discussing *Armory v. Delamirie*, wherein it was held that the finder of a jewel could maintain trover against one taking it out of his possession, there being no evidence as to the true owner, it is said: "But the result of that case would have been very different if the owner had been known. * * * The distinction between that case, where the possessor was the only known owner, and the ordinary case of one who himself has the possession wrongfully and sues another wrongdoer for interfering with his possession, the true owner being known and standing by ready to sue for the property, is as clear as daylight." We could not make the distinction clearer by further discussion of citation of authorities. The plaintiff must recover upon the strength of his own title.

The same questions are raised by exceptions to the charge of his honor. He properly put upon the defendant the burden of showing that the steer was not the property of the plaintiff, the admitted possession at the time of the taking raising a presumption in his favor. *Boyce v. Williams*, 84 N. C. 275, 37 Am. Rep. 618.

The plaintiff seeks to distinguish the case before us from those cited for that the steer was taken from the possession of the plaintiff's servants by violence, and for this he cites *Lain v. Gaither*, 72 N. C. 234. In that case the property sued for was borrowed by the defendant from the plaintiff, and he sought to prevent its recovery by showing that the plaintiff had been adjudged a bankrupt. The court held that, having acquired possession under the plaintiff, he was estopped to show an outstanding title in another, unless he should connect himself with it. This is elementary learning. In an action for trespass the violence of the defendant in taking the property should be considered in fixing the damages, either actual or punitive, but does not affect the right of action. The slightest trespass is sufficient to entitle the plaintiff to an action—as, in the case of realty, treading upon the grass. *Chaffin v. Mfg. Co.*, 135 N. C. 95, 47 S. E. 226.

We have carefully examined the authorities cited by the plaintiff's counsel in his excellent and exhaustive brief. The disposition of the case turns upon the cause of action set forth in the pleadings, and which, as we have seen, involved the title to the property, and upon the strength of which the plaintiff must recover, if at all. This

having been decided against him, the court below properly rendered judgment for the defendant. We find no error in the record, and the judgment must be affirmed.

Affirmed.

HOKE, J., took no part in the decision of this case.

(67 W. Va. 1)

ELKINS NAT. BANK v. SIMMONS et al.
MOORE v. SIMMONS et al. HANS-
FORD v. SIMMONS et al.

(Supreme Court of Appeals of West Virginia.
Jan. 24, 1905.)

APPEALABLE DECREE — QUASHING ATTACHMENT
— RENEWAL OF MOTION — CLAIMS OF
THIRD PARTY — LIMITATIONS.

1. Under subsection 8 of section 1 of chapter 135 of the Code of 1899, a decree overruling a motion to quash an attachment is an interlocutory, but appealable, decree, and does not preclude a renewal of the motion at the same or any subsequent term before final decree, and in a suit in which an attachment is sued out, and some of the defendants appear and move to quash the attachment, and their motion is overruled, a creditor who files a petition under section 23, c. 106, Code 1899, disputing the validity of the plaintiff's attachment, and stating a claim to or interest in the property attached, and is made a formal party thereto, has the right to move to quash said attachment, and the statute of limitations as to his right to appeal begins to run at the date of the decree overruling his motion.

2. An affidavit for an attachment, after stating the material facts relied upon, states, "And therefore the affiant says they fraudulently contracted the debt and incurred the liability for which the said suit is about to be brought." Held to be a sufficient statement of the ground for an attachment under subsection 8, § 1, c. 106, Code 1899.

3. Where an affidavit for an attachment, after stating the material facts relied upon, and after stating the liability of the defendants, states, "Affiant says that the said J. H. and Chas. Simmons fraudulently incurred the liability aforesaid, for which suit is about to be brought," this is a sufficient statement of the ground for the attachment under subsection 8, § 1, c. 106, Code 1899.

4. Where the ground for an attachment is that the defendants fraudulently contracted the debt or incurred the liability for which the suit is about to be or is brought, the affiant should state the material facts relied upon to show the existence of such ground, and, if the facts are stated in a vague and uncertain manner, and not sufficient to show that the debt was fraudulently contracted, or the liability fraudulently incurred, the attachment should be quashed.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by the Elkins National Bank against Jesse H. Simmons and others and by B. W. Moore against J. H. Simmons and others, and by Lloyd Hansford, trustee, against Jesse H. Simmons and others. Judgment for plaintiffs, and W. E. Hedrick and other defendants appeal. Reversed.

Harding & Harding and J. L. Wamsley, for appellants. L. D. & J. F. Strader, C. W. Dalley, and E. D. Talbott, for appellees.

SANDERS, J. The first two of these causes were instituted in the circuit court of Randolph county, that of the bank against Simmons and others being first instituted, and attachments were sued out in each of them and levied upon the real estate of the defendants J. H. and Chas. Simmons, situated in Tucker and Pendleton counties. A short time thereafter the defendants J. H. and Chas. Simmons, by deed of trust, conveyed to plaintiff in the last-named case, L. Hansford, trustee, all their property, including that which had been levied upon as aforesaid, to secure all their indebtedness to their creditors ratably. After the execution of said trust deed, Hansford, trustee, instituted a chancery suit in the circuit court of Tucker county against J. H. Simmons and others for the purpose of settling up the estate of J. H. and Chas. Simmons, which suit was, by an order entered on the 12th day of March, 1900, removed to the circuit court of Randolph county, and by a decree in the circuit court of the last-named county, on the 16th day of May, 1900, these three causes were consolidated, and ordered to be heard together. And on the 16th day of May, 1900, E. A. Cunningham, counsel for Timothy Simmons and certain other creditors of J. H. and Chas. Simmons, other than the appellants, appeared, and moved to quash said attachments, which motion was, by the court, overruled; and on the 21st day of May, 1900, and again on the 16th day of October, 1900, J. H. and Chas. Simmons appeared, and moved to quash each of said attachments, which motions were likewise overruled. There is nothing in the record to show just when L. Hansford, trustee, moved to quash said attachments, except in the decree entered on January 27, 1903, it appears that the joint motion to quash of L. Hansford, trustee, and others, had been filed, but when filed the record does not state; but this is immaterial, for the decree of January 27th does show that the motion was made and on that date overruled. The appellants W. E. Hedrick and E. D. Wamsley filed their petitions in the two first-mentioned causes disputing the validity of said attachments, and were made formal parties to these proceedings, the petition of Hedrick being filed on the 16th day of October, 1900, and that of Wamsley at the January term of said court, 1901. After petitioners were made formal parties to these suits, they each moved to quash said attachments, which motions were, by decree entered on the 27th day of January, 1903, overruled, and on the 21st day of January, 1904, the appellants Hedrick, Wamsley, and Hansford, trustee, presented their petition for an appeal from the decree overruling their motions to quash said attachments, which was allowed.

There are only two questions presented by the record. One is, was the right of appeal barred by the statute of limitations at the time the appellants presented their petition

therefor, and the other is, if the appeal was not barred, did the court err in overruling the motions to quash said attachments? The appellants contend that at the time the petition was presented for the appeal that more than two years had elapsed since the motions to quash said attachments were made and overruled. It is true the record shows that the petition was presented for an appeal on the 21st day of January, 1904, and that more than two years had expired since each of said motions to quash was overruled. When the motions to quash on the 16th and 21st days of May, 1900, were made, neither Hedrick nor Wamsley were parties to these suits—Hedrick not becoming a party until the 16th day of October, 1900, and Wamsley not becoming a party until the January term of court, 1901. It is insisted that the order entered overruling the motions to quash the attachment was an appealable decree, and that the appellants became parties before the right to appeal therefrom was barred. Subsection 8 of section 1 of chapter 135 of the Code of 1899 provides that a party to a controversy in any circuit court may obtain an appeal in any case where there is a judgment or order quashing or abating or refusing to quash or abate an attachment, and, of course, under this provision of the statute, the orders entered overruling the motions to quash were appealable; but certainly not by parties who at that time were not parties to the suit, but only those persons could appeal from such order whose motions had been passed upon adversely to them. It certainly does not require argument nor the citation of authorities to show that appellants could not have appealed from these orders, which were entered before they became in any way identified with the suits, and, not being entitled to appeal from the orders entered before they became parties, it is difficult to understand how their rights could be in any way affected by such orders. It is said they became parties before the appeal was barred. What if they did? This would give them no right to appeal from the decree of the court refusing to quash an attachment upon the motion of some other defendant. The appellants could not be heard to complain in this court that the circuit court had refused to quash the attachments when they had not asked this to be done. They must first make such motion, and it must be passed upon adversely to them. The statute allows an appeal from an order quashing or abating or refusing to quash or abate an attachment. This applies to the parties directly interested in the motion, not to some one who may be a party to the suit, and have an interest in its ultimate result, and does not make such motion, or join therein. The appellants clearly had no right to appeal from either of the orders refusing to quash the attachments upon the motion of the other defendants. If they had done so, they would have been met,

and properly so, in this court, with a motion to dismiss their appeal on the ground that the lower court had made no adverse ruling to them. But appellees say that the orders entered overruling the motions to quash the attachments were final, and could not be set aside after the term of court at which they had been entered, and that, if the appellants desired to be relieved against these orders, they should have filed their bill of review. This position is not sound, for an order overruling a motion to quash an attachment is interlocutory, and does not prevent a renewal of the motion, and the appellants, as soon as they became parties to the suits, moved to quash the attachments, which was not acted upon till the 27th day of January, 1903, and therefore they had no appealable interest in the case until that time, and the statute did not begin to run against them until that date. An order entered in a case overruling a motion to quash an attachment is like an order entered overruling a demurrer. There is no reason, because a court enters an order at one term overruling a demurrer, that it cannot, at the next term, consider the demurrer, and sustain it; and the same rule will apply to motions to quash attachments. Although an order refusing to quash an attachment is appealable, still it is not a final decree. The fact that the court refused at one term to quash the attachment is no reason why at a subsequent term it could not, upon the motion of the same person who had previously made it, or upon the motion of some other defendant, made at a subsequent time, quash the attachment. The very late case decided by this court of *Simmons v. Simmons*, 48 S. E. 833, decided that an order overruling a motion to quash an attachment is interlocutory, and does not preclude a renewal of the motion; and certainly a party who had never made such motion would have the right to do so at any time before the final decree in the cause, and his right to appeal would date from the time the court passed upon it. Clearly this court has jurisdiction to entertain the appeal.

The next question is, should the circuit court have quashed the attachments? It is claimed that the affidavits are defective, because they fail to show what ground is relied upon. In the case of *Bank v. Simmons et al.* the affidavit, after stating the material facts relied upon, contains this language: "Affiant says that they fraudulently contracted the debt and incurred the liability for which the said suit is about to be brought;" and in *Moore v. Simmons et al.*, after also stating the material facts, and after describing the liability, it says: "Affiant says that the said J. H. and Chas. Simmons fraudulently incurred the liability aforesaid, for which suit is about to be brought." The ground stated in the affidavits is as provided for in subsection 8 of section 1 of chapter 106 of the Code of 1899,

and comes clearly within its provisions. Are the facts relied upon in these affidavits sufficient? The affidavit should, by some direct and positive averment, show a fraudulent act upon the part of the debtor in contracting the debt, and it must be such an act as to constitute and show a fraudulent intent. Now, in the first above mentioned case—Bank v. Simmons et al.—the affidavit does not show by that positive and clear language which is required that when J. H. Simmons presented the draft for \$4,000 to Warfield, the cashier, and had it placed to his credit in the Elkins National Bank, that Kunkle Bros. were indebted to him, and it certainly does not show that he stated that they owed him enough to pay the draft. The affidavit, in this respect, is vague and uncertain. What did Simmons say? The affidavit does not show. His language ought to be given, so the court can see that he made such statements as amount to a fraudulent contraction of the debt, and not leave it to the affiant to form his conclusions as to what would amount to fraud. Then, again, there is a statement in the affidavit that the draft for \$4,000 was sent to the Merchants' National Bank of Baltimore, Md., for collection, and the said draft was promptly presented to the said Kunkle Bros. for payment, but the same was dishonored and protested, and payment thereof refused, upon the ground of no funds, or not sufficient funds for the purpose. Now, it is certainly material, even if Simmons had stated to Warfield that Kunkle Bros. owed him a sum sufficient to pay the draft, to negative the fact that he did owe him. Simply an allegation in the affidavit to the effect that the draft was presented to Kunkle Bros. for payment, and that it was dishonored and protested, and payment thereof refused, for the reasons above given, does not say that Kunkle Bros. did not owe Simmons that amount of money. It simply says that Kunkle Bros. refused to pay it, and gives their reasons for refusing to pay it, but does not, in positive and direct language, state that Kunkle Bros. did not owe it. The refusal to pay for certain reasons is simply the statement of Kunkle Bros. They may have owed the debt or they may not have owed it, but it is certain that the affiant does not state that they did, and, so far as affiant is concerned, the statement that he made in the affidavit as to him can be perfectly true, and yet still there may have been ample funds in the hands of Kunkle Bros. to pay the draft.

Now, as to the affidavit in the case of Moore v. Simmons, made by B. W. Moore. This affidavit is very much like the one just referred to. Its language is vague, uncertain, and indefinite. There is no positive and direct statement of facts which shows that the debtor fraudulently contracted the debt. The substance of it is that Moore sold

to J. H. Simmons 28 head of cattle and 315 head of sheep at a given price. These cattle and sheep were to be weighed and received by J. H. and Chas. Simmons, and paid for where plaintiff resides, at such time as the Simmonses should indicate in the month of October, 1899; that in October, 1899, the 28 head of cattle were delivered to the Simmonses at the price agreed upon, and part of which had already been paid, and, without receiving the residue of the money the affiant, as directed by the Simmonses, drove the cattle to the pasture of E. Hutton, and left them there for the purchaser; that on another date in October, 1899, the Simmonses directed the 315 head of sheep to be sent to Huttonsville, and they were sent to the Simmonses at that place, from where they were the next morning shipped to Baltimore, Md.; and not receiving the pay for either the cattle or sheep, as affiant says Simmonses had promised him, he went to Huttonsville, and the Simmonses gave him a check for \$1,000; that this check was drawn on the Elkins National Bank, and was deposited by the payee in the First National Bank of Grafton; that it was presented for payment, and payment thereof refused, and the check was protested for the reason no funds in said bank. In the first place, the contract had already been made between the parties, price agreed upon, and stock weighed and delivered, and the sale actually consummated, before the check was given. Even if there were no funds in the bank to meet the check, that could not be urged as a reason to show the fraudulent contraction of the debt. And not only that, but this affidavit in one respect is subject to the same objection as the one above considered; that is, there is no statement of fact showing that Simmons did not have the money in the bank to meet the payment of this check. And again, these affidavits not only fail to show that Simmons did not have the money in the hands of Kunkle Bros. and the bank to meet the draft and check, but there is nothing in them to show that, even if Simmons made the statements that he had the money there, he did so knowing his statements to be false in fact, knowing that he did not have it. And neither do the affidavits show that the credit was extended to him believing in the truthfulness of his statements and relying thereon, and not knowing his statements were false. The facts stated in the affidavits should be fraudulent in fact, and if Simmons made the statements that he had the funds to meet these debts in the hands of Kunkle Bros. and the bank, yet, unless he made the statements falsely, knowing that he did not have the money there, then there is no actual fraud; and his statements must have been accepted as true and relied upon and confided in by the persons who extended the credit.

But, inasmuch as counsel for appellees in

their brief contend that they should be given a day, under section 1 of chapter 106 of the Code of 1899, to file a supplemental affidavit, we therefore reverse the judgment of the circuit court refusing to quash said attachments, and remand these causes, with directions to the circuit court to quash the same, but with leave to the appellees, if they so desire, to file a supplemental affidavit, as provided by section 1 of chapter 106 of the Code of 1899.

(57 W. Va. 29)

KLINE v. McKELVEY.

(Supreme Court of Appeals of West Virginia.
Jan. 24, 1905.)

MANDAMUS — ADMISSION TO OFFICE — EXPIRATION OF TERM — VACANCY.

1. Mandamus lies to compel the admission or restoration to office of the party having a clear prima facie right thereto, shown by a commission, certificate, or other legal evidence thereof.

2. Such writ will be awarded directly against one who, under section 2 of chapter 7 of the Code of 1899, holds over after the expiration of the term for which he was elected or appointed, to compel him to yield the office to the person elected or appointed to succeed him.

3. Incumbency of an office by holding over under said statute does not preclude the existence of a vacancy as a basis for the exercise of the appointive power under section 5 of chapter 45 of the Code of 1899.

(Syllabus by the Court.)

Error to Circuit Court, Tucker County;
John Homer Holt, Judge.

Action by Joseph Kline against R. C. McKelvey. Judgment for defendant, and plaintiff brings error. Reversed, and mandamus awarded.

C. O. Strieby, Conley & Smith, and P. J. Crogan, for plaintiff in error. Cunningham & Stallings, for defendant in error.

POFFENBARGER, J. This case presents, upon a writ of error to a judgment of the circuit court of Tucker county, the question whether mandamus lies to obtain admission to an office by a person elected or appointed thereto against another person holding over under the claim that his successor has not been elected and qualified. The controversy arises between Joseph Kline, who, in November, 1903, was elected to membership in the board of education for the district of Davis, in Tucker county, but failed to qualify within the time required by law, and was afterwards appointed by the superintendent of free schools of said county to the same position for the term for which he had been elected, on one side, and R. C. McKelvey, who, at the time of the election, held the office by appointment to fill a previous unexpired term thereof, and refused, upon the demand of Kline, to surrender the office to him, on the other. McKelvey's only claim of title is the authority given by the statute to every officer to hold his position "until his successor is elected or appointed and quali-

fied." Section 2, c. 7, Code 1899. The scope of the writ of mandamus in controversies concerning the title to office has not been very clearly defined in this state, though there are several cases illustrating such use of it. The most important of these are *Bridges v. Shallcross*, 6 W. Va. 562; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 28, 3 L. R. A. 58; *Schmubach v. Spedel*, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922; and *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639. It has often been judicially declared that mandamus is a proper remedy for the trial of title to office, and will lie where there is another appropriate remedy, because it is a more speedy, and therefore a more adequate, remedy. *Banton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Tex. 516; *Harwood v. Marshall*, 9 Md. 83; *Strong's Case*, 20 Pick. 484; *Conlin v. Aldrich*, 98 Mass. 557; *Dew v. Judges*, cited. On the contrary, it is more generally declared that mandamus is not the remedy for trial of title to office. *People v. Olds*, 3 Cal. 167, 53 Am. Dec. 398; *Meredith v. Supervisors*, 50 Cal. 433; *Warner v. Myers*, 4 Or. 72; *People v. New York*, 3 Johns. Cas. 79; *People v. Stevens*, 5 Hill (N. Y.) 616; *Matter of Gardner*, 68 N. Y. 467; *Denver v. Hobart*, 10 Nev. 28; *Brown v. Turner*, 70 N. C. 93; *Fitch v. McDermid*, 26 Ark. 482; *Underwood v. White*, 27 Ark. 382; *People v. Treasurer*, 36 Mich. 416; *State v. Auditor*, 84 Mo. 375; *People v. Detroit*, 18 Mich. 338; *People v. Head*, 25 Ill. 325; *State v. Dunn*, 12 Am. Dec. 25. For the purposes of this case it suffices to say that the writ of mandamus is a proper remedy for the admission or restoration to office of one who holds the clear, legal, prima facie right to it. Upon this proposition all the authorities agree. See *State v. Dunn*, 12 Am. Dec. 25, and the able and exhaustive note reviewing the cases at page 28. No case decided by this court seems to go beyond this limit, nor is any instance recalled in which the jurisdiction by mandamus has been held to stop short of it. A mandamus was refused in *State v. McCallister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343, but the decision turned upon the peculiar nature of the controversy, it being one in which a town council had refused to admit one who had been elected to membership in that body on the ground of his ineligibility. As that case materially differs from this in its facts and the relations subsisting between the parties, the principle there announced does not bar the remedy in this case, and may not contravene the general principles above announced. Often the conditions under which the writ is awarded are different from those presented in this case. In *Dew v. Judges*, cited, it was directed, not to the wrongful incumbent of the office, but to the court, whose duty it was to admit or restore the clerk. This relationship is characteristic of the larger number of the reported cases. But the writ may be

invoked directly against the person holding the office, requiring him to admit thereto his successor; for it is a part of his official duty to turn over to his successor the books, papers, and property belonging to the office and the insignia thereof. Thus, in *Bridges v. Shallcross*, cited, and in *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26, 3 L. R. A. 58, the respondents were, respectively, Shallcross and Wilson, the parties holding the offices in question. In the former, Shallcross was in office by appointment of one board, and Bridges claimed the office by a subsequent appointment of another board, and the test of the right of the petitioner was the constitutionality of the legislative act in pursuance of which his appointment was made. Neither of the two boards, asserting conflicting authority respecting the appointment, was made a party to the proceeding, and the whole matter was settled upon the issue made between the incumbent of the office and the party who claimed as his successor. In the former case the office in question was independent of the power of appointment by any inferior board or tribunal. In these cases the remedy was invoked against persons who had lawfully and rightfully occupied the offices and were holding over after the expiration of their terms, awaiting the election or appointment and qualification of their successors. Such also is the present case, and the authorities uniformly hold that under such conditions the writ of mandamus will go, at the instance of the person entitled to the office, directly against the incumbent thereof, to compel him to yield to his successor. *Walter v. Belding*, 24 Vt. 658; *Burr v. Norton*, 25 Conn. 103; *Warner v. Myers*, 4 Or. 72; *People v. Head*, 25 Ill. 323. In this respect the case of *Schmubach v. Speidel*, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922, may be regarded as going further, since the respondents therein were not holding over, but had ousted the petitioners from their offices. Whether, by holding mandamus to be a proper remedy in such case, any rule was violated, it would be useless now to inquire, but authority is not wanting for the proposition that the writ will go against an intruder under color of authority. *Banton v. Wilson*, 4 Tex. 400; *Lindsey v. Luckett*, 20 Tex. 516; *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769; *Kimball v. Lamprey*, 19 N. H. 215. Why should it not go against a de facto officer? His acts are valid, and to allow them efficacy as regards the public generally, and then deny that he has any official power, so as to deprive the person entitled to the office of the benefit of an expeditious remedy against him on the technical ground of want of legal right to the office, savors of inconsistency, and sacrifices substance to technicality. Moreover, it allows the intruder to set up in his own behalf, and for his own protection, his own want of title and his own wrong, contrary to well-

settled principles of law. "The act of an officer de facto, where it is for his own benefit, is void, because he shall not take advantage of his want of title, which he must be cognizant of." *Building Ass'n v. Sohn*, 54 W. Va. 101, 114, 46 S. E. 222, 227. However, we are not to be understood as reaffirming the holding in *Schmubach v. Speidel*. What is said here on that subject is necessarily obiter, since the state of the case does not raise the question.

On what ground the court based its action in refusing a peremptory writ of mandamus does not very clearly appear. The motion to quash the writ, the motion to dismiss the petition and the demurrer to the writ, as stated in the order, were all overruled, and yet the court refused the peremptory writ, and dismissed the proceeding. The return does not controvert the election of the petitioner, his qualification after the time had expired, his subsequent appointment by the county superintendent, nor his qualification after appointment. It does deny that there is any vacancy in the office because it says the respondent is in the office holding over. It is further objected by the demurrer to the writ that it asserts conflicting claims to the office, that it fails to show that Kline was appointed to succeed McKelvey, that it failed to show whether he is claiming by election or appointment, that it sets up a double claim to the office, and that it shows McKelvey to be in the office, exercising the duties thereof, at the time of Kline's appointment. The respondent's incumbency of the office after the expiration of his term could be no bar to the right of appointment. For the purposes of appointment there is a vacancy notwithstanding his occupancy. Section 2 of chapter 7 of the Code of 1899 virtually says this, for it provides that the term of every officer shall continue until his successor is elected or appointed and qualified. To say the least, it implies that an appointment may be made while the officer is awaiting the selection of his successor. The allegations of Kline's election and appointment are proved by certificates exhibited with the petition. It is further asserted that he was elected and appointed as successor to McKelvey, and this last allegation is not denied by the return. The averment must therefore be taken as true. Though the petition does not set up conflicting claims to the office, it clearly shows the legal title to be in Kline. In law it shows no conflicting rights. Moreover, it is immaterial that he asserts two titles to the office, one by election and the other by appointment. Though they cannot stand together, it is manifest that either the election or the appointment vests the right to the office in Kline. In the brief there is much discussion as to whether or not the failure to qualify as an elected officer, within the time limited by the statute, forfeited the of-

fice, but it is unnecessary to decide that question.

The conclusion resulting from the foregoing authorities and reasoning is that the court erred in refusing the writ and dismissing the petition. Therefore the judgment will be reversed, and a peremptory writ of mandamus will be awarded, commanding the respondent, McKelvey, to yield possession of the office in question to the applicant, and turn over to him the insignia thereof.

(57 W. Va. 9)

CAIN et al. v. CITY OF ELKINS et al.
(Supreme Court of Appeals of West Virginia.
Jan. 24, 1906.)

MUNICIPAL CORPORATIONS — SEWERS — ASSESSMENTS — INJUNCTION.

1. The city of Elkins has no authority, under its charter act (chapter 151, p. 420, Acts 1901), to collect the whole or any part of the cost of the public sewers placed by it in its streets and alleys from the owners of the real estate abutting on such streets and alleys, by means of the levy of a special tax or assessment against them for that purpose.

2. If a municipal corporation acts ultra vires in the levying of a tax or assessment, and attempts to collect it, equity has jurisdiction, upon proper bill filed by the party or parties subject to such tax or assessment, to enjoin its collection.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by James Cain and others against the city of Elkins and others. Decree for defendants, and plaintiffs appeal. Reversed.

Bent & Spears and J. L. Wamsley, for appellants. W. B. Maxwell and B. M. Hoover, for appellees.

COX, J. On the 29th day of July, 1903, the common council of the City of Elkins adopted an ordinance which in part is as follows:

"Be it ordained by the council of the city of Elkins:

"(1) That the expense of all sewers hereafter put in any of the streets and alleys of the city shall be paid for as follows: One-third of the actual cost thereof shall be paid out of the city treasury, and the residue of said cost shall be assessed upon the real estate bounding and abutting upon the street or alley where such sewer is located and built in the proportion of the one-third of such cost upon property abutting on each side of the street or alley where such sewer is located, and the said expense so taxed upon said real property shall be collected from the owner of said property as other taxes assessed thereon and collected.

"(2) The expense of all such sewers may be paid out of the city treasury as the work is done, and subsequently, but within the same fiscal year that the work is completed,

the two-thirds of the said expense assessed and collected from the owners of the adjoining and abutting real estate as provided in the first section of this ordinance."

After the adoption of the ordinance the city proceeded to construct sewers in a number of the streets and alleys of the city, and paid the cost thereof out of the city treasury; and, upon report of its engineer of the cost of the work, the common council assessed against the owners of the real estate abutting the streets and alleys so sewer-ed according to said ordinance two-thirds of the cost of the construction of such sewers, proportioned according to the number of feet the real estate of each owner abutted on such streets and alleys; and the city of Elkins, by its collector, was, at the time of the institution of this suit, proceeding to enforce the collection of such assessment against the plaintiffs and those for whom they sue. Plaintiffs James Cain and M. H. Harvey, suing on behalf of themselves and on behalf of the property owners of said city subject to such assessment, filed their bill in the circuit court of Randolph county, setting up these facts, and making other proper allegations against the city of Elkins, and its mayor, members of its common council, and its collector and treasurer, to enjoin and restrain them from collecting from the plaintiffs and those for whom they sue the said assessment, or any portion of it, and from selling the property levied on by the collector thereunder, and to declare such assessment void. On the 15th day of February, 1904, the judge of the circuit court of Randolph county, in vacation, upon presentation of said bill, awarded to the plaintiffs a temporary injunction, substantially as prayed for therein. Depositions were taken by the plaintiffs in support of the bill. At the May term of said circuit court, 1904, the defendant city of Elkins filed its demurrer and answer. The other defendants did not answer. The answer of the city of Elkins admitted substantially the allegations of the bill in relation to the levy and attempted collection of the special assessment complained of, but claimed that the city of Elkins and its officers had the right and authority to so levy and collect said assessment under its charter act. After the filing of the answer, the city of Elkins made its motion to dissolve the injunction and dismiss the bill, and the case was heard by said circuit court in term on the 14th day of May, 1904, upon the bill and exhibits, separate answer of the city of Elkins, general replication, and upon said motion to dissolve the injunction and dismiss the bill, but not upon the depositions; and on that day a decree was entered by said circuit court wholly dissolving the injunction and dismissing the plaintiffs' bill, from which decree the plaintiffs appealed to this Court.

The first question raised by the record, which we desire to notice, and which is vital

to this case, is, had the city of Elkins, under its charter act, the authority to levy the special tax or assessment complained of in the plaintiffs' bill? This question goes to the very foundation of the case. If the city of Elkins had no such authority, then it has no defense to this suit appearing in the record, and all its acts in adopting the ordinance in pursuance of such supposed authority, and in attempting to collect such special tax or assessment, are without authority. The authority claimed by the city of Elkins to levy and collect such special tax or assessment can only be exercised under the authority of the Legislature. It is in its nature an extraordinary power sometimes delegated by legislative authority to municipal corporations. Under such authority, where it exists, the individual, in addition to the payment of general taxes for the support of municipal government, is required to pay a special or local tax or assessment not levied generally upon all taxable property of the municipality. The charter act under which the authority is claimed in this case is chapter 151, p. 420, of the Acts of the Legislature of 1901. Under the powers conferred by this act the special tax or assessment complained of must be justified, if at all. Section 28, p. 430, of this act, is relied upon to show the existence of the authority to levy this special tax or assessment. This section is voluminous, but for the purposes of this case we deem it necessary to refer only to such parts of it as are considered material in determining the authority of the city of Elkins to levy and collect the special tax complained of. The parts considered material are as follows: "The council of said city shall have power to lay off, vacate, close, open, alter, grade, and keep in good repair the roads, streets, alleys, pavements, sidewalks, crosswalks, drains, sewers and gutters therein, for the use of the citizens or of the public, and to improve and light the same, and keep them free from obstructions of every kind; to regulate the width and kind of pavements and sidewalks, footways, drains and gutters and cause the same to be kept in good order, free and clean by the owners and occupants of real property next adjacent thereto; * * * to cause to be filled up, raised or drained, by or at the expense of the owner any town lot or tract of land covered or subject to be covered by stagnant water; * * * and for the proper draining of city lots and other parcels of land by or at the expense of the owner or occupant thereof; * * * and generally to have power to take such measures as are deemed necessary or advisable to protect persons and property, public or private, within the city, to preserve peace, quiet and good order therein, and to promote the health, safety, comfort and well-being of the inhabitants thereof."

In considering this question of authority

we are guided by well-settled rules of construction. From the many decisions and authorities on this subject, we deduce the following as applicable to this case: Municipal corporations can exercise only such powers as by their charters are granted in terms expressed, or by necessary or fair implication, regard being had to the purpose of the grant. The authority is not inherent in any public corporation to levy assessments upon property. Such authority cannot be inferred from the general welfare clause of the charter, or from similar general provisions, or from the general words of an act, unless the words employed clearly grant the authority. The authority to levy assessments will not be extended by construction, for, as against the corporation, the construction is strict, and nothing in its favor will be inferred, except such matters as are clearly implied from the express words of the act. If any reasonable doubt arises as to the existence of the authority, it will be resolved against the corporation assuming it. The rule of strict construction is applied rigidly when the right and authority to exercise an extraordinary power are assumed by the corporation. Applying these rules to the charter act of the city of Elkins, and the parts above referred to, we do not think that the authority to levy the special tax or assessment complained of can be inferred from the first clause of section 28, which simply grants power to the council to do certain things generally, and makes no provision for the payment of the cost of doing those things by the abutting property owners. Nor do we think such authority can be inferred from the second clause of said section, which provides that the council may cause drains and gutters, etc., to be kept in good order, free and clean, by the owners and occupants of the real property adjoining thereto. Nor do we think such authority is granted or can be inferred from either of the two clauses of said section, one of which provides for the draining of a lot covered or subject to be covered by stagnant water by or at the expense of the owner, and the other for the proper draining of city lots by or at the expense of the owner or occupant thereof. A lot abutting a street or alley may be covered by stagnant water, or liable to become so, and may need draining; but this would not justify the inference that the city can build a public sewer in the street, and assess all or any part of the cost of such public sewer upon all the abutting lot owners, regardless of whether all the lots are covered or liable to be covered by stagnant water, or needed draining, or not. Public sewers in a street or alley are not alone for the purpose of draining lots or lands, although it is true lots or lands may be drained by them if connection therewith be made for that purpose, but they are for many other purposes, such as draining the streets, and providing a proper

way to dispose of the refuse and rubbish collecting thereon, and others; and the size, character, and cost of such sewers are governed by the many uses for which they are designed. It does not seem reasonable that the Legislature intended that the owners of abutting real estate should be made to pay, in whole or in part, the cost of such sewers, on the ground alone that the lots of such owners might be drained thereby. We do not think such authority can be maintained under the general welfare clause of said section. If the city of Elkins desires to protect persons and property, public or private, within the city, or promote the health, safety, comfort, and well-being of the inhabitants, by the exercise of this extraordinary power of levying special assessments upon part of the taxable property therein only, it must have clear, and not doubtful, authority to do so. And we think this clause does not even purport to give such authority. The right to pass ordinances not repugnant to the Constitution of the United States or of this state, necessary to carry into effect the powers granted by the charter act of the city of Elkins, does not create power or authority, but only permits the city to carry into effect the powers granted. An ordinance is without authority unless made pursuant to the powers granted by the Legislature. Neither by the provisions of the charter act above referred to, nor by any other provisions of the act, is the authority to levy the special tax or assessment complained of expressly given, and we think no such authority is clearly implied from the language used. Therefore we conclude that the city of Elkins has no authority under its charter act (chapter 151, p. 420, Acts 1901) to collect the whole or any part of the cost of the public sewers placed by it in its streets and alleys, by means of the levy of a special tax or assessment against them for that purpose.

We do not deem it necessary, from the view we take of this case, to decide the question of whether or not such tax or as-

essment, if the same had been levied pursuant to authority given by the Legislature, could legally be collected from property other than the real estate abutting the streets and alleys in which sewers were placed.

The only other question presented by the record is whether or not a court of equity has jurisdiction in this case. We think the jurisdiction of a court of equity is clearly established under the circumstances of this case, and that it lies in all cases where a municipal corporation acts *ultra vires* in the levying of a tax or assessment, and attempts to collect it. This question was thoroughly discussed and considered by Judge Snyder in delivering the opinion of the court in *Christie v. Malden*, 23 W. Va. 667, and was also discussed and considered in the case of *Crim v. Town of Philippi*, 38 W. Va. 122, 18 S. E. 466, and in the case of *Tygart's Valley Bank v. Town of Philippi et al.*, 38 W. Va. 219, 18 S. E. 489, and in other cases before this court. We think these cases uphold the jurisdiction where the act of levying the tax or assessment is *ultra vires*, and its collection is attempted, upon proper bill filed by the party or parties subject to such tax or assessment to enjoin its collection.

For the reasons above stated, the plaintiffs' bill in this cause is sufficient, and the motion to dissolve the injunction and dismiss the bill should not have been sustained by the circuit court, but the injunction should have been made perpetual. Therefore the decree entered by the circuit court of Randolph county in this cause on the 14th day of May, 1904, wholly dissolving the injunction awarded by the judge of the circuit court on the 15th day of February, 1904, and dismissing the plaintiff's bill, is reversed, and, this court proceeding to enter such decree as the circuit court should have entered, it is adjudged, ordered, and decreed that the injunction awarded by the judge of the circuit court of Randolph county in vacation, on the 15th day of February, 1904, be, and the same is, made perpetual.

(57 W. Va. 43)

BILLMYER v. HAMBURG-BREMEN FIRE INS. CO.(Supreme Court of Appeals of West Virginia.
Jan. 24, 1905.)**INSURANCE—ACTION ON POLICY—FORFEITURE—
DEFENSES—WAIVER—PROOF OF LOSS—ARBITRATION—AMOUNT OF LOSS—AWARD—MISCONDUCT OF ARBITRATORS.**

1. An award under an insurance policy—the submission limited to the amount of loss by fire—does not prevent action on the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1431.]

2. No specification having been filed in the trial court of the defense that the policy of insurance was forfeited by the assignment of the right of the assured, that defense cannot avail on writ of error.

3. A fire insurance policy provides for notice of loss, and proof of loss and arbitration, and contains the independent provision that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." A preliminary proof of loss having been furnished, this clause does not require another after an award upon the amount of loss.

4. An insurance policy provides, in case of disagreement as to amount of loss to goods by fire, for arbitration as to such amount, as a condition precedent to suit on it, and provides that the award shall "determine the amount of such loss." A valid award under it is final and conclusive as to the amount of loss.

5. Awards—effect of.

6. An award under a submission in the country—not a statutory award—cannot be impeached at law by evidence of misconduct of the arbitrators in becoming intoxicated while performing their duties, or other cause not apparent on the face of the award.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 322, 325, 399.]

7. An award has the same effect whether the submission is by writing under seal or not under seal. It may be not so if award is to pass title to land.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, § 269.]

(Syllabus by the Court.)

Error to Circuit Court, Jefferson County;
E. Boyd Faulkner, Judge.

Action by J. D. Billmyer against the Hamburg-Bremen Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. T. Barton and Forrest W. Brown, for plaintiff in error. Geo. M. Beltzhoover and D. C. Westenhaver, for defendant in error.

BRANNON, J. Action on a policy of insurance by J. D. Billmyer against the Hamburg-Bremen Fire Insurance Company for loss by fire to a stock of store goods, in which the court gave judgment for the plaintiff for \$873.30 upon a demurrer to the evidence filed by defendant.

A primary question is whether this action, which is based on the policy, can be main-

tained; the defendant contending that the action cannot be on the policy, but must be on an award made in the case. The policy provides: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss." The policy also provides: "No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements." The declaration goes only on the policy, not on the award. "It is a general rule that a valid award operates to merge and extinguish all claims embraced in the submission. Thereafter the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand; and the defendant cannot, in an action to enforce the award, set up in defense thereto any matters embraced in the award." Such is the force of an award upon all matters in controversy in a given transaction, but in this instance the submission was limited to the arbitration of only one matter under the contract of the policy; that is, the amount of the loss by fire. It did not include or close other points of controversy under the contract, but only provided a process of settling one matter—the ascertainment of one element of settlement. We find in 3 Cyc. 583, the following: "Where the whole matter of dispute is referred to quasi judicial determination, the original cause of action is merged by the judgment; but a mere appraisal, valuation, or the like act, does not destroy the original cause of action. At most, it affects the evidence rather than the remedy." "Technically, to constitute a valid common-law award, it is necessary that there should be a submission by the parties of an existing matter of difference, for the purpose of terminating or concluding the parties as to the entire subject-matter in issue between them, as distinguished from a submission for the ascertainment of a single fact or the settlement of a particular question in the chain of evidence constituting a mere appraisal, valuation, or reference not designed to terminate the whole controversy between the parties, which proceeding is said not to be an arbitration." Though the finding on such one matter has the attribute of finality of an award, yet it does not cover all the rights under the contract, does not

drown or merge the whole contract, and therefore does not forbid action on it, but only gives evidence in that action as to that one matter. Judge Tucker expresses this view in *Bierly v. Williams*, 5 Leigh, 700, 703. And there are several instances where the matter of measurement or estimate of work done for pay under a contract was submitted to a person, making his finding final; but it was not supposed to merge the contract, so as to limit action to the award, as, in its nature, it is only an item of evidence in adjudicating the rights of the parties in an action on the contract. *Condon v. South Side*, 14 Gratt. 302; *N. & W. R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255. We conclude that the action was properly brought on the policy, and the award evidence in it. It adds much to the force of this holding to note that the words above quoted of the clause of the policy itself look to a suit on the policy after the award.

The next question comes up on the defendant's claim that the policy was assigned to other parties by Billmyer in violation of its conditions forfeiting it for that cause, and barring the action for that cause. It is enough to say that this defense is first made in this court. No statement of the breach of that clause was filed in the circuit court, as demanded by Code 1899, c. 125, § 64, and it is not involved in the case in this court. *Rosenthal v. Ins. Co.*, 46 S. E. 1021, 55 W. Va. —. Moreover, the assignment, being after loss, is valid. *Nease v. Ins. Co.*, 32 W. Va. 283, 9 S. E. 233.

We take up next the defense that Billmyer failed to furnish proof of loss. He did furnish a proof of loss. It is said to be defective in being too general. The policy called for a statement giving "the cash value of each item thereof and the amount of loss thereon," whereas this statement specified "men's overcoats," "suits," "coats," and other items; giving not even the number of the articles; not giving each item or classes, with their separate values and losses, but total values and losses of classes of goods. The company returned this proof to Billmyer, simply saying that it was not "in proper form," but not specifying defects. The law requires that defects in a proof of loss shall be specified; else it avails nothing. May on Ins. § 469b. But the court has come to the conclusion that the proof of loss is substantially good, as it gives the different classes of goods, and gives value and loss to each class. It also states that it is "a summary of detailed inventory duly certified as correct and true, now in the possession of Billmyer open to inspection and verification, or copy by said insurance company." Now, concede that Billmyer should have furnished that list or a copy; yet he informed the company

that it was in the town, open to inspection, or that a copy could be had. The agent in the town did not ask for it; did not say the proof was defective for want of it. Justice would say that he should have called for it, if the proof was not sufficient in itemization. It was so easy to do this. The inventory was right at hand. He contented himself with the declaration, in general terms, that it was not good; not telling Billmyer that he wanted that inventory. It seems hard and technical to hold that Billmyer be defeated under these circumstances; but, as the policy denied power in agents to waive conditions, we do not place our decision on this ground, but say that the proof was sufficient, though it adds to the equity of our holding to mention the omission of the agent to point out defect, which in this respect was remediable, as it shows that Billmyer had the goods inventoried, and that the inventory was near the spot where the agent returned to Billmyer the proof of loss as bad. We have not failed to note that the company's agent states that he told Billmyer that the proof of loss was bad, and that, unless withdrawn, exceptions to it would be filed, and that the attorney of Billmyer, in his presence, agreed to withdraw the proof of loss. Of course, he could withdraw the proof of loss, and it would then be incumbent upon Billmyer to furnish another proof; but, under all the circumstances, we cannot hold that there was such real, intentional withdrawal. The agent told Billmyer that the proof was bad, and, unless withdrawn and an arbitration agreed to, exceptions would be made to the proof of loss, and then the arbitration was agreed to. This means only that Billmyer agreed to arbitrate the loss, substituting arbitration for the proof of loss; not really considering that he withdrew his proof; not intending to do so. We do not say that the agent did by arbitration waive proof of loss, but we say that the proof was sufficient to answer the policy demand for it, and worked its office, and that its legal effect was not nullified by its withdrawal.

But the contention is that after the award there must be a second furnishing of proof of loss. The policy says that, in case of disagreement as to amount of loss, it should go to arbitration, and in another clause provides that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein have been received by the company, including an award by appraisers when appraisal has been required." It is not the object of this independent clause to require a second proof of loss. Its object is to bind the company to pay within a specified time, and, to guard against any inference of absolute obligation to pay, it reiterates that, precedent to payment, the requirement of certain things found in other clauses must

be met. Why a second proof of loss? It is not reasonable to suppose that the intent was to repeat the same thing. Cui bono? The last clause is intended to demand the presentation of an award, if any.

The award: The policy says that, in the event of disagreement as to the amount of loss, the same shall be ascertained by the appraisers and an umpire, "and the award in writing of any two shall determine the amount of such loss." In this case there was an arbitration and award under this clause. The plaintiff contends that it is not binding on him. He gave evidence, over protest, of the cost of the goods by cost marks, and entered into a general inquiry by general evidence as to the value of the goods, and the loss, as if there had been no such award; and this is asserted to be error. The final effect of an award is shown by the quotation above from 3 Cyc. See, also, *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Martin v. Rexroad*, 15 W. Va. 512; 4 *Minor's Inst.* 170. The award in this case must finally fix the one matter submitted—the amount of loss. *Joyce on Insurance*, § 3247; *Dickinson v. Railroad*, 7 W. Va. 390; *Lunsford v. Smith*, 12 *Grat.* 554; *Condon v. South Side*, 14 *Grat.* 302; *B. & O. v. Polly*, *Id.* 447; *M. & P. R. Co. v. March*, 114 U. S. 549, 5 *Sup. Ct.* 1035, 29 L. Ed. 255. The defendant says that the award does not appraise the property article by article, or find sound values, as required by the submission. It states on its face that the property was so appraised, and the inventory accompanying it gives columns for sound value as well as loss, and the oral evidence proves that it was so appraised. The award says the appraisal was article by article, and the inventory so shows. A third objection against the award is that the arbitrators were intoxicated when acting. Evidence was admitted to prove this. We think this evidence was not admissible, because the award could not be set aside at law for cause not apparent on its face. This can be done only in equity. 4 *Minor's Inst.* 184; *Dickinson v. Railroad*, 7 W. Va. 390. At common law "no extrinsic circumstances or matter of fact dehors the award can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators is not admissible to defeat it." *Story*, *Eq.* § 1452. See *Morse on Arbitration*, 542; 3 *Ency. Pl. & Prac.* 154; 3 *Cyc.* 750. It must not be thought that because *Code* 1899, c. 103, § 4, gives a court of law power to set aside certain awards for

causes not apparent on the face, the principle above stated is wrong. That statute applies only to awards in pending suits, or where the submission provides that the award shall be returned to a court for judgment or decree. This submission is in the country, not in court, and does not provide for return of the award to court. There is a distinction between such awards found in the books. *Moore v. Luckess' Next of Kin*, 23 *Grat.* 168; *Hogg, Eq. Principles*, § 32. 4 *Minor's Inst.* 188, draws the distinction by saying that an award under a submission in pais can only be affected in equity for matters not disclosed by its face, but it is different as to statutory awards. See *Mathews v. Miller*, 25 W. Va. 817; *Rogers v. Corrothers*, 26 W. Va. 238. The submission in this case was by parol—by writing not under seal—and it is said that the award had not finality, for this reason. Authority cited does not sustain this distinction. It is without reason. It is against modern law. "At this day an award under a parol submission operates as a merger of the original cause as fully as one by bond." 3 *Cyc.* 731. Mere want of seal does not change the nature of the act. See 2 *Am. & Eng. Ency. L.* (2d Ed.) 543; *Jordan v. Westerman* (Mich.) 28 N. W. 826, 4 *Am. St. Rep.* 636; 1 *Bacon, Abridg.* 306; *Morse on Arbit.* 50. It may be different when title to land is to be passed by the award itself, which is rarely the case. I have no doubt a writing not sealed would be good to submit title, as a court would compel performance of the award, as it would of an unsealed written contract. We think it was error to disregard the award, open up the question of amount of loss, and hear evidence of the misconduct of the arbitrators in drinking intoxicants. If the award were for any cause invalid, it would be the worse for the plaintiff in this action, because, where an award is bad, that does not end the submission, but the party must ask another arbitration, which Billmyer did not do; and, the submission still being valid, and the policy making an award a precedent condition to action, the action could not be supported. Billmyer could not arbitrarily disregard it and sue. *Ostrander on Insurance*, 275; *Westenhaver v. German*, 113 Iowa, 726, 84 N. W. 717; *May on Ins.* § 496b.

The award being valid, we reverse the judgment, which disregarded the award, and give judgment for the plaintiff according to it for \$486.86, with interest from the 19th day of February, 1903, and costs in the circuit court.

(57 W. Va. 15)

GEORGE v. ZINN et al.(Supreme Court of Appeals of West Virginia.
Jan. 24, 1905.)**APPEAL — REVIEW — DECREE PRO CONFESSO —
TRUST DEED—SALE—EQUITY—JURISDICTION—POWER OF SALE.**

1. An appeal from a decree upon a bill taken for confessed, after a motion to correct the same, under section 5 of chapter 134 of the Code of 1899, specifying certain errors therein, and charging generally the existence of others, has been overruled, brings before the appellate court all the errors of law in the decree.

2. A trustee in a deed of trust cannot, as a matter of course, resort to a court of equity to have a sale made under its decree, instead of selling under the power vested in him by the deed of trust; and, unless he shows such impediment to the exercise of his powers as renders it inequitable for him to proceed without the aid of the court, he will not be entertained.

3. The existence of prior or subsequent liens, or both, on real estate which a creditor desires to have sold under a deed of trust held by him, constitutes no impediment to the execution of the power of sale vested in the trustee, unless it be shown that there is such uncertainty, dispute, or controversy as to the amounts or priorities of some or all of them as may deter bidders from offering full and fair prices for the property.

4. The possibility of a right of subrogation and marshaling of assets in the trust creditor desiring such sale confers upon the trustee no right to the aid of a court of equity in the execution of the power of sale vested in him.

5. The rights, powers, and duties of a trustee in a deed of trust executed to secure the payment of a debt are limited and defined by the instrument under which he acts; and he does not control the debt secured, and cannot assert the equities, rights, and powers of the cestui que trust respecting it, to any extent, beyond the powers expressly conferred upon him by the deed of trust, and such incidental and implied powers as are included in the authority so expressly conferred.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by W. T. George against Nannie E. Zinn and others. Decree for plaintiff, and defendants appeal. Reversed.

Talbott & Hoover, for appellants. W. T. George, pro se.

POFFENBARGER, J. In the disposition of this appeal, all the questions which it is necessary to determine may be resolved into the following: (1) When a motion in the trial court to correct errors in a decree upon a bill taken for confessed, made as a preliminary step to the taking of an appeal from such decree, specifies certain alleged errors therein, and contains a general charge of other errors apparent on the face of the record and decree, does it affect errors not specifically pointed out? (2) Do a prior judgment lien, a prior vendor's lien, which is alleged and subsequently shown to have been satisfied, and subsequent trust deed and judgment liens, constitute an impediment to a fair execution of the powers of a trustee in a deed of trust executed to se-

cure a debt, authorizing a resort by him to a court of equity for relief? (3) Does a prior judgment lien, covering not only the lot on which the trust debt is secured, but other real estate, constitute such an impediment?

W. T. George, as trustee in a certain deed of trust executed by Nannie E. Zinn and A. W. Zinn, her husband, to secure, upon a town lot owned by Mrs. Zinn, a note for \$1,500, executed by the grantors to H. A. Monahan, brought this suit in the circuit court of Randolph county to have the liens on said lot adjudicated as to their amounts and priorities; alleging the lack of such ascertainment to be an impediment to the exercise of the power of sale vested in him by the deed. His bill shows the reservation of a lien for \$350 in one of the deeds by which the lot was conveyed to Mrs. Zinn, which it avers has been satisfied, and as to the discharge of which it does not charge the existence of any controversy, dispute, or doubt, and a small judgment lien in favor of A. D. Barlow, which is ultimately found to amount to \$85.24, both prior to the deed of trust. It then shows a subsequent, unsatisfied deed of trust, executed to W. T. W. Morgan, trustee, securing, on the same lot, the payment of two notes, for \$522.75 each, in favor of Cutright Bros., and two satisfied judgment liens of still later date, and charges that there may be other liens of which the plaintiff is ignorant. Of the interested parties, Nannie E. Zinn, A. W. Zinn, A. D. Barlow, Dora T. Gall, who had held the vendor's lien, and W. T. W. Morgan, trustee, only, were made defendants. Monahan, the creditor in the first deed of trust, and Cutright Bros., creditors in the other, were not made parties at all. Mrs. Zinn owns another lot, conveyed to her by C. F. Teter and wife by deed dated August 30, 1898, and reserving a vendor's lien for \$750 of purchase money. On this the Barlow judgment is a lien, and the Cassell judgments had been liens. The bill does not show any other liens upon it, but, from the commissioner's report and the decree, it appears that there were other subsequent liens. On account of the inclusion of this lot in the bill, Charles F. Teter was made an additional party defendant. Though the bill does not say so, it appears from the commissioner's report and decree and the exhibit filed with the bill that A. W. Zinn, the husband of Nannie E. Zinn, owned a third lot, which has been drawn into the proceedings. From the bill and exhibits it appears that on the 18th day of September, 1891, A. W. Zinn and wife conveyed this lot to I. P. Russell, trustee, to secure the payment of a note for \$150 executed by A. W. Zinn to A. D. Barlow. On account of this deed of trust on this piece of property, Russell, as trustee, is made an additional party defendant. Of course, the judgment in favor

of Barlow against A. W. Zinn and Nannie E. Zinn, dated March 20, 1897, is a lien upon this piece of property, as well as upon Mrs. Zinn's, and the Cassell judgments had been liens upon it. The commissioner's report and decree show a number of other subsequent judgment liens upon it, some of which were against A. W. Zinn alone, and some against him and Nannie E. Zinn. Mrs. Zinn made no appearance in the case. There was a reference to a commissioner, who reported all the liens and their amounts and priorities. By the decree made and entered on the 4th day of May, 1903, the report was confirmed, the liens fixed upon the property, and a sale directed to be made by W. T. George, who was appointed a special commissioner for that purpose, in case of default in payment of the liens. Pursuant to notice, Nannie E. Zinn on the 12th day of October, 1903, filed her petition, praying that the decree be set aside, and the errors and insufficiencies in the decree and the record be corrected. Thereupon the court suspended the sale until further order, and on the 21st day of October, 1903, sustained a demurrer to her petition, dismissed the same, and refused to set aside the decree or correct any errors therein.

The first error specifically assigned was failure to make C. H. Scott, trustee, W. C. Ward, B. L. Butcher, trustee, A. G. Dayton, trustee, Jennie Zinn, and J. C. Arbogast parties. This specification was founded upon testimony taken before the commissioner, showing that there had been certain deeds of trust on some or all of the property, which had been satisfied by payment. Whether they were prior or subsequent, or on what particular lots they had existed, does not appear anywhere in the record. The second assignment is based upon the failure to make Cutright Bros. parties, and the third on the failure to make Monahan a party. The fourth was based upon the failure to ascertain before decree the rental value of the property, and the fifth asserted that it was error to decree a sale of any of the lands, except the lot upon which the plaintiff held his lien. These specifications were followed by a general charge that there were many other errors apparent upon the face of the record and decree.

A motion to correct errors in a decree upon a bill taken for confessed, under section 5, c. 134, Code 1899, must, from its nature, be as broad and efficacious as an appeal, for it is essentially a substitute for an appeal, since section 6 of the same chapter forbids an appeal for any error which may be corrected on such motion, until after it has been made, and said section 5 provides that on such motion the court in which the decree was rendered, or the judge thereof in vacation, may reverse it for any error for which, but for the prohibition in section 6, an appellate court might reverse it, and give such

decree as ought to be given. This makes the power and duty of the court or judge on such motion coextensive with the powers and duties of the appellate court upon an appeal. Hence an appeal after a refusal of the court below to correct, upon a petition pointing out certain errors, and charging the existence of others, brings up the whole decree, as to all errors of law, as fully as does an appeal in any other case. In such cases no issues of fact are involved, for none have been made. *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 368. Here the petition specifies certain alleged errors, and then charges others apparent on the face of the decree and proceedings. How can we assume that none save the errors specifically pointed out were insisted upon in the court below? The defect of want of necessary parties, broad as a demurrer to the bill would have been, striking at the basis of the entire suit, was brought to the attention of the court below, and is now relied upon here as the principal assignment of error.

Before entering upon any consideration of this ground of error, it is deemed proper to advert to a more serious defect in the bill, which, though not mentioned in the briefs, cannot escape the notice of the court, since it is apparent upon the face of the record, and is a matter of such substance, that, being noticed, it ought not to be passed over in silence. It is well settled that this court does not limit its investigation to the errors assigned, unless it is apparent that all others have been waived. Rule 5, § 4, 45 S. E. x. Nothing appears from which it can be safely inferred that any defense has been waived. On the contrary, the bill, constituting the foundation of the whole structure, is attacked. Since we are called upon to examine it and pass upon its sufficiency, it is, to say the least, not improper to give it full and thorough consideration.

The extent to which a trustee will be permitted to resort to a court of equity for the removal of impediments to a fair and just execution of his power of sale has never been clearly defined by this court. It would be more accurate to say that no rule has been established by which to determine what is and what is not such an impediment. In *Spencer & Miller v. Lee*, 19 W. Va. 179, Judge Patton, speaking of the duties and powers of a trustee, lays down this proposition: "He is supposed to be the common friend and agent of both parties, impartial and disinterested, whose duty it is to act justly and discreetly towards those in interest. In order that the trustee may thus act, a court of equity is always open to him, when the amount due by the deed is uncertain or is in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when for any reason a sale is likely to be accompanied by a sacrifice of the property, which at the cost

of some delay may be obviated." The use of the words, "when for any reason a sale is likely to be accompanied by a sacrifice of the property," does not indicate what particular circumstance would constitute a reason for such sacrifice. Reference to the cases cited in support of the proposition reveals the fact that in all of them there was some matter of controversy as to the state of the title, the amount of the debt due, or a conflict as to priority or amounts of liens. Not one of them asserts that the mere existence of one or more prior liens upon the property, undisputed in any sense or to any extent whatever, constitutes any obstruction or impediment to the exercise of the power of sale. A cloud upon the title, or a question as to whether some lien upon the property, other than the one created by the deed of trust under which the sale is about to be made, is prior or subsequent to the trust deed lien, or a question as to whether or not the apparent prior lien is valid, or has been satisfied in whole or in part, would create a state of uncertainty as to what the purchaser would obtain for his money, and thereby prevent him from bidding the amount which the property is, in his opinion, worth. He, of course, would want a clear title, legal or equitable, without any incumbrances uncertain in amount. He would want no uncertainty as to the amount of the prior liens, for his purchase would be subject to them. But if there is no uncertainty as to the amount of such liens, and no cloud upon the title, and no controversy as to whether some debt is prior or subsequent to the one for which the sale is being made, there is nothing to deter him from bidding what, in his judgment, the property is worth. He takes it subject to the prior liens. *Crumlish v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180; *Fleming v. Holt*, 12 W. Va. 143. They, together with the amount bid by him, constitute the whole cost of the property to him. That the mere existence of prior liens, not shown to be disputed as to their validity or amounts, or as to whether they are in fact prior, do not constitute any impediment to a fair execution of the trust, has been decided by this court in *Curry v. Hill*, 18 W. Va. 370, holding that, "where the amount of the prior liens is certain and ascertained, the sale of the equity of redemption is proper." In that case the court dismissed the bill filed by the debtor himself, predicated upon the theory that a fair sale could not be made, because of the existence of prior trust-deed liens. There had been no adjudication as to either the amounts or priorities of the liens. The defect of the bill was that it failed to show that any of them were controverted by anybody in either of these particulars. Judge Johnson said, the amount of the prior lien being certain and ascertained, the sale of the equity of redemption under the last trust would be proper. Judge Snyder so under-

stood the rule, for he so states it in *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775. His language is: "The facts in this case do not show that there was any such controversy or uncertainty about the title to the property, or the amounts and priorities of the debts, as would have justified the trustees in resorting to a court of equity. Much less do they show any right on the part of the debtor to set aside a completed sale made by the trustees." In the preceding paragraph he had discussed the conditions under which a trustee is required to delay sale pending a removal of impediments. In *Schurtz v. Johnson*, 28 Grat. 657, the rule is stated as understood and declared in *Curry v. Hill* and *Lallance v. Fisher*. In that case there were both prior and subsequent liens, but there was no dispute, and the court held that the trustees had violated no duty in selling without having had the liens adjudicated. It is to be observed that all the references to liens in all the cases are as to the amounts and priorities thereof, and uncertainty as to amount or priority. Nowhere has it been declared that the mere existence of liens necessitates or justifies a suit in equity.

A comparatively recent case is *Muller's Adm'r v. Stone*, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889, which declares a limitation upon the rule to be that there must be some controversy, some dispute, which stands in the way of a just and fair sale. The liens in that case were junior, but that does not alter the rule. The decision rests not upon the ground that they are junior liens, but upon the ground that it does not appear that there is any uncertainty about them, so as to make it necessary to resort to a court of equity for their ascertainment. *Lewis, P.*, concludes by saying: "But it is not the duty of the trustee in every case to invoke the aid of a court of equity before making a sale of the trust subject, where there are liens thereon; and to hold that he is, or that, if he fails to do so, an injunction will be awarded at the instance of any party in interest, as of course, would be to impose serious delays, involving costs and expense, in the execution of deeds of trust, which the law never contemplated, and without promoting the interests of either creditor or debtor." Proceeding, the learned judge becomes more emphatic, and says: "It is only when the aid of a court of equity is necessary that it ought to be applied for, and it is only in such a case that its aid will be extended. If there are no real impediments in the way of a fair execution of the trust, then its aid is not necessary, and the costs of a lawsuit ought not to be added to the ordinary cost of executing the trust."

This principle is well illustrated in *Hogan v. Duke*, 20 Grat. 244, which, however, did not involve any question of liens. The debtor attempted to enjoin the sale upon the ground of uncertainty as to the amount due

under the deed of trust; it appearing that he was entitled to two credits, of \$150 each, both of which were conceded and had never been denied by the creditor. He claimed a further credit for some oats, potatoes, lumber, and other articles. The answer denied that he was entitled to this last credit, and his bill, as to that point, was unsustained by proof. The court held that he could not maintain the suit on the ground of uncertainty, but did remove the trustee because he had been declared bankrupt. Judge Moncure, speaking for the court, said: "There was no uncertainty as to the amount of the cash payment to be so made. It could be made certain by a simple statement from materials furnished by the decree. Still less was there any uncertainty as to the amount necessary to be paid to prevent any sale at all under the trust deed or under the decree. That amount was the balance due on the trust debt, and expenses already incurred in the part execution of the trust."

It may be asked whether, if a purchaser at a sale under a deed of trust buy a piece of property on which there is a prior lien, he may, upon paying off that lien, have a right of action on the covenants in the deed of trust, or by way of subrogation, against the debtor, to recover back the money paid out in discharging the prior lien, so that the ultimate price of the property to him is not the amount of his bid plus the amount of the prior liens, but the aggregate, less whatever sum he may so recover back, and whether this does not introduce an element of uncertainty into the bidding, to the injury of the debtor. It does not, for the obvious reason that, if any such prospective right of action exist—a question which need not be here determined—it is common to all the bidders, and its value not necessarily difficult of ascertainment. Judgments and other claims, secured and unsecured, are subjects of daily barter and sale. If one bidder may be supposed to make an allowance for such contingent recovery, the supposition holds good as to each of the others. At any rate, the courts have never recognized such possible recovery back as an element of uncertainty, and certainly not as an existing controversy. In *Lallance v. Fisher*, quoted above, Judge Snyder says there were two trust deeds prior to that of Fisher under which the sale was made. *Curry v. Hill* and other cases cited, in which there were prior liens, clearly preclude any ground of equity jurisdiction. Though a prior lien may be in some sense a cloud on the title, these cases undoubtedly hold it not to be such a cloud as constitutes an impediment to a fair execution of the power of sale. Nor is it to be classed with an outstanding legal title, hostile to both creditor and debtor, affecting the whole subject of the sale, such as existed in *Rossett v. Fisher*, 11 Grat. 492.

Two cases decided by this court seem to

proceed upon a principle contrary to what is here stated, but they do not go so far as to declare that the mere existence of liens gives the right to resort to a court of equity. They are *Keck v. Allender*, 37 W. Va. 201, 18 S. E. 520, and *Hartman v. Evans*, 38 W. Va. 660, 18 S. E. 810. In the former the debtor made no resistance to the bill. Its sufficiency was never tested. The suit started with an acceptance of service of process, and an order of reference by consent. The only controversy in the case arose between two creditors, both of whom desired an adjustment of the conflict between their liens. That case, however, would be no exception to the rule, because of this conflict and dispute between the lienholders. *Hartman v. Evans*, in its declaration of principles, goes far beyond the case decided, and beyond any former decision of this court, or the Virginia court, or any other court, so far as has been discovered. Point 8 of the syllabus says: "Where there is, from any cause, an impediment to his making a fair and proper sale, (1) as where, from the fact of the deed of trust being one of long standing, or from any cause, the amount due and to be raised by a sale is uncertain; (2) where there are various deeds of trust or other incumbrances; (3) where the legal title is outstanding; (4) where there is a cloud upon the title—the trustee may, of his own motion, apply to a court of equity to remove such impediment to a proper execution of the trust; and, if he should fail to do this, the party injured by his default has a right to make such application." In that case the deed of trust under which the sale was sought to be made was the last one of four, and it recited that it had been given for the amount due upon the three former ones, so that in fact there was but one debt. The court expressed a doubt as to whether the creditor was bound by this recital, and as to whether or not the legal title might not be outstanding. Hence the decision does not proceed upon the ground of undisputed incumbrances, and a re-examination of its soundness, as regards the sufficiency of its allegations respecting uncertainty in the debt, and as to the effect of an outstanding legal title, need not be inquired into, though it may be remarked, as to the outstanding legal title in a trustee in a prior deed of trust, as an independent ground of equitable relief in such case, if it was intended to say that it is sufficient, that the case is in direct conflict with the decision in *Curry v. Hill*, 18 W. Va. 370. The obiter dictum on the subject of incumbrances immediately precedes a citation of *Horton v. Bond*, 28 Grat. 815, and *Cole v. McRae*, 6 Rand. 644. Both of these were judgment lien creditors' bills to enforce the liens and set aside fraudulent deeds. Neither of them in any degree supports the suggestion ventured.

It is difficult to perceive any reason for allowing a resort to expensive litigation for

the accomplishment of that which the parties can do themselves. Courts were instituted to give relief in those instances in which there are differences, disputes, controversies, to settle. It is contrary to fundamental principles of law to allow a man to have the aid of a court when his situation is such that he does not need it. The business of courts is to hear and determine controversies, not to make calculations for people or advise them in ordinary business transactions. For the purpose of allowing a useless and expensive proceeding, the law does not presume that, in cases of public sales, men will not ascertain for themselves plain, open, and undisputed facts, nor that they do not have the capacity to do so. Neither will it be assumed that they are ignorant of the law—the facts being known—or presumed that men will not recognize each other's legal rights, or that controversies exist or will arise. These things must be made to affirmatively appear.

It may be supposed that, because the prior judgment lien covers two lots owned by Mrs. Zinn and one owned by her husband, this gives equity jurisdiction. It might afford a basis for a bill by Monahan, the creditor. Conditions may be such as to enable him to say to the judgment creditor, "As you have two securities for your debt, and I have but one, and that is insufficient to pay both your debt and mine, you shall first resort to the other piece of property." Under some circumstances a creditor may do this. Without intending to intimate that Monahan may, under the circumstances of this case, do so, it is clear that, if anybody can do it, in respect to his debt, it must be himself. It affords no ground for a suit at the instance of a trustee. His duties are prescribed and defined by the deed of trust under which he is acting. *Crumlish v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180. He is not the general representative of Monahan, as regards his debt. His duty is only to sell in case of default. His only right to resort to a court of equity, if he has any, is incidental to that power of sale. It can only be done for the purpose of removing impediments to that sale, and, if none exist (and his bill fails to show that any do), then he has no right to bring such suit. He has no right to collect the debt as trustee, except in the event of a sale of the property by him. To hold that the trustee in the deed of trust represents the creditor for all purposes in the collection of the debt would extend his powers far beyond the limits fixed by the instrument under which he holds, and would have the effect of depriving the creditor of the control of his debt. He could subject him to useless costs, prosecute unsuccessful suits, and compel the creditor to undergo unnecessary delay. That is clearly not the office of such a trustee.

The principle or rule which might give a right to this trust creditor, or other junior incumbrancer of the lot on which the trust

lien is, to compel the judgment lienor to resort to the other lot, is that which requires the marshaling of funds, securities, or assets, founded upon the principle of subrogation. This is never enforced at the instance of the common debtor. *Sheldon on Sub. 64*; *McDevitt's Appeal*, 70 Pa. 373; *Butler v. Stainback*, 87 N. C. 216; *Plain v. Roth*, 107 Ill. 588; *Witherington v. Mason*, 86 Ala. 245, 5 South. 679, 11 Am. St. Rep. 41. It applies only as between creditors of a common debtor. *Plain v. Roth*, cited; *Lee v. Gregory*, 12 Neb. 282, 11 N. W. 207. Since the rule does not operate at all in favor of the debtor, how can it be said the trustee may base a suit upon it for his benefit? As his only duty to the creditor is to sell the property in such manner as not to sacrifice it, he clearly has no right to represent him in the assertion of equities against other creditors. Would a suit, after sale under the deed of trust, to shift the whole or part of the Barlow judgment onto the other lot, assuming that conditions are such as to warrant a marshaling of assets, injure or prejudice the purchaser? Not to any extent whatever. The lot is bound for the entire judgment. The judgment creditor may enforce it against either lot, unless prevented from doing so by some other creditor asserting against him the two-fund rule; and, if no such claim is set up before he obtains satisfaction, it cannot be asserted against the land at all, but may go against the fund collected by the judgment creditor. *Sheldon on Sub. §§ 62, 66*. Clearly, the purchaser takes the land subject to the entire amount of the judgment, and the only open question is whether he shall ultimately pay all of it or any of it to the prior creditor, or to other creditors who may marshal the assets against the former. As to the amount of that judgment, the purchaser becomes a stakeholder. He must know he is liable to somebody for the whole of it, and he is presumed to be governed by that in his bidding. Therefore it creates no uncertainty as to what the purchaser must pay or as to what he buys, and cannot work any sacrifice of the property. If the power of sale can, in view of our statutory regulations, be treated as a cumulative remedy, so as not to deprive the creditor of his suit to enforce the lien of his trust deed, this gives the trustee no right to prosecute such suit, for the terms of the deed conferring his authority do not go that far.

The bill in this case sets up no question about the amount of any lien, prior or subsequent, nor any about the order in which they, or any of them, are to be satisfied. As to those which are alleged to have been paid off, it is not shown that the fact is denied, or that the trustee or anybody else has made any inquiry about them. Such an inquiry would involve less time and expense than a judicial investigation of matters which in no sense of the terms call for

judicial determination. The paragraph of the bill which it is supposed was intended to show how the trustee is hampered and obstructed reads as follows:

"Plaintiff further says that, owing to all of the aforesaid judgments appearing of record, and the aforesaid deeds of trust, that it is impossible for him to proceed in the enforcement of the trust for the collection of the debt due to said Monahan by advertising and selling the property as provided for in the said deed of trust; and therefore he avers that he has a right to file a bill in equity for the purpose of having the court to ascertain what portion of the aforesaid debts have been paid, and what amount thereof remains unpaid, in order that the property, when sold, may sell more readily, and to a better advantage for the creditors."

Though the deed of trust empowers the trustee to sell only upon the request of the creditor, the bill does not aver that any such request has been made. If the creditor were a party, this defect might be cured by his acquiescence in the proceedings; but he is not a formal party, and it does not affirmatively appear that he ever presented any claim to the commissioner. Whether that officer ascertained and reported the debt from the bill and exhibits alone, or from them and a claim presented by Monahan, cannot be determined from the record. If there were a presumption that he did, it might be overcome by the fact that the debt is decreed to W. T. George, trustee, and not to Monahan. See *Bryan v. McCann* (W. Va.) 47 S. E. 143.

The general rule in equity is that all persons interested in the subject-matter of a controversy are necessary parties. For the appellee here, the application of this rule to the case in hand is virtually admitted; but it is insisted that the defect has been cured by the appearances of all interested parties before the commissioner, since his report ascertains and presents their claims. Whether this position is sound, need not be determined, because, for defects in the bill, the whole structure of the suit falls, and we will not assume that necessary parties will be omitted from any future proper proceeding.

The bill, in its present form, being wholly devoid of equity, the decree must be reversed and the cause remanded, with leave to the plaintiff to amend, or have his bill dismissed without prejudice, as he may elect.

(57 W. Va. 34)

BLUE v. CAMPBELL et al.

(Supreme Court of Appeals of West Virginia.
Jan. 24, 1905.)

EQUITY—DEMURRER TO BILL—REMAND ON APPEAL—RES JUDICATA—AMENDMENT—JUDICIAL SALES—NOTES.

1. Where a demurrer to a bill in equity has been erroneously overruled by the circuit court,

and upon appeal the demurrer is sustained, the decree reversed, and the cause remanded, "to be heard and finally determined according to the rules and principles of equity," although the decree contains no directions for leave to plaintiff to amend his bill, the judgment of the appellate court is not res judicata, and the bill may be amended.

2. Where a sale has been made by a commissioner under a decree of court, and notes taken for the deferred payments, no demand for payment thereof is required or necessary.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Action by Fred O. Blue, special commissioner, against George C. Campbell and others. Decree for plaintiff, and defendants appeal. Modified.

Samuel V. Woods, for appellants. Dayton & Dayton and F. O. Blue, for appellee.

McWHORTER, J. In the cause of Albert G. Welch et al. against George G. Campbell et al., in the circuit court of Barbour county, a sale of a tract of 256 acres of land was made January 3, 1861, by Special Commissioners David Goff and Samuel Woods, which sale was confirmed in 1866, and in the decree of confirmation said Woods was appointed special commissioner to convey to the purchaser, George Campbell, said tract of land upon the payment of all the purchase money. Commissioner David Goff died, and, the purchase money not having all been paid, said Samuel Woods instituted his suit to enforce the collection thereof by the sale of the said tract of land, and obtained a decree for the sale thereof, from which decree George G. Campbell, the only heir at law and distributee of the purchaser, George Campbell, and the surety on the purchase notes, appealed to this court. The demurrer to the bill was sustained, and the cause remanded for further proceedings to be had therein. See 45 W. Va. 203, 32 S. E. 208. The plaintiff, Samuel Woods, having departed this life, F. O. Blue was appointed in his stead as special commissioner to collect said money and to prosecute said suit. Commissioner Blue filed his amended bill in the said circuit court, to which bill the defendants George Campbell and Bedford Campbell filed their demurrer, as did also the defendants J. Hop Woods and Samuel V. Woods, administrators with the will annexed of Samuel Woods, which demurrers were overruled. Said defendants George G. Campbell and J. Hop Woods and Samuel V. Woods also filed their answers, to which the plaintiff replied generally. The cause was referred to a commissioner, and the balance due on the purchase money of said Gilbert Boyles farm was ascertained, and a report made by the commissioner, to which report the defendants Campbell filed seven exceptions. The cause was heard on the 31st of October, 1903, when the court overruled said several exceptions

and confirmed the report, and entered a decree for \$3,031.55, with interest from October 30, 1903, and decreed the sale of the said land to pay the same. From this decree the defendants George Campbell and Bedford Campbell appealed, and say that the court erred in overruling the demurrer to the bill, in confirming the report of the commissioner, in overruling petitioner's exceptions to the commissioner's report, and in decreeing "that there existed a lien of \$3,031.55 in favor of Blue, special commissioner, for original purchase money, against the Gilbert Boyles farm, and decreeing sale thereof."

It is insisted by appellants that the decree of this court, in sustaining the demurrer to plaintiff's bill, is *res judicata*, and that the amended bill filed by the plaintiff, Blue, commissioner, should have been dismissed upon the demurrer. The appellate court sustained the demurrer to the bill for want of proper allegations of the nonpayment of the purchase money due from said Campbell on the said land. The bill was not dismissed, but the cause, with the other two causes heard with it, was remanded to the circuit court, "to be heard and finally determined according to the rules and principles of equity." It could have been remanded for no other reason than to permit such amendments as would warrant the granting of relief if such amendments could be made. It is the practice of this court, as well as of the circuit courts (and that practice is founded upon the principles of equity), where it is obvious that the plaintiff may be able to so amend the allegations of his bill as to entitle him to relief upon the sustaining of the demurrer, to grant leave to so amend. While there is no direction in the opinion to the circuit court to allow an amendment, it is here done clearly by implication. If this court had intended that its decision should be final, the bill would have been dismissed, and not remanded to the circuit court. In *Pickens v. Kniseley*, 36 W. Va. 794, 15 S. E. 997 (Syl., point 1), it is held: "It is not error to omit giving leave to amend upon dismissing a bill upon demurrer, where the record does not disclose that any amendment improving the bill can be made." This language implies, beyond question, that if, on the other hand, it clearly appear that the bill can be so amended as to entitle the plaintiff to relief, he will be permitted to so amend his bill. As held in *Burlew v. Quarrier*, 16 W. Va. 108 (Syl., point 5): "It is the practice of courts of equity to allow amendments to bills when the purposes of justice require it." In *Atkinson v. Sutton*, 23 W. Va. 197 (Syl., point 1), it is held: "Where it is apparent to the court, from the record of a cause, that the real merits sought to be determined are not so presented, either on account of defects in the pleadings or in the evidence, as to enable it to decide the real questions in controversy, it is the duty of the

court to require such defects to be removed before proceeding to hear the cause and pass upon it finally. And in a plain case, where the inferior court fails to discharge this duty, the appellate court will for that reason alone reverse and remand the cause." In the case at bar the court had overruled the demurrer to the plaintiff's bill, which bill was clearly bad upon demurrer; and, under the last above ruling, it was the duty of the circuit court to have sustained the demurrer and granted leave to amend the allegations of the bill, it being clear that the bill was susceptible of such amendment. *Lamb v. Cecil*, 25 W. Va. 288; *Doonan v. Glynn*, 28 W. Va. 225; *Love v. Tinsley*, 32 W. Va. 25, 9 S. E. 44. The authorities hold that, in order to amend, the plaintiff must ask leave. 2 Tuck. Comm. 268; *Hart v. Railroad Company*, 6 W. Va. 336; *Pickens v. Kniseley*, supra. Of course, this rule cannot apply where, by the overruling of the demurrer, there is no occasion for asking leave to amend. In support of their contention that the decree of this court is *res judicata*, appellants, by counsel, cite *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174. This case is not applicable to the case at bar, as it refers to a decree of the appellate court reversing the decree upon the merits, and remands the cause to the circuit court "for further proceedings therein to be had according to the rules and principles stated in the written opinion" filed in the cause, and that the findings of fact set forth in the opinion are binding upon the court below, which court could not permit new pleadings and further evidence to be filed, but must enter a decree in accordance with the opinion. The decision in the case at bar was not upon the merits of the case, but a ruling upon the demurrer for want of proper allegations, and the cause was remanded for further proceedings, when, if it had appeared that the bill could not have been amended, the same would have been dismissed in the appellate court, and not remanded for further proceedings therein to be had. The amended bill filed by Commissioner F. O. Blue contains sufficient allegations to entitle him to relief. He alleges the nonpayment of the purchase money, and that the same is still due and owing and has never been paid, and alleges that the cause of such nonpayment was the fact that Commissioner Woods was the counsel of the said Campbells, and that said Woods and George G. Campbell, his client, colluded and combined together to prevent the collection of the said money, and to defraud the then infant parties, who were also nonresidents of the state, out of the sum due them from the proceeds of the sale of said Boyles farm, and that all the delays and laches in the collection of said purchase notes were solely due to the misconduct of said Commissioner Woods and said purchaser, Campbell; that the defendant S. L. Reger claimed to be the assignee of certain portions

of said funds from the parties defendants entitled thereto, and that he, in turn, had conveyed and assigned said interests claimed by him. The original suit, in which this land was sold, was still pending. Having been left off the docket, it was reinstated by order of the court on the 17th of July, 1886. On the 7th of October, 1886, George G. Campbell (the surety on said notes, and the sole heir at law and distributee of George Campbell) and Commissioner Woods made an adjustment of that part of said purchase money which was payable to the said George G. Campbell, which was entered as credits upon the three several notes by Commissioner Woods. This was an acknowledgment at that date that all the purchase money had not been paid. If he then contended that it was all paid, why did he not satisfy his own counsel, Judge Woods, that it had been so paid, and receive from him a deed for the land? His contention is that it was paid to Commissioner Goff about 1865 or 1866. The other tracts purchased by him were paid for at that time, and he received from Commissioner Woods deeds for the same, yet he received no deed for this tract of 256 acres. Commissioner Goff lived until about the year 1882 or 1883; some 17 or 18 years after he claims to have paid all the purchase money; yet during all that time he failed to satisfy his counsel, Commissioner Woods, by receipts of Goff or otherwise, that he had paid all the purchase money to entitle him to a deed to the property. All this time the suit in which sale was made and confirmed, and in which proceedings on a rule or otherwise could have been taken for the collection of the purchase money, was pending in the court, and he took no steps and made no effort in all that time to have the suit expedited, although it stood there a constant menace to his interests. Was it not his duty, in his own interest, to have placed himself in a position to have demanded the deed for the property? In *Fisher v. McNulty*, 30 W. Va. 186, 3 S. E. 593 (Syl. point 3), it is held: "Delay and laches in the prosecution of a suit after it has been commenced are not generally matters of which the defendant can complain or avail himself where the record fails to show that he made any effort in the court below to expedite the cause."

After the laches and delay of which the defendant Campbell was guilty, to the detriment of his own interests, during the 17 or more years from the time he claimed the payment in full was made to Goff, before Goff's death, he is hardly in a position to claim that plaintiffs were guilty of laches and delay in prosecuting their suit. He was in a position during all that period to have enforced the decree providing for making him a deed, if in fact he had paid the purchase money, as he contends. The beneficiaries were nonresidents, and depending upon their counsel to press the collection of their

claim; and the active commissioner was without the county in which the collection had to be made, while his co-commissioner was sole counsel for the purchaser, and for his sole distributee after his decease, and residents of the same county. A vendor's lien or a trust is never barred by the statute of limitations, so far as the trust subject is concerned. The notes made for the debt are barred, at law, as a personal liability; but the subject-matter of the lien is always subject to the equitable, and not to the legal, rule; and while, under the statute, an obligation is barred in 10 years, yet, under the equitable rule, no absolute bar arises, but only a presumption of payment after the lapse of 20 years, which presumption may be rebutted. *Hopkins v. Cockerell*, 2 Grat. 88, is a case where H., living in Pennsylvania, sold to B. his right and title to a tract of land in Virginia, and agreed to convey the same when B. should pay the purchase money, for which B. executed his bonds to H. in 1797. N. purchased B.'s bargain, and agreed by parol with H. to take B.'s place, and paid H. \$300 in part of the purchase money in the same year. N. died in 1815, not having received a conveyance or paid the balance of the purchase money, and his executors, under a power in his will, sold the land. In 1832 a suit was brought by an assignee of one of the devisees of N. to obtain his portion of the purchase money remaining unpaid on the last sale. H. was made a party defendant and answered the bill, and then filed a cross-bill setting up his claim to a lien upon the land for the balance of the original purchase money. To the cross-bill the representative of N. in 1834 pleaded the statute of limitations. It was held, "The statute is no bar to the claim of H.," and, "under the circumstances of this case, held, the lapse of time is no bar to H.'s recovery upon his lien as against the representative of N. and the assignee of the devisee of N." *Criss v. Criss*, 28 W. Va. 388-396; *Coles v. Withers*, 33 Grat. 186; *Camder v. Alkire*, 24 W. Va. 674; *Pitzer v. Burns*, 7 W. Va. 63; *Brown v. Lambert*, 33 Grat. 256; *Calwell v. Prindle*, 19 W. Va. 604. In *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912 (Syl. point 3), it is held: "No time bars the right, either under the statute of limitations or presumption of payment, of a vendor to recover purchase money for land, if he has not parted with the legal title." Thus it seems to have been held by this court, unequivocally, that presumption of payment cannot avail as a defense where the legal title has been withheld. I presume it will not be contended for a moment that the defendant Campbell could enforce the decree for the conveyance to him under his purchase of the 256 acres of land, without affirmatively showing to the satisfaction of the court that all the purchase money had been paid.

The first and second exceptions to the commissioner's report raise the same questions that are raised upon the demurrer to the bill.

The third exception is that the commissioner erred in "calculating the interest from the 19th of March, 1866, when, in truth and in fact, no interest should be calculated thereon, except from the date of the demand of payment from the special commissioner by those entitled to receive the purchase money; it having been shown by the deposition of Commissioner Woods that no demand had ever been made at the time his bill was filed." The purchase of the 256 acres from the commissioners on the 3d day of January, 1861, although not confirmed until March, 1866, relates back to the day of sale, and the notes, all bearing date on the day of sale, bear interest from their date, as shown on their face. *Cale v. Shaw*, 33 W. Va. 299, 10 S. E. 637. The record itself was a standing demand for the payment of the purchase money.

The fourth exception is that the commissioner did not find, as shown by the deposition of Samuel Woods, that George G. Campbell was entitled to \$179.65, to be credited on his debt as of the date of said statement, as an heir of the half-blood of George W. Bedford. It appears from the record that this exception is well taken, and should have been sustained, as it appears from the deposition of Samuel Woods, after the payment of all the debts of George W. Bedford, there remained a sum of \$2,094.38 due to the estate of said Bedford, for distribution amongst his heirs; the amount of the same due to George G. Campbell, half-brother and heir of the half-blood, the sum of \$179.65, which was not credited to the said George G. Campbell, and for which he was entitled to have a credit as of the 19th day of March, 1866. In this respect the decree is erroneous.

The fifth exception to the report is because the amount found and the debt reported by Commissioner Kittle are at variance with

his former report, made on the 27th of January, 1902, where he found the amount due to be \$1,059.93, upon which he calculated the interest from the 9th day of December, 1865, while in the report now complained of he found said amount to be \$930.40, with interest from March 19, 1866. As this variance is in favor of the appellants, they cannot complain of it, and the last amount is that fixed by Samuel Woods in his deposition.

The sixth exception is that he does not report the persons entitled to receive the money which he finds due and payable to the special commissioner. While the commissioner does not give this information in his last report, of September 24, 1903, it is sufficiently set out in the report of January 27, 1902, with the exhibits filed therewith.

The seventh and last exception is because the commissioner did not find the debt claimed to have been paid as testified to by George G. Campbell in his deposition, which was uncontradicted by any testimony and uncontroverted by any circumstances, except that the original notes remained in the file of the papers. This proposition does not appear to be seriously considered by counsel for appellant. Section 23, c. 130, Code 1899, is too plain to be misunderstood, and all that is said about it by counsel for appellant in his brief is in his "deductions" at its close, "(g) Campbell is rendered competent to testify because Woods, commissioner, testified as to the same matter."

For the reasons herein given, the decree will be modified by deducting the credit of \$175.65, as of the 19th of March, 1866, from the said sum of \$930.40, which leaves \$750.75 as the true amount, bearing interest from March 19, 1866, until October 30, 1903, amounting to the sum of \$2,445.17, the amount of said decree, with interest from said October 30, 1903, until paid; and, with such modification, the decree is affirmed, with costs to the appellants, as the party substantially prevailing, and the cause remanded for further proceedings to be had therein.

(138 N. C. 566)

STATE v. TURNAGE.

(Supreme Court of North Carolina. Feb. 28, 1905.)

HOMICIDE—EVIDENCE—INSTRUCTIONS.

An instruction in a homicide case that on all the evidence, if believed, defendant was guilty of manslaughter, at least, is error; a finding of innocence being authorized by defendant's testimony that he did not fire the gun; that he had it in his hand, hanging down by his side, and as he was coming out of the house it went off accidentally; that at the time he had his hand in front of the hammer; that he did not know it was loaded, and did not intentionally point it at any one; that it went off before he saw the boys, one of whom was shot; and that he and his brother had been playing, and he got the gun to continue to frolic; and there being further evidence that the gun was usually kept unloaded, and that a third person had said he loaded it that morning.

Appeal from Superior Court, Greene County; Council, Judge.

John Turnage was convicted of manslaughter, and appeals. Reversed.

The Attorney General, for the State.

BROWN, J. The prisoner was tried at September term, 1904, of the superior court of Greene county upon a bill of indictment charging him with the murder of James Hunt. He was convicted of manslaughter, and appeals to this court. We set out only so much of the evidence as is necessary to an understanding of the case: The evidence on the part of the state tends to show that on the day of the homicide the prisoner, then about 27 years of age; the deceased; Blaney Turnage, 19 years of age; and Dan Moore and Sam Moore—were in the yard of Mrs. Turnage. The boys had been working in tobacco, and, when it began raining, sought shelter in a ginhouse. After the rain was over, they went to Mrs. Turnage's yard, near the house, for the purpose of getting some peaches. Dan Moore and Blaney Turnage were up in the tree, gathering peaches, eating some, and dropping others down to the boys below. The boys up the tree were "chunking peaches down at the others, and John Turnage, the prisoner, threw a brickbat up the tree at Blaney Turnage, who was in the tree." The boys then left the tree and went into Mrs. Turnage's back yard. There was evidence on the part of the state tending to prove that the prisoner went around the house, and Blaney Turnage, his brother, followed him with an ax. The prisoner went in the house, and came out with a gun in his hands, with the muzzle in the direction of the deceased and his companions, James Hunt and others. Dan Moore, a state's witness, testified that he could not say "how high the gun was up, or whether to the prisoner's shoulder or not; that he heard the gun fire when the prisoner was 12 feet from the deceased. James Hunt was hit—shot in the front of the stomach—and killed." The prisoner, after testifying to the

occurrences at the peach tree, stated, in substance, that he and Blaney Turnage were playing, that Blaney followed him with an ax, and that they were talking and laughing. "I went in the house and got the gun and took it out with me. It was an old gun. I went out the front door with the gun in my hand. As I stepped out of the door and got clear off the porch, it fired, and as it fired I looked, and saw the others coming around the house. The crowd were following me, Blaney in the rear. When I got the gun I did not know it was loaded—had no knowledge of it. After shooting, I learned that the gun had been loaded. Did not intentionally point the gun at any one. The deceased told me I did not intend to shoot him or any one." The prisoner further stated on cross-examination that: "The gun fired before I saw the boys. I did not notice whether the gun was cocked or not. It had been on the rack a long time, and I did not know it was or had been loaded. I got the gun to frolic with Blaney. If I had had an idea it was loaded, I would not have taken it from the rack. I carried the gun in my right hand, swinging by my side. I did not cock the gun. My hand held the gun in front of the hammer." Among other things, Blaney Turnage testified for the prisoner that "the gun was not kept loaded usually. Ben Danner told me he loaded the gun that morning."

We will notice only one exception of the prisoner, as, in our opinion, the court below erred, and a new trial must be had. Among other instructions, the court charged the jury that, upon all the evidence in the case, if believed beyond a reasonable doubt, the prisoner was guilty of manslaughter, at least. We do not controvert any of the legal propositions contended for by the state as to what acts will constitute manslaughter when death ensues from the reckless use of a deadly weapon, such as a pistol or gun. Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this state it is immaterial whether the gun is loaded or not. Acts 1889, p. 502, c. 527. At common law, one who leveled a loaded gun at another without intention of discharging it, and the gun goes off accidentally and kills another, is guilty of manslaughter. *Regina v. Weston*, 14 Cox, C. C. 346. Involuntary manslaughter has been defined to be "where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." 1 Wharton, Cr. Law (10th Ed.) § 305; *Barnes v. State*, 134 Ala. 36, 32 South. 670. Applying these general principles of the law of homicide to the evidence in this case, we are of the opinion that the judge erred in his instruction that, in any

view of it, the prisoner was guilty of manslaughter. We do not mean to intimate that there was not sufficient evidence to go to the jury, but we think the guilt or innocence of the prisoner should have been submitted to the jury upon all the evidence, with full and appropriate instructions as to what constitutes manslaughter, as the state asked for no other verdict, and presenting to the jury the contentions of the state and prisoner arising upon the evidence. Nor do we mean to intimate that, in order to constitute manslaughter, the gun must have been intentionally discharged by the prisoner. Any unjustifiable and reckless use of it which jeopardizes the safety of another is unlawful, and, if death ensues therefrom, it is manslaughter. But where the evidence is conflicting, or where the facts testified to are such that reasonable minds may draw different inferences therefrom, it is settled law in this state that the case should be submitted to the jury untrammelled by such an instruction as the one excepted to by the prisoner in this case.

The painstaking judge who tried the case in the court below seems to have overlooked the prisoner's evidence in some particulars. The prisoner denies that he fired the gun; states that he had it in his hand, hanging down by his side, and, as he was coming out of the house, it went off accidentally; that, at the time it went off, he had his hand in front of the hammer, holding the gun; that he did not know it was loaded, and that he did not intentionally point it at any one; that the gun fired before he saw the boys; and that he and his brother Blaney had been playing, and he got the gun to continue the frolic. Blaney Turnage testified that the gun was usually kept unloaded, and that Danner told him he loaded it that morning. The state's witness Dan Moore testified that he could not say how high the muzzle of the gun was up, or whether the prisoner had it to his shoulder or not. It is useless to discuss the evidence at any length. It is apparent to us that two different inferences may be drawn from it. *Robertson v. State*, 70 Tenn. 239, 31 Am. Rep. 602. In considering it in the light of the instruction given, that construction should be put upon it which is most favorable to the prisoner; and, if there is any view of it by which innocence may be inferred, such view should be presented to the jury. We quote with approval the wise words of Mr. Justice Connor in granting a new trial in *State v. Geo. W. Daniel*, 134 N. C. 673, 46 S. E. 991, for a similar error committed by the writer of this opinion when on the superior court bench: "The prisoner, however guilty, is entitled to be tried by 'the ancient mode of trial by jury,' in which the court decides all questions of law, and the jury all questions of fact." "The jury are the constitutional judges not only of the truth of the testimony, but of the conclusions of fact resulting there-

from." *Henderson, J., in Bank v. Pugh*, quoted in the above case.

For the error pointed out, there must be a new trial.

New trial.

(137 N. C. 414)

FERGUSON v. TWISDALE et al.

(Supreme Court of North Carolina. Feb. 21, 1905.)

CHATTEL MORTGAGE—ADVANCEMENTS FOR CROPS—CONSTRUCTION OF MORTGAGE.

W. and F. together cultivated a crop on F.'s land, and, to obtain fertilizer, they gave a crop mortgage on "all the crops cultivated by us" on F.'s land; the lien directing a sale of the crop for "payment of the debt and interest and for any surplus to us." Held, that the individual crop of F., cultivated by him on another part of the same tract of land, on which no part of the fertilizer was used, could not be held by the mortgage lien.

Appeal from Superior Court, Halifax County; Webb, Judge.

Action by H. R. Ferguson against J. H. Twisdale and J. H. Fenner. From a judgment for plaintiff, defendants' appeal. Reversed.

E. L. Travis, for appellants. Albion Dunn and Daniel & Green, for appellee.

BROWN, J. This action is brought to recover possession of a lot of peanuts and corn. The facts are embodied in a statement of "agreed facts," the substance of which is as follows: The two defendants cultivated the crop together on the W. E. Fenner plantation during the year 1903. During the same year the defendant J. H. Fenner individually cultivated a crop on another part of the same plantation, in which Twisdale had no interest. The defendants needed guano for their "copartnership crop," and purchased it from the plaintiff, and used it exclusively on the Twisdale crop. Fenner used none of it for his individual crop. The crops seized in this action are those raised by Fenner exclusively, and embrace none of the Twisdale joint crop. Twisdale was a subtenant of his codefendant, on the half-share plan; J. H. Fenner furnishing the land and team, and Twisdale furnishing the labor and guano; the crop raised to be equally divided. The plaintiff had no notice of the terms of the contract between Fenner and Twisdale, but knew J. H. Fenner had an individual crop on the same plantation, separate and distinct from the Twisdale crop. To secure the plaintiff for the guano used on the Twisdale crop, the defendants executed a note and crop lien. The descriptive words used in the latter are, "all crops cultivated by us this year 1903 on the lands known as the W. E. Fenner lands and situated in Halifax County, including tobacco, peanuts," etc. The lien directs the sale of the crop for "payment of the debt and interest and for any surplus to us."

His honor in the court below held that the crop lien or mortgage conveyed the Fenner individual crop, as well as the Twisdale joint crop, and gave judgment against the defendant. In this we think there is error. The intention of the parties to the crop lien is to be collected from the whole instrument, and the words used are to be understood in their plain and literal meaning. Where the meaning is not clear, in sustaining it courts will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain the intention of the parties. "Courts will not make an agreement for the parties, but will ascertain what their agreement was—if not by its general purport, then by the literal meaning of its words." Clark on Contracts (2d Ed.) 404; *Roberts v. Bonaparte*, 78 Md. 191, 20 Atl. 918, 10 L. R. A. 689. In all written contracts and agreements the language used is the primary guide to the meaning. But sometimes the language is ambiguous. In such cases the meaning must be derived from the interests and relations of the parties, as appearing in the contract. "Wherever the promise is by two or more persons, as where the words 'we promise,' etc., are used, the liability is *prima facie* joint." Clark, *supra*, 415. The intention of the parties determines the quantity of estate, as well as the property conveyed. The terms and phraseology of description must be interpreted with that view, if it can reasonably be done. When conflicting descriptions are contended for, and cannot be reconciled, courts will adopt that construction which best comports with the manifest intention of the parties and the circumstances of the case. "The intention must be collected from the surrounding circumstances at the time the mortgage was made, and the language of the instrument itself." 20 Am. & Eng. Enc. 919, and cases cited. What were the surrounding circumstances when this mortgage was executed? It appears that Twisdale and Fenner were the owners of a joint crop, which they were cultivating in copartnership on the W. E. Fenner land, and that J. H. Fenner owned individually another crop on another part of the same plantation. Fertilizers were needed for the joint crop. By the terms of their farming agreement, Twisdale was to furnish them. To enable him to do so, J. H. Fenner, co-owner of the crop they were cultivating together, joined in the execution of this crop mortgage to the plaintiff. All the fertilizers were used by Twisdale on the joint crop, and none on the individual crop of Fenner. If it had been the intention of the mortgagee to include the individual crop of Fenner, knowing, as he did, that Fenner had a separate crop, it is very likely that he would have used words broad enough to cover it and leave no room for dispute. The words "all crops cultivated by us on the W. E. Fenner land" do not necessarily mean

"all crops cultivated by us or either of us." The natural and ordinary meaning and significance of those words would limit the crop conveyed to that crop cultivated by the two defendants jointly. It is not likely that J. H. Fenner intended to mortgage his individual crop for fertilizers which Twisdale himself had contracted to furnish. But to leave the question almost free from doubt, the plain terms of the mortgage provide for a sale of the crop in default of payment of the debt, and plainly provide that after the debt is paid the mortgagee shall "pay any surplus to us"; that is, to Fenner and Twisdale jointly. It is not likely that J. H. Fenner intended to share the surplus from his own individual crop with one who had no interest whatever in it. Yet that is the legal and proper disposition of any surplus from the joint crop remaining after the debt is discharged. Neither the diligence of counsel nor our own researches have been able to find any very apposite authority in our own Reports. The nearest approach to a pertinent case is *Tallaferro v. Sater*, 113 N. C. 76, 18 S. E. 94, wherein it is substantially held that "lumber to be sawed by one does not include lumber sawed by that person and another."

We have considered with care the well-prepared brief of counsel for plaintiff, as well as the able and oral argument of Mr. Dunn, but we are unable to conclude that the mortgage conveys more than the joint crop of Twisdale and Fenner.

Let the cause be remanded to the superior court of Halifax county, with direction to render a judgment upon the facts agreed in accordance with this opinion. Reversed.

(137 N. C. 421)

JONES et al. v. WOOTEN.

(Supreme Court of North Carolina. Feb. 28, 1905.)

EXECUTORS—ACTION FOR ACCOUNTING—PLEA IN BAR—SUFFICIENCY—REFERENCE—APPEAL.

1. On the death of an executor and the appointment of an administrator *de bonis non* with the will annexed, such administrator is the proper person to call on the administrator of the deceased executor to account for any funds remaining in the hands of the deceased executor belonging to the estate of the testator.

2. Where an administrator *de bonis non* with the will annexed was sued by alleged legatees of the testator, who averred that the testator's original executor had died without having fully administered the testator's estate, that plaintiffs had requested the defendant to require the administrator of the deceased executor to account, and that he had refused, a plea by the defendant that a full and complete accounting and settlement to and with each other for and on account of any money, goods, and chattels belonging to the estate of the testator which went into or should have gone into the hands of his original executor had been had between himself and the administrator of the deceased executor, and that in such settlement the correct balance was ascertained and payment made, constitutes a good plea in bar of

the action, and hence it was error to order a reference before disposition was made of the plea.

3. An order of reference made before disposition of a plea in bar of an action is one from which an appeal can be immediately taken.

Appeal from Superior Court, Greene County; Council, Judge.

Action by Alice Jones and others, by their next friend, George Heath, against John L. Wooten, administrator d. b. n. of Travis E. Hooker, deceased, and others. From an order of reference, defendant appeals. Reversed.

Jarvis & Blow, for appellant. Geo. M. Lindsay and Moore & Fleming, for appellees.

HOKE, J. It appears from the pleadings that John H. Freeman, having made his will, died in the county of Greene in December, 1885; that Travis E. Hooker qualified as his executor on December 31st of the same year, and proceeded to administer on said estate; that Travis E. Hooker died in March, 1887, about 14 months after his qualification as executor, and without having fully administered the estate. After the death of Hooker, John Sugg was appointed and qualified as administrator d. b. n. with the will annexed of John H. Freeman. J. Q. Jackson was appointed and qualified as administrator of Travis E. Hooker, and in due time settled his estate, filed his final account and was discharged, and has since died. Before the present action was begun, the defendant John T. Sugg was appointed as second administrator d. b. n. of said John Freeman, and the defendant Wooten was appointed administrator d. b. n. of said Travis Hooker. The plaintiffs are special legatees under the will of John H. Freeman, whose legacies are made a primary charge on his personal estate and a secondary charge on his real estate, and bring this suit against J. T. Sugg, administrator d. b. n. of John H. Freeman, and John L. Wooten, administrator d. b. n. of Travis E. Hooker, and others, alleging (1) that their legacies have never been paid; (2) that Travis E. Hooker, as executor of John H. Freeman, had received large sums of money for which he had never accounted; and (3) that John Sugg, former administrator d. b. n. of John H. Freeman, had negligently and wrongfully failed to call him to account; that such accounting was necessary to the recovery of their legacies; and that before bringing this suit they had demanded of the defendant John T. Sugg, the present administrator d. b. n. of John H. Freeman, that he bring suit against the defendant Wooten to recover from him the amount due from Travis E. Hooker's estate to the estate of John H. Freeman, and that he had refused to comply with such demand. The defendant answered, denying the principal allegations of the complaint, and John L. Wooten specially answered that there had been a full, true, and complete accounting

between his predecessor in office, J. Q. Jackson (former administrator of Travis E. Hooker), and John Sugg, who was then administrator d. b. n. of John H. Freeman; that a balance had been struck finding a small amount due from the estate of Freeman, which said amount had been paid, and all claims against the estate of Travis E. Hooker settled and adjusted. The form of this plea is set out in section 38 of the defendant's answer, as shown in the record at pp. 31, 32, 33, 34, 35, 36, and 37. The court, on motion of plaintiff's counsel and on the pleadings, ordered a reference to take and state an account, "as against John L. Wooten, administrator of Travis E. Hooker, former executor of John H. Freeman, as to the personal estate of John H. Freeman, and the dealings of said Travis E. Hooker as executor of John H. Freeman." The defendant John L. Wooten, administrator of Travis E. Hooker, excepted and appealed.

The administrator d. b. n. of John H. Freeman's estate is the proper person to call the administrator of Travis E. Hooker to account. *Ham v. Kornegay*, 85 N. C. 119; *Gilliam v. Walker*, 104 N. C. 180, 10 S. E. 183. And if John Sugg, who was formerly administrator d. b. n. of John H. Freeman, while he held that office, had a full accounting and settlement with J. Q. Jackson, administrator of Travis E. Hooker, as set out in the answer, it is a good plea in bar, and would protect the estate of Travis E. Hooker from any further accounting, unless the same should be successfully impeached for fraud or specified error. In 1 Enc. of Pleading & Practice, p. 100, it is said: "A plea of account stated is a good bar to a bill for account, for there is no rule more strictly adhered to in courts of equity than that, when a defendant sets forth a stated account, he shall not be obliged to go into a general one." *Costin v. Baxter*, 41 N. C. 197; *Suttle v. Doggett*, 37 N. C. 203. In this last case, *Ruffin, J.*, says that "the well-established principle of a court of equity is that an account once settled is conclusive unless assailed for fraud or mistake, and, in order thus to assail it, the complaint must not simply insinuate fraud, but aver the particulars with such definite certainty that issues may be raised in regard to them." The plaintiff has done this in his reply, and the cause is properly at issue. As a matter of pleading, however, there is in the answer a good plea in bar of any further accounting. *Grant v. Hughes*, 94 N. C. 231, the authority most relied upon by the plaintiff, does not conflict with this position. In that case there had been an ex parte settlement by the administrator with the clerk, and the court said, concerning the answer, that the allegations thereof in reference to such settlement were "vague, indefinite, questionable, and unsatisfactory," and an order of reference was therefore approved. But there are no such defects in the plea here set out. These administrators at

the time of this alleged settlement held adversary positions, and were the persons whose duty it was to adjust the matter. The allegation is that they had "a full and complete accounting and settlement to and with each other for and on account of all moneys, goods, and chattels belonging to the estate of said Freeman which went into or should have gone into the hands of Travis E. Hooker, executor of John H. Freeman, and that in such settlement the correct balance was ascertained and payment made." The accounts are further set out in full in the way of exhibits, showing an ascertained balance, and the allegation made that such accounting was full, true, and complete, the balance ascertained and agreed upon as correct, and payment thereof made.

Whether the defendant can make his plea good by proof is another question, but in the pleadings it is a good plea in bar. This being true, it was error to order a reference until such plea was disposed of. *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746.

This decision is also an authority for the position that the order in question is one from which an appeal can be immediately taken. The practice in this respect is further declared in *Kerr v. Hicks*, 131 N. C. 90, 42 S. E. 532, and *Shankle v. Whitley*, 131 N. C. 168, 42 S. E. 574. It is decided in these cases that, where a plea in bar is overruled or sustained as a matter of law by the judge, it is optional with the party to take an appeal at once, or preserve his right by having an exception noted. Where, however, the issues are tried by a jury, and the right to an account is established by a verdict, and an order of reference made, it is proper to proceed with the reference, and an appeal can only be taken from a final judgment after report.

Let this be certified, to the end that the order of reference be stricken out and the cause proceeded with in accordance with this opinion.

Error.

(138 N. C. 560)

STATE v. SCHENCK et al.

(Supreme Court of North Carolina. Feb. 28, 1904.)

BAIL BOND—FORFEITURE—LIABILITY OF SURETIES—STATUTE.

Defendant in a criminal prosecution was tried before a justice of the peace, and required to give bail for his appearance at the next term of court to answer the state on the charges against him, and "not to depart the same without leave first had and obtained." He appeared, was tried and convicted, and the court adjudged that he pay a fine and costs. He thereupon excepted and appealed, and was ordered to give an undertaking for costs of the appeal, and an undertaking to stay the execution on the judgment, and one for his appearance at the next term of court, but failed to give any of the undertakings, or to pay the fine and costs, and, having been called before the expiration of the term of court and failing to answer a judgment nisi was entered against him and his sure-

ties for the penalty of the bail bond. A scire facias having been issued on the judgment and served, the judgment was made absolute. *Held*, on a motion by the sureties to set aside the judgment, that the defendant's appearance, his conviction, and sentence did not exonerate the sureties from liability on the bond, in view of Code, § 1230, providing that the sureties can surrender their principal to the court, or to any lawful officer appointed to receive him, at any time before execution against them.

Appeal from Superior Court, Craven County; Council, Judge.

William Schenck was convicted of unlawfully selling liquor, and, from an order overruling a motion to set aside a judgment forfeiting his bail bond, his sureties appeal.

The defendant Schenck was tried before, a justice of the peace for unlawfully selling liquor, a misdemeanor by statute. He was required to give bail for his appearance at the next term of the court held in October, 1903, and the appellants, Williams and Howard, became sureties on his bond, which was conditioned for Schenck's appearance at the said term of court "to answer the state on a charge of selling liquor on Sunday, and selling liquor without license, and not to depart the same without leave first had and obtained." Schenck appeared, was tried, and convicted. The court adjudged that he pay a fine of \$100 and the costs. He thereupon excepted and appealed, and was required to give an undertaking in the sum of \$35 for the costs of appeal, an undertaking in the sum of \$150 to stay the execution of the judgment, and one in the sum of \$100 for his appearance at the next term of the court. He failed to give any of these undertakings or to pay the fine and costs, and, having been called and failed, a judgment nisi was entered against him and his sureties for \$100, the penalty of his bond. A scire facias issued on this judgment and was duly served, and at April term, 1904, the judgment was made absolute. The appellants moved to set aside the judgment; the motion was overruled, and they appealed.

R. A. Nunn, for appellants. The Attorney General, for the State.

WALKER, J. (after stating the case). The ground upon which appellants seek to vacate the judgment is that, when Schenck appeared and was convicted and sentenced, the condition of the bond was fully performed, and the appellants, his sureties, were exonerated, as, by reason of the conviction, they lost control of him, and thereafter, he was in the custody of the law. We cannot think this the true construction of the bond, and it is certainly contrary to the uniform practice of the courts in this state in such cases. At common law, when bail was given and the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail. They had a dominion over him, and it was their right at any time

to arrest and surrender him again to the custody of the law, in discharge of their obligation. They were sometimes said to be his jailers, and to have him always upon the string, which they may pull when they please, in order to surrender him in their own discharge. *Cain v. State*, 55 Ala. 170; 1 Chitty's Cr. Law, 104. If they would fully discharge their obligation as his bail, they should as effectually secure their principal's appearance and put him as much under the power of the court, as if he were in the custody of the proper officer, and they do not answer the end of the law unless this is done. The principle thus stated is of ancient origin, and has been recognized as controlling in determining the liability of bail. 1 Bacon, Abr. "Bail," L; *State v. Stout*, 11 N. J. Law, 124. The extent of their duty and obligation, therefore, is to see to it that the principal, at all times during the term of the court to which he is bound to appear, is present to answer the call of the court and to do what the law may require of him. If they fail in this respect, they have not kept him under the power of the court as if he had been in the custody of its proper officer. It must not be inferred that the surety is thereby required to do something not stipulated in his bond, for the obligation thus imposed is nothing more than what the law reasonably considers to be within the condition of his undertaking. It is said by the highest authority that a recognizance (or bail bond), in general, binds to three things: (1) To appear and answer either to a specified charge, or to such matters as may be objected; (2) to stand to and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. This was said, too, with reference to a bail bond worded precisely like the one in this case. It was contended by counsel in that case, which we will presently cite, that the stipulation not to depart the court without leave was an unusual one and of no binding force whatever, and, in answering this contention, the court said: "That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than 30 years ago by this court after full consideration." *State v. Hancock*, 54 N. J. Law, 393, 24 Atl. 726. That was a well-considered case, and seems to be a conclusive authority against the appellant upon the main question presented in the record. See, also, *State v. Stout*, supra. The doctrine has been thus stated and illustrated: "A recognizance binds the principal not only to appear, but to abide the judgment of the court, and not depart thence without its leave, and, if the principal be ordered to execute a new bond, either to keep the peace for a specified period or for his appearance at a subsequent term or before another court, and he depart without complying with the

order, it is a breach of the recognizance." 3 Am. & Eng. Enc. of Law (2d Ed.) 715; *State v. Thompson*, 62 Ind. 367. This construction of a recognizance or bail bond is sustained by analogy in *State v. Smith*, 66 N. C. 620. In that case the defendant gave a bond with a surety for his appearance at the next term of the court. His case was continued, and he was ordered to give bond for his appearance at a subsequent term, which he failed to do, but departed without leave of the court. He was called, and, having failed to answer, his forfeiture was duly entered. In answer to the scire facias issued, the surety insisted that the defendant could not be called and a forfeiture entered after the continuance of the case. This court held that under the recognizance he could not depart without leave of the court, though not so expressly stated therein, and that he was required to answer at any time during the term when called, "it being the universal practice near the close of the court to look over the docket and call such defendants as have departed without leave of the court." And this, we now say, is a most reasonable practice. *State v. Morgan*, 136 N. C. 593, 45 S. E. 604. It works no harm to the sureties, nor does it increase the risk they assume, nor in any way add to their obligation. It is fairly within the scope of their undertaking, as they have expressly agreed that their principal shall not depart without leave, and it appears to us that there is no valid reason for holding otherwise. The sureties can surrender their principal to the court or to any lawful officer appointed to receive him, and this can be done, it is said in the statute, at any time before execution against them. Code, § 1230; *State v. Lingerfelt*, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605. The conviction does not, by virtue of its own force, put the defendant in the custody of the court or of the sheriff. This is done, in our practice at least, by an order from the court, given of its own motion or on application of the solicitor; and the court, when it passes judgment upon a defendant and he appeals, can direct that he be not taken into custody immediately, but be permitted to find security for the costs of his appeal and for his appearance at the next term, and, if he fails afterwards to appear, when called during the term, and perfect his appeal and give the necessary security for his appearance, or in default thereof to surrender himself in execution of the judgment, he may be called and his forfeiture entered. Judge Story says for the court, in *Ex parte Milburn*, 9 Pet. 704, 9 L. Ed. 280: "A recognizance of bail in a criminal case is taken to secure the attendance of the party accused to answer the indictment, and to submit to a trial and the judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment which

the law ordains for his offense." In *People v. Stager*, 10 Wend. 431, we find an instructive discussion of the matter by Savage, C. J., the substance of which, being briefly stated, is that a person bound by a recognizance is not at liberty to depart after once making his appearance in court, but he must remain until discharged, and not quit the court without leave at any stage of the trial; the object being not only to cause the accused to appear and answer the charge, but to submit to such punishment, if any, as shall be adjudged.

But there is another sufficient reason why the appellants should be held bound by the recognizance or bail bond, and to be now liable for the penalty thereof. All the proceedings of the court are in fieri until the expiration of the term, and during the term the record remains completely under the control of the court. It may strike out its judgment and enter a different one. In other words, the court has the whole term during which to consider its action and modify or reverse it. The principle is supported by abundant authority. *Penny v. Smith*, 61 N. C. 36; *Halyburton v. Carson*, 80 N. C. 16; *Turrentine v. Railroad*, 92 N. C. 642. This being so, why could the court not strike out the verdict and judgment and award a new trial, and then continue the cause to the next term, in which case the sureties would remain liable (*State v. Smith*, supra)? And, if it could do this, why did it not also have the power to direct that the defendant should not be taken into custody until it could come to a final determination in the matter, or, as in this case, suspend execution of the judgment for a proper reason? The conviction and sentence were not final and irrevocable until the end of the term, which was after the default of the defendant and the entry of the forfeiture. If the court could set aside the judgment, it could, a fortiori, postpone its enforcement.

We conclude that the recognizance binds the sureties for the continued appearance of their principal from day to day, during the term and at all stages of the proceeding, until he is finally discharged by the court, either for the term or without day. He must answer its calls at all times, and submit to its judgment. In no other way can the criminal law of the state be well administered.

No error.

(137 N. C. 426)

GASKINS et al. v. ALLEN.

(Supreme Court of North Carolina. Feb. 23, 1905.)

EJECTMENT—DEEDS—ALTERATION—EVIDENCE—DEGREE—HUSBAND AND WIFE—PROBATE—PRIVATE EXAMINATION—RATIFICATION OF VOIDABLE DEED—LAPSE OF TIME—LIMITATIONS.

1. Plaintiff, claiming an alteration in the date of probate of a deed of land, was only bound

to establish it by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, § 259.]

2. A commission by a probate judge to a justice of the peace to take the probate and privy examination to a deed of a married woman was issued August 19, 1871. The blank form for such probate was on the same paper as the commission, which referred to a deed executed in 1871, at which time the woman was a minor. The certificate of the justice referred to "the foregoing deed." Two deeds were found pinned to the paper—the deed of 1871, and another, dated 1872, after the woman had attained majority. *Held*, that the probate must refer to the deed of 1871, and the deed of 1872 was invalid for want of probate.

3. A deed by a married woman, not properly executed, and with no probate, or privy examination taken, was no ratification of a prior deed executed by her while a minor.

4. A deed executed by a married woman while a minor was not ratified by lapse of time with no disaffirmance for more than 20 years.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 45.]

5. A married woman, who was a minor, executed a deed in 1871, which she disaffirmed by a deed executed in 1894 to her daughter, who was married, and an infant until 1898. *Held*, that an action in 1904, by the daughter, to recover the land, was not barred by Acts 1899, p. 209, c. 78, as the second section of said act provides "that in all actions commenced after the ratification of this act by married women heretofore protected by subsection 4 of sections 148 and 163 of the Code, in which the defense of adverse possession shall be relied upon, the time completed as constituting such adverse possession shall not include any possession had against such married woman prior to the passage of this act."

Appeal from Superior Court, Pamlico County; Council, Judge.

Action by Zenia A. Gaskins and another against Victoria Allen. From a judgment for plaintiffs, defendant appeals. Affirmed.

The following issue was submitted to the jury: "Is the plaintiff Zenia Gaskins the owner in fee and entitled to the immediate possession of the land described in the complaint? Ans. Yes." From the judgment rendered, the defendant appealed.

D. L. Ward, for appellant. Simmons & Ward, for appellee.

BROWN, J. Mary F. Swindell was seised in fee of the land in controversy. She and her husband, David, executed a deed to W. H. Rawls in 1871, at which time she was married and a minor. On June 22, 1872, the day after she became of age, Mary F. Swindell and her husband signed another deed for the same land to W. H. Rawls. This deed was pinned to the first, and both recorded under one probate taken by J. S. Fowler, justice of the peace. The defendant claims by mesne conveyances under Rawls. On October 10, 1894, Mary F. Swindell and her husband executed a deed to the plaintiff Zenia, their daughter, for the land. She was then 17 years of age. This action was commenced on April 8, 1902. "Hard cases are the quicksands of the law." We remembered this

adage in considering this appeal, and gave it a minute and careful investigation. It is with natural reluctance we feel impelled to affirm a judgment which deprives the defendant of land in the possession of which she and those under whom she claims have been so long. But "such is the law."

1. As to the probate of the deed of June 22, 1872: We can find no evidence that it was ever probated, or any privy examination taken. The commission issued by West, Probate Judge, is dated August 19, 1871. It refers in specific terms to the deed of 1871, when Mary F. Swindell was under age. The probate of the justice of the peace, Fowler, is at the bottom of this commission, and admitted to be a blank form, all on one paper, and filled out by the probate judge and the justice of the peace. This probate is dated June 22, 1872, in the record sent here, and, if actually taken then, would have been a confirmation of the act of the infant grantor after arriving at full age. His honor charged the jury that: "The plaintiffs claim that the date of this probate has been altered; that one date has been erased, and another substituted. If the plaintiffs have satisfied you by the preponderance of the evidence that this is so, and, further, that she neither executed nor acknowledged the deed after she was 21 years of age, you should answer the first issue 'Yes.'" The jury answered the issue "Yes." We approve this instruction in general, and more particularly as to the degree of proof required to establish the alteration in the date of the probate. *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775, and cases cited; *Perry v. Insurance Co.* (at this term) 49 S. E. 889. The finding of the jury under such instruction destroys the value of that probate as a confirmation by Mrs. Swindell of her deed made when a minor. The probate could not possibly refer to the deed of June 22, 1872. In 1871-72 justices of the peace had no original jurisdiction to take acknowledgments of deeds, or to take the privy examinations of married women. The probate judge, who was also clerk of the superior court, took the acknowledgment of the husband, and when the wife was not present to take her privy examination himself he issued a commission to some convenient justice of the peace to take it. The blank forms of the justice to fill up were printed on the same paper with the commission, as was admitted in this case. The commission described the deed, and named the grantor and grantee, as this commission does, and empowered the justice to take the privy examination of the wife. This commission is dated August 19, 1871. Under it the justice had no authority to take the probate and privy examination to the deed of June 22, 1872, or to any other deed except the one named in the commission. The two deeds were pinned together with this one commission and certificate of probate. The commission issued by West and the certificate of

probate signed by Fowler evidently belonged to the deed of 1871. The certificate of the justice is on the same paper as the commission, and refers to the "foregoing deed of conveyance," viz., the deed described in the commission. There is no other reference to any deed in it. The deed of June 22, 1872, was not probated, and its registration was void.

2. Did Mary F. Swindell ratify and confirm her deed of 1871 after she became of full age? We see no evidence of ratification or confirmation. She was married when the deed was made, and her husband was living at the time of the trial. The deed of June 22, 1872, is no ratification, because, as we have shown, it was never properly executed, and no probate or privy examination taken. Lapse of time is not a confirmation in this case. "The presumption of ratification of a voidable deed by long acquiescence will not arise against a woman under disability of coverture." *Epps v. Flowers*, 101 N. C. 158, 7 S. E. 680. So far as Mrs. Swindell is concerned, this matter seems to have been "quiescent," and "in statu quo" from the attempt to make a deed on June 22, 1872, until October 10, 1894, when she made the deed to her daughter Zenia, her coplaintiff, and who is the real plaintiff in this action. The deed of October, 1894, was an absolute disaffirmance, and the only disaffirmance, so far as this record discloses, by Mrs. Swindell of her act and deed of 1871, made when a minor. "A deed of bargain and sale made by an infant is avoided by his executing, upon his arrival at full age, another deed of the same kind, and for the same land, to a different person." *Ruffin, C. J.*, in *Hoyle v. Stowe*, 19 N. C. 320. There is no conflict with *Weeks v. Wilkins*, 134 N. C. 516, 47 S. E. 24. Three years after majority is a reasonable time within which an infant must disaffirm a deed. Where the infant is under the disability of coverture, the three years begin to run when the disability is removed. Mrs. Swindell was under disability of coverture in 1871, when a minor, and it continued up to the time of the trial in the court below.

3. Does the act of February 13, 1899 (Acts 1899, p. 209, c. 78) bar a recovery in this action by plaintiff Zenia Gaskins? We think not. As we have shown, Mrs. Swindell disaffirmed in 1894, before the act of 1899. Zenia Gaskins was 17 years of age when the deed to her was executed, and was married, and an infant, both, until October, 1898. The first section of the act eliminates married women from those saved from the operation of the statutes of limitation mentioned in the act. But for the second section, a married woman might, under proper facts, be barred at the end of three years from the ratification of the act. This section enacts "that in all actions commenced after the ratification of this act by married women heretofore protected by subsection 4 of sections 148 and 163 of the Code, in which the defense of ad-

verse possession shall be relied upon, the time completed as constituting such adverse possession shall not include any possession had against such married woman prior to the passage of this act." It is clear to us that there is nothing in the act of 1899, or any statute of limitation, which bars a recovery in this action by the plaintiff Zenia Gaskins.

The three questions we have briefly discussed are the only ones presented in the record of much importance. The other exceptions are without merit.

The judgment is affirmed.

(137 N. C. 418)

TAYLOR v. PARKER.

(Supreme Court of North Carolina. Feb. 28, 1905.)

USURY—RECOVERY OF INTEREST PAID—LIMITATIONS—AMOUNT OF RECOVERY.

1. Under Code, § 3836, providing that, when more than 6 per cent. interest has been paid, the debtor may recover twice the amount of interest paid if the action be commenced within two years after the usurious transaction, the defense that the action was not brought in two years is available, though not pleaded.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 678; vol. 47, Cent. Dig. Usury, § 298.]

2. Where within two years before the action a usurious payment is made, and afterward a payment of legal interest, only twice the amount of the usurious payment, and not twice the entire interest, can be recovered, but both usury and legal interest may be recovered when paid together, and not merely twice the usurious part of the payment.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 424.]

3. Whether the payment of usury was suggested by the creditor or debtor is immaterial.

Appeal from Superior Court, Hertford County; Hoke, Judge.

Action by Lee Taylor against C. W. Parker. From a judgment for plaintiff for less than his demand, he appeals. Reversed.

Geo. Cowper and Pruden & Pruden, for appellant. Winborne & Lawrence, for appellee.

CLARK, C. J. The plaintiff was indebted by bond in the sum of \$580. In January, 1895, the defendant, at the plaintiff's request, purchased the bond from the obligee therein, upon the plaintiff's payment to defendant of all interest then accrued and a bonus of about \$35 for further extension. In January, 1896, the legal interest then due was paid. On 20th March, 1899, the defendant again extended the debt upon payment of the sum of \$156.04, which included \$50 usury, the interest due to that date at 6 per cent. being \$106.04. On 4th February, 1901, the defendant again extended payment upon receipt of \$63, being the amount of interest then due. This is an action to recover back double the above sums under Code, § 3836, which provides that, when a greater interest than 6 per cent. has been paid, the debtor

or his legal representative "may recover back, in an action in the nature of an action of debt, twice the amount of interest paid, provided such action shall be commenced within two years from the time the usurious transaction occurred." The payment of usury in 1895 was beyond the two years prior to the beginning of this action, which was instituted on 4th March, 1901, and need not be considered. It would be otherwise under chapter 69, p. 75, Laws 1895, but that statute, by its terms, does not apply to this case, as the bond was executed before its passage. The two-years statute was pleaded, and, even if it had not been pleaded, the defendant was entitled to its protection. *Roberts v. Ins. Co.*, 118 N. C. 435, 24 S. E. 780; *Carter v. Insurance Co.*, 122 N. C. 339, 30 S. E. 341. The payment of \$63 was within two years, but was not a "usurious transaction," only the legal interest then due being paid. This case differs from *Roberts v. Insurance Co.*, supra, where the court gave judgment for double the entire interest paid in two years before suit, in that here there was no usury after the payment of 20th March, 1899. The payment of \$156.04 on 20th March, 1899, was a usurious transaction, for the legal interest then due was only \$106.04, and it occurred within two years before this action was brought. Under the clear terms of the statute the plaintiff is entitled to recover back double the entire interest paid at that time—i. e., \$312.08—not merely double the usurious excess. *Smith v. B. & L. Ass'n*, 119 N. C. 255, 26 S. E. 41; *Laws 1895*, p. 75, c. 69; *Cheek v. B. & L. Ass'n*, 127 N. C. 121, 37 S. E. 150. The evidence is conflicting whether the debtor solicited the extension of time upon his own suggestion of a bonus, or whether the creditor suggested the usury. Besides, it is immaterial. *Faison v. Grandy*, 126 N. C. 830, 36 S. E. 276. The payment of more than legal interest was in either case caused by the debtor's necessity, and the lawmaking power has forbidden it under a penalty deemed by it heavy enough to discourage such transactions by making them unprofitable. The terms of the statute are identical with those used in the United States Revised Statutes, § 5198 [U. S. Comp. St. 1901, p. 3493], in reference to usury by national banks, to which the federal courts give the same construction placed on our statute. Usury laws have prevailed among all nations, whether "Greek or Barbarian." 29 Am. & Eng. Enc. (2d Ed.) 453. At common law the taking of any interest was punishable. 16 A. & E. Enc. (2d Ed.) 991. Among the Hebrews it was forbidden as to their brethren, but was not forbidden as to Gentiles. Deuteronomy, xxiii, 19, 20. A very interesting discussion of the origin and history of usury legislation will be found in *Dunham v. Gould*, 16 Johns. 367, by Chancellor Kent (8 Am. Dec. 323). In New York the charging interest in excess of 6 per cent. in certain cases is still an indictable offense

under a recent statute. The whole subject of usury is a matter of public policy, resting in legislative discretion, and the courts have no concern save to execute the law as it is written. The charge of the court that the plaintiff could recover only \$100—i. e., double the excess of interest paid 20th March, 1899—was contrary to the statute, which authorized the recovery of double the entire interest paid at the time of the usurious transaction, and was error.

HOKE, J., took no part in decision of this case.

(122 Ga. 111)

GOODMAN v. STATE.

(Supreme Court of Georgia. Jan. 27, 1906.)

HOMICIDE—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—EVIDENCE—MISTRIAL.

1. The evidence authorized a charge on the law of voluntary manslaughter, and the exception taken to the instruction given in reference to that offense was not meritorious.

2. It was not error to admit in evidence, as res gestæ, the declaration of the deceased, "Oh Lord! my poor wife and children!" made as he fell from the fatal wound. Even if of doubtful admissibility, it was properly permitted to go to the jury, in order that they might consider what light, if any, it threw upon the condition of the mind or motives of the deceased at the time he was shot. (Simmons, C. J., dissenting.)

3. Nor was it error to refuse to grant a mistrial on account of the improper remark of the solicitor general in his argument to the jury; he having expressly withdrawn it, and the court having instructed the jury not to consider it.

4. The charge that if the accused was the aggressor, and the deceased drew his club only for the purpose of resisting further aggressions, this would not be sufficient provocation for the homicide, was pertinent. Furthermore, such charge was given while the court was instructing the jury as to the law of murder. The verdict being for voluntary manslaughter, the charge was not harmful to the accused, even if not authorized by the evidence or his statement.

5. If a party have knowledge of a fact, and the same can be proved at the trial by evidence, a new trial will not be granted on the ground that other evidence of the fact, claimed to be newly discovered, has been found since the trial, unless the movant satisfactorily explains why he did not use the evidence in his control at the time of the trial.

6. The evidence authorized the verdict, and the court did not abuse its discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Oatham County; Geo. T. Cann, Judge.

W. C. Goodman was convicted of manslaughter, and brings error. Affirmed.

W. C. Goodman was indicted at the October term, 1904, of Chatham superior court, for the murder of E. O. Zipperer. On the trial the state introduced only one witness, C. M. Malphus, whose testimony was, in brief, as follows: On September 29, 1904, Goodman, Zipperer, and witness were all policemen in the city of Savannah, and were all on duty and in uniform on that day.

Goodman and Zipperer, while standing at the doorway of the Union Depot in Savannah on that day, engaged in a conversation about two negroes, one a boarding-house keeper, and the other a drummer for a saloon, who met trains at the station. The conversation at first was apparently friendly; Zipperer asserting that the negroes were causing considerable trouble to the public, and also to the policemen on duty at the station, while Goodman expressed the opinion that they were doing no harm. "Zipperer said he would run them in or drive them away whenever they came there when he was on duty. Goodman said that he would not unless they were obstructing the sidewalk—if they blocked that walk he would run them off; * * * and, in the course of the conversation, Goodman said to Zipperer, 'You got no sense. If you had sense you would not act that way.' Zipperer said, 'I have as much sense as you have.' He [Goodman] said, 'No; you have not half as much.' Zipperer said, 'Yes; I have as much sense as you;' and Goodman said, 'You have not such a damn thing.'" Witness, seeing they were getting out of humor, stepped between them, and told them to stop that nonsense, and not make fools of themselves. Just as witness stepped between them, each "caught the other by the collar. Each man had his hand on the other man." Witness was then near enough to shake hands with both of them. Witness could not say which took hold of the other first. They had each other by the coat at the same time. Neither of them had a weapon in sight at that time. About the time they took hold of each other and witness stepped between them, Zipperer said, "Take your hand off me." Both of them had their coats buttoned up, and, as witness stepped between them, each loosened the bottom of his coat and stepped back two steps, so as to make the distance between them 8 or 10 feet. Zipperer pulled his club from his left hip pocket, and had it in his left hand. Goodman pulled his pistol from his holster, and, "as quick as he pulled it out," shot Zipperer. They were still about 8 or 10 feet from each other. After the shot, witness grabbed the pistol, and, after something like a half minute, succeeded in taking it away from Goodman. When the pistol fired, Zipperer dropped to his knees and said, "Oh! my wife and children!" or, "My poor wife and children!" He said this about a second after the pistol fired. When the pistol fired, Zipperer had nothing in his right hand. When he fell from his knees on his back, after he was shot, witness saw a part of the barrel of his pistol exposed in his right hip pocket, the barrel pointing upwards. Zipperer made no effort to draw his pistol. Goodman and Zipperer both had on sack coats, which were long enough to conceal a pistol or club in the hip pocket. They both began to unbutton their coats about the same time. Wit-

ness could not say which began first. Zipperer drew his club about the same time Goodman drew his pistol. Witness could not say which was drawn first—the club or the pistol. Zipperer had the club in his left hand a few seconds before he was shot. "It was all done as quick as a wink." Policemen in Savannah are required to carry loaded pistols. The shot fired by Goodman killed Zipperer.

The accused introduced no testimony, but made the following statement: "On the 29th of September I was standing in the driveway at the Union Station, talking to Officers Zipperer, Malphus, and Sergeant Davis. We were talking there about negro drummers around the depot. Officer Zipperer said that he would arrest them every chance that he got. I told him that there was no use to do that, that a man could handle them without arresting them, and that I would not arrest them unless they were obstructing the sidewalk. He said that he would. I said, 'Any man can handle a crowd of negroes without arresting them.' He said he could not, and I said, 'You can if you have any sense.' He said, 'You are a God damn fool.' So then I threw my left hand on his breast, and he threw his right hand to my breast and reached with his left hand for his club. Mr. Malphus stepped between and pushed us back, and said, 'Don't have a fuss;' and, as Zipperer stepped back, he threw his hand to his right hip pocket that way [indicating], and tried to pull his gun. It seems that he made a second attempt. As I seen Malphus between he and I, I tried to strike him on the right shoulder, to try to disable him from using his gun. I thought he was going to shoot me, is the reason I shot him. Mr. Malphus asked me to give him my pistol I still held, and I called Malphus' attention: 'Don't you see that man trying to shoot me?' He then took the pistol sticking out of Officer Zipperer's hip pocket, about that position [indicating]. It seemed that when he pulled at it the hammer caught, and he couldn't get it out of his pocket, and, as he lay, his hand dropped away from the pistol." Malphus testified in rebuttal: "I didn't hear Mr. Zipperer use the expression, 'You are a God damn fool.' He didn't use it."

The first two grounds of the motion for new trial were that the verdict was contrary to law and the evidence. The other grounds were as follows:

"(3) The court erred in charging the jury concerning voluntary manslaughter.

"(4) Because the court erred in admitting, against the objection of defendant, then and there made, that the evidence was irrelevant and would illustrate no issue in the case, testimony from the witness Malphus that, immediately after the deceased had been shot and had fallen, the only words that he uttered were, 'Oh, Lord! my poor wife and children!'

"(5) Because the court erred, against the

objections of defendant's counsel, in permitting the solicitor general, in his argument to the jury, to comment upon this language as he did do more than once.

"(6) Because the court erred in not declaring a mistrial, when thereto requested by the defendant's attorneys, because of the statement made by the solicitor general to the jury to the effect that the deceased had left four fatherless children. This motion for a mistrial was made after the solicitor general had for the fourth time mentioned this as a fact, and as a part of an earnest appeal to the jury. Up to this time nothing had been said as to this statement by the court or the defendant's attorneys. When the motion for a mistrial was made, the solicitor general said he would withdraw the remark, and the court instructed the jury not to consider what had been said about four fatherless children. The court overruled the motion without further comment. There was no further allusion to the matter by the court.

"(7) Because of the prejudicial statement by the solicitor general, set forth in the sixth ground, in his argument to the jury, several times made, to the effect that the deceased had left four fatherless children; there being no evidence as to this, and such a statement being calculated to injure the defendant.

"(8) Because the court erred in charging the jury as follows: 'If you believe from the evidence that the defendant was the aggressor, and that he had causelessly laid hands on the deceased, and if you believe that after this the deceased drew his club, and if you believe that this was an act of preparation on the part of the deceased only to resist further aggression, in that event the act of preparation only, if such you find it to be, cannot be alleged by the accused as a sufficient provocation for the homicide,' said charge being unauthorized by the evidence. The court, after this charge, added: 'It may, however, be considered by you, along with the other facts and circumstances of the case, in determining whether the defendant acted under the fears of a reasonable man in what you may find he did.'

"(9) Because the court erred in charging the jury as follows: 'It should be voluntary manslaughter if you are satisfied that the facts and circumstances surrounding the accused were such as to excite the fears of a reasonable man that some bodily harm, less than a felony, was imminent and impending. It would be murder if the circumstances were not such as to excite the fears of a reasonable man that he was in any serious danger at all.' The said charge being illegal, and not authorized by the evidence or the theory of either the prosecution or the defense during the argument; the defense contending that the circumstances were such as to justify the fears of a reasonable man that his life was in danger, and the

state that the defendant was guilty of the offense charged.

"(10) Because of the new evidence disclosed in the affidavits of Samuel Russell, Samuel Thomas, Henry Jenkins, Albert L. Jones, C. C. McEvoy, and J. H. Herring, here to the court shown."

Robt. L. Colding and Adams & Adams, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

FISH, P. J. 1. The law of voluntary manslaughter was clearly applicable to some phases of the case. There was evidence from which the jury could find that there was a sudden altercation between the accused and the deceased, during which each caught the other by the collar, it not appearing who caught the other first; that, when separated, both began at once to unbutton their coats for the purpose of drawing weapons; that both drew weapons about the same time (the accused, a pistol, and the deceased, a policeman's club); that the accused shot the deceased immediately after drawing the pistol; that each had assaulted the other; that both were in a sudden heat of passion, and there was a mutual intention to fight on the spot. If such were the facts, it needs no argument or citation of authority to sustain the proposition that a charge on the law of voluntary manslaughter was appropriate.

We are also of the opinion that, in view of the evidence and the statement of the accused, the charge complained of in the ninth ground of the motion for new trial was applicable. The portion of the charge excepted to was: "It should be voluntary manslaughter if you are satisfied that the facts and circumstances surrounding the accused were such as to excite the fears of a reasonable man that some bodily harm, less than a felony, was imminent or impending." The accused shot just as the deceased had drawn a policeman's club from his pocket, and had it in his hand. What his purpose was in drawing it, and what he intended to do with it, or was in the act of doing with it, was for the jury to decide. It was also for them to judge of the character of the club as a weapon—whether deadly or not; and, if the deceased was about to assault the accused, the character of the assault—whether less than a felony or not. The jury, considering all the circumstances of the case, might have believed that the deceased, after the separation, still intended to fight, and when shot was in the act of making an assault, and that such assault was not felonious.

2. Did the court err in admitting in evidence what the deceased said as he fell after being shot, viz., "Oh, Lord! my poor wife and children"? The contention for the state is that the words were admissible as part of the *res gestæ*, and as tending to show the

state or mind of the deceased at the time he was shot, and, as the accused claimed that the deceased was the aggressor, that he was actuated by malice toward the accused and intended to do him harm, that the exclamation of the deceased, made immediately after he was shot, and as he fell to his knees, and before a change of mind was likely to have resulted, indicated that he had no malice in his heart, but was actuated solely by motives of self-defense in what he was doing when he was shot. On the other hand, the contention for the accused is that the words did not tend to illustrate any issue in the case; that they shed no light on the frame of mind of the deceased; that a violent man might force an issue, show a murderous purpose, and when shot down might, under a revulsion which may come in the twinkling of an eye, refer in pathetic terms to his wife and children, but that such a reference could not aid the jury in arriving at the truth of the case; and that the words used by the deceased in the present case did not tend to show that when shot it was not his purpose to kill the accused. "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*." Pen. Code 1895, § 998. "Res gestæ are the circumstances, acts, or declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." "An indispensable characteristic of declarations is that they must be made at the time of the act done, which they are supposed to characterize; and, further, they must be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction." *Carter v. Buchanan*, 3 Ga. 513; *Mitchum v. State*, 11 Ga. 615, 623. "Acts are pertinent if they are done pending the enterprise, and whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard, or to evince essential motive or purpose in reference to, it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous." *Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (7). There are many other decisions of this court to the same effect. In *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, it was said that the Code section above quoted introduces no new rule, and reference is approvingly made to the "luminous and able opinion of Judge Nisbet in *Mitchum v. State*, 11 Ga. 615." "When an act is done, to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from which the motive may be collected, is part of the *res gestæ*." *Monroe v. State*, 5 Ga. 85. We are not prepared to hold that the sayings or exclamations of the de-

ceased, made immediately after he was shot, did not tend to show the state of his mind towards the accused immediately prior thereto, or that they were not calculated to illustrate the character of his acts just before he was shot. We therefore rule that the court did not err in admitting them. At most, we think it could only be said that their admissibility was doubtful, and it has long been the rule in this state, when its admissibility is doubtful, to admit it, and leave its weight and effect to be determined by the jury. *Mitchell v. State*, 71 Ga. 128; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *Dalton v. Drake*, 75 Ga. 115; *Central R. Co. v. Smith*, 78 Ga. 209, 2 Am. St. Rep. 81; *Gilmer v. Atlanta*, 77 Ga. 688; *Thompson v. Thompson*, 77 Ga. 700, 3 S. E. 261; *Savannah R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; *Western R. Co. v. Young*, 83 Ga. 512, 10 S. E. 197; *Central R. Co. v. Bernstein*, 113 Ga. 175, 38 S. E. 394.

If the evidence were properly admitted, then, of course, counsel for the state had the right to make legitimate comments on it in his argument to the jury. In the fifth ground of the motion for new trial, where complaint was made because the court allowed the solicitor general to comment on the evidence we have been considering, it does not appear but that his comments were entirely legitimate.

3. It was not error to refuse to grant a mistrial on the ground that the solicitor general, in arguing the case to the jury, stated that "the deceased had left four fatherless children." It is stated in the motion (sixth ground) that the "motion for a mistrial was made after the solicitor general had for the fourth time mentioned this as a fact, and as part of an earnest appeal to the jury." What the appeal was, does not appear from the motion. So we can only rule upon the question made; that is, whether the court erred in refusing to grant a mistrial because of the statement made by the solicitor general that "the deceased left four fatherless children." It appears from the motion for new trial that, when the motion for a mistrial was made, the solicitor general withdrew the objectionable remark, and that the court instructed the jury not to consider what had been said about four fatherless children. Whatever influence harmful to the accused the remark of the solicitor general was calculated to have on the minds of the jury was, we think, removed by the positive instruction by the court to the jury on the subject.

4. The exception to the charge set out in the eighth ground of the motion was not well taken. Considering both the evidence and the statement of the accused, there was room

for the theory that the accused was the aggressor, and that the deceased, in drawing his club, was only intending to resist further aggressions. Granting, however, that there was nothing either in the evidence or the statement to authorize the charge, it would not be cause for a new trial, as the court instructed the jury that, if they believed such theory to be true, then the drawing of the club by the deceased would not be "a sufficient provocation for the homicide." The court was then dealing with the law of murder, and, as the verdict was for voluntary manslaughter, this instruction on the law of murder, if erroneous, could not have been harmful to the accused, and was not cause for a new trial.

5. The alleged newly discovered evidence was not cause for a new trial. It appears from the affidavit of counsel for the accused that three of the six witnesses who made affidavits as to the newly discovered evidence were present at the trial, and that counsel for the accused then knew what one of them would testify, and had heard that the testimony of the other two present would be favorable to the accused. It further appears that the other three witnesses, of whose testimony neither the accused nor his counsel had any intimation prior to the trial, would testify to substantially the same facts as the three witnesses present at the trial, and that the testimony of all six witnesses was practically the same. In *Norman v. Goode*, 121 Ga. 449, 49 S. E. 268, it was held: "A party is bound, at his peril, to submit on the trial all competent evidence in his favor he has at hand. If he had knowledge of the fact, and the same could have been proved at the trial by evidence other than that newly discovered, a new trial will not be granted, unless the movant can satisfactorily explain why he did not attempt to use the evidence then at hand." No satisfactory reason was given in the present case why the accused did not attempt to use the evidence of the three witnesses present at the trial. It is due to counsel who appeared for the accused before this court to say that he candidly stated in his argument that in his opinion the alleged newly discovered evidence was not of itself sufficient cause for the grant of a new trial.

6. The evidence authorized the verdict, and the court did not abuse its discretion in refusing a new trial.

Judgment affirmed. All the Justices concur.

SIMMONS, C. J. I concur in the judgment, but dissent from the view expressed in the second headnote.

(57 W. Va. 98)

NEWMAN et al. v. KAY et al.(Supreme Court of Appeals of West Virginia.
Feb. 7, 1905.)**VENDOR AND PURCHASER—CONTRACT OF SALE—
PAROL EVIDENCE—SALE IN GROSS—EXCESS—
ACTION BY VENDOR—MISTAKE—RESCISSION.**

1. A contract for the sale of a tract of land, or a deed conveying a tract of land, specifying the quantity by the words "containing — acres" (giving the number), and reciting a price which is an exact multiple of the number of acres so mentioned, is presumed to be a contract of sale of the tract in gross, but is ambiguous on its face as to whether it is a contract of sale in gross or of sale by the acre; and parol evidence of the circumstances which surrounded the parties, and their situation, when the contract or deed was made, and the conduct of the parties in carrying the contract into execution, is admissible as an aid in interpreting such contract or deed.

2. Whether a deed reciting \$4,800 as the price of a tract of land thereby conveyed, and describing it by metes and bounds, and as "containing 200 acres and 37 square poles," is ambiguous on its face as to whether the sale was in gross or by the acre, *quære*?

3. A case in which the admissible parol evidence is held insufficient to prove that a contract of sale of land was by the acre; the deed being treated as ambiguous on its face as to whether the sale was in gross or by the acre.

4. As to the vendor, every sale of land in gross is a contract of hazard as to the quantity of the tract or tracts sold, and he cannot recover, on the contract, either at law or in equity, compensation for an excess therein above the quantity which the tract or tracts were at the time of the sale supposed to contain. Nor can he have rescission of the contract on the ground of mutual and innocent mistake as to the quantity, resulting in a considerable excess, when both parties have been ignorant of the area of the land, and free from fraud in the execution of the contract.

5. In so far as they hold that a contract of sale of land in gross may be rescinded on the ground of a mutual and innocent mistake as to the quantity of land in the tract sold, resulting in a large excess or deficiency, no other ground for relief being shown, *Western Mining & Manufacturing Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406, *Orislip v. Cain*, 19 W. Va. 438, *Hansford v. Coal Co.*, 22 W. Va. 70, and *Pratt v. Bowman*, 17 S. E. 210, 37 W. Va. 715, are disapproved and overruled.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County; J. M. McWhorter, Judge.

Bill by W. C. Newman and others against James Kay and others. Decree for plaintiffs, and defendants appeal. Reversed.

Payne & Hamilton and Brown, Jackson & Knight, for appellants. C. W. Dillon and A. N. Campbell, for appellees.

POFFENBARGER, J. Whether a certain sale of real estate, the contract having been executed by conveyance and payment of all the purchase money, was a sale by the acre or in gross, is the first question presented in this case; and, it being held to have been a sale in gross, the second is whether the sale can be rescinded, in equity, on the ground of a considerable excess, found upon surveying the tract of land, both parties having been

ignorant at the time of the sale of the quantity of the land, and both being entirely free from any fraud or misrepresentation as to quantity.

In 1884 W. W. Newman, a resident of Virginia, died seised of a tract of land in Fayette county, this state, described in his deed, by metes and bounds, as containing 200 acres and 37 poles, and leaving his widow and two sons surviving him. On the 23d day of October, 1895, the widow and sons conveyed the land to James Kay in consideration of \$4,800, of which \$1,000 was paid in cash, and for the residue of which the purchaser executed his four negotiable notes, in equal amounts, payable in one, two, three, and four years. This deed described the land thereby conveyed in the exact language used in the old deed by which it had been conveyed to W. W. Newman in 1874, and reserved a vendor's lien for the unpaid purchase money. Some time afterwards Kay had the land surveyed, and found that the tract contained 272.2 acres, and had the landbook corrected accordingly. Knowledge of this excess of 72 acres having come to the Newmans, they caused a notice to be served on Kay on the 26th day of October, 1900, reciting the discovery of the excess; claiming they had sold by the acre, in ignorance of the quantity; demanding payment for the excess at the contract price of \$24 per acre, or a rescission of the sale; and averring their readiness and willingness to repay the purchase money, with interest. Kay having refused to do either, they brought this suit, alleging in their bill the facts relating to the sale hereinbefore set out, and, in addition thereto, that at the time the deed was executed they believed the tract contained only the quantity mentioned in the deed, and so represented to J. M. Richards, who negotiated and consummated the sale; that at the time they did not know it contained a larger quantity; and that they were informed and believed said Richards and Kay accepted the deed with the understanding that the quantity of land was as stated in the deed. A few days before the deed was executed, the Newmans executed to Richards, "his heirs and assigns," an option on the land for 20 days at the price of \$24 per acre, describing the tract as containing, by estimation, 200 acres; and the bill sets up the option, and alleges that, when Richards came and negotiated for it, he represented that he desired to purchase the land for some person other than himself, whose name he did not disclose. It is further shown that Richards returned to Virginia a few days after the execution of the option, with the deed prepared to be executed by the Newmans, conveying the land to Kay, which, it is charged, he represented to be in exact conformity with the terms and stipulations of the option, except that it set forth the aggregate amount of purchase money, instead of specifying the price per acre, and that this variance was discussed at the time

of the execution of the deed, and the plaintiffs were assured that the deed was in substantial conformity with the option. The option, the notice served on Kay, and copies of the deed to Kay and the deed to W. W. Newman are exhibited with the bill. It is further alleged that Kay has leased the land to Frank Lyman, who is made a defendant, for the purpose of mining and removing the coal underlying it, and that Lyman has re-leased it to the Low-Moore Iron Company, but that none of the coal had been mined at the time of the institution of the suit; and plaintiffs aver their willingness, in case the sale shall be rescinded, to carry out the terms of the lease made to Lyman and the one made by Lyman to the iron company. The prayer is that Kay be required to pay plaintiffs for said excess at \$24 per acre, with interest from the date of the deed, or that the sale and deed be rescinded, and that they may have general relief.

Kay demurred to the bill, and, his demurrer being overruled, he answered, denying that Richards was his agent in the matter of the purchase, and averring that he purchased from Richards for the sum of \$5,440, giving him \$644 in addition to the \$4,800 paid to the Newmans; that he had no notice or knowledge of the option; that Richards acted for himself, and represented that he had authority to sell, and procured and delivered the deed as aforesaid; that the sale was one in gross, the land having been purchased by the defendant to solidify his holdings of surrounding lands, and irrespective of its acreage; that such was the inducement and understanding of the parties; that the quantity of the land was easily ascertainable, and could easily have been known by plaintiffs, had they exercised ordinary care; that they had conveyed by the description and statement of quantity contained in the deed to W. W. Newman; that the defendant, upon the faith and credit of said purchase, had expended large sums of money, whereby the property had been greatly enhanced in value, and sold to third parties, who had made further heavy expenditures on account thereof, in consequence of which the plaintiffs were barred by laches; that the plaintiffs sold and received pay for the exact quantity purchased and paid for by W. W. Newman, wherefore his vendors, if anybody, were entitled to pay for the excess; that defendant had made large expenditures in rendering said tract, and others near to or adjoining it, valuable and accessible to market, and effected a coal lease thereon, with an option of purchase, to Frank Lyman, who assigned it to the Low-Moore Iron Company, and sale of the land was afterwards consummated, and that, in the event of a rescission, the parties cannot be placed in statu quo, wherefore, and because of the laches of complainants, if they ever had any right, a court of equity cannot entertain their suit. Although denying the right of the plaintiffs to have re-

scission, the respondent asks that, in case the court shall be of opinion that the complainants are entitled to such relief, he may be permitted to pay for the excess.

Depositions were taken and filed by both parties, and on the hearing the court pronounced a decree in favor of the plaintiffs for \$2,341.44, awarding execution therefor, and granting the plaintiffs leave for further proceedings against the land, should said sum and the costs be not paid. From this decree, Kay has appealed.

As the rights and liabilities of the parties to a sale of real estate by the acre materially differ from those arising out of a sale in gross, it becomes necessary to determine in the first instance whether the sale now under consideration was by the acre or in gross. The principles governing the construction of deeds and contracts of sales of real estate are exhaustively considered and accurately defined in the case of *Crislip v. Cain*, 19 W. Va. 438. In reaching his conclusions, Judge Green, who delivered the able opinion of the court in that case, reviewed and analyzed all the Virginia decisions, as well as all the leading cases decided by other courts, and the principles deduced by him from them were embodied in the syllabus of the case and declared to be sound law. As tested by those rules and principles, the contract of sale evidenced by the deed from the Newmans to Kay is a contract of sale in gross. So much of point 18 of the syllabus as relates to the rule for determining what is a sale in gross reads as follows: "If the vendor by his written contract agrees to convey, or by his deed does convey, for a specified price, a tract of land, described by metes and bounds or otherwise, with the words added, 'containing a specified number of acres,' this, on the face of such contract or deed, is a contract, not by the acre, but in gross, and without any implied warranty of the quantity. * * *

And if, in addition to the exact specification of the quantity of the land, the contract or deed on its face shows that the price to be paid for the land is a multiple of the number of acres specified, this would render the deed ambiguous, as to whether it was a contract in gross or by the acre." In point 19 the effect of ambiguity in the contract or deed, resulting from the circumstance of the mathematical relation of the price to the number of acres, is stated as follows: "If such deed or contract is rendered ambiguous on its face in the manner just spoken of, the court, for aid in interpreting the same, may consider parol evidence of the circumstances which surrounded the parties, and their situation, when the contract or deed was made, and also the conduct of the parties in carrying the contract into execution; but the court can consider no other sort of parol evidence, such as the declaration of the parties before, at the time of, or after the execution of the deed or contract; nor can the court call in aid any kind of parol testimony to alter, ex-

plain, or modify the written contract or deed, if it is unambiguous on its face."

This deed states the whole amount of purchase money at \$4,800, and then conveys and describes the land in the following terms: "The said F. E. Newman, W. C. Newman and E. W. Newman do grant unto the said James Kay all the following real property, situate," etc. (giving its location and metes and bounds), "containing 200 acres and thirty-seven square poles." It specifies the aggregate price and the number of acres. No account is taken of the 37 square poles, nearly a quarter of an acre, which would have been nearly \$6—a very insignificant sum, to be sure, and in itself unworthy of notice—but the inquiry here is for the legal effect of the terms used in the deed. It is from them that the intention of the parties is to be ascertained, if possible. Upon such an inquiry, a single word or a fact very insignificant in itself often determines the construction, without regard to the magnitude of the interest dependent upon it. The decision of the question whether the slight variation might be disregarded, and the deed held to be ambiguous on its face as to whether the sale was by the acre or in gross, however, for reasons presently to be given, is unnecessary, and would be without practical value as a precedent, since the variance from the multiple rule is peculiar in its nature, and unlikely to occur often, if ever, again.

If the ambiguity of the deed on its face be conceded, the admissible evidence is wholly insufficient to establish a sale by the acre. Much of it consists of declarations of intention which could not be admitted at all. Only the circumstances which surrounded the parties and their situation at and before the making of the contract, and their conduct in carrying it into execution, can be considered.

Kay knew nothing about the quantity of the land, nor had he anything to do with the Newmans personally. He never saw them or corresponded with them. They lived near Richmond, and knew nothing about the quantity of the land, except that their deed called for 200 acres and 37 poles. All communication between the Newmans, on the one side, and Kay, on the other, were had through Richards. He says he had purchased some property for Kay in the neighborhood of the land in question, and showed him a map of the Newman land, and suggested that its situation with reference to lands purchased or negotiated for by Kay made it desirable property for him, whereupon Kay told him to buy it if he could, and that he then corresponded with the Newmans, who said they would sell it at \$25 per acre. Then, as claimed by Richards, he went to Kay, and offered it to him at \$30, and was told to go on and get it, whereupon he went to Richmond and persuaded the owners to give him the option hereinbefore described at \$24 per acre; came back with it; showed it to Kay; offered to do what was right with him about

the land; received from Kay \$600 or \$700 to go back to Richmond and close the contract under the option, and a letter from Kay to Kay's attorney at Fayetteville to draft the deed and notes and a deed of trust to secure the deferred payments, which was done; took the papers back to Kay, who, with his wife, acknowledged the deed of trust, and delivered the deed, trust deed, his four notes, and his check to Richards, who took these papers to Richmond, and procured the execution of the deed, and brought it back to Kay. Kay denies that he ever had possession of the option, and the testimony of Richards imports no more than that he saw it. He also denies having told Richards to buy the land. But he says he told him he might buy it of him if he bought it; that Richards went to Richmond, and either wrote or telegraphed that it would require a certain amount of money to buy the property, to which he replied that he did not want it at that price, and would have nothing more to do with it; and that Richards, after returning, came to see him again, saying he had tried in vain to sell to others, and his option was about to expire, whereupon he gave him, or agreed to give him, \$600 for his bargain in the land, without ever having seen the option, which arrangement was afterwards consummated, as has been stated. He denies that Richards was his agent, that he purchased by the acre, and that he accepted or adopted the Richards option. There is no pretense that the option was ever assigned to him, or accepted by him so as in any manner to bind him. The Newmans say they had no intention of selling otherwise than by the acre; that Richards told them he was buying for another person, whose name he did not disclose; and that when he came back with the deed they rather objected to it as not conforming in terms to the option, but were assured by Richards that it was in substance the same.

A great deal of this evidence could not be considered. Declarations of parties as to intentions are inadmissible. Kay was engaged in the effort to buy or get control of several adjoining tracts of coal lands, with the view to obtaining enough in a body to enable him to make an advantageous sale to some person desiring to engage in mining on an extensive scale, and the Newman lands were found to be desirable for combination with others which he had bought or contemplated buying. He, no doubt, wanted them, and would have made the contract by the acre, had that been insisted upon; but there is no evidence that his attention was ever called to the distinction between the two kinds of contract, unless his very slight connection with the option may be said to have had that effect. That option stands upon a footing very different from a contract of sale between the Newmans and Kay. Had Kay been a party to it, he would not have been in any sense bound by it to take the land on the

terms therein stated or any others. While it bound the owners of the land to sell, it did not bind the holder to purchase. As to the latter, it was a mere proposal to sell. But it was not even a proposal as to Kay. Under it Richards had the exclusive right to purchase, and that right was never assigned to Kay. The option was the proposal of the Newmans to sell to Richards or his assignees. The delivery to the Newmans of the check, notes, deed for execution, and deed of trust was Kay's proposal to buy the land. On the whole, there appears to be nothing in the circumstances, situation, or conduct of the parties indicating that the deed was intended to be other than what on its face it appears to be. They ignored in their settlement the 37 poles—a fact which argues slightly in favor of a sale in gross.

This view is strengthened by the circumstance of the conduct of the grantors both before and after the sale. They were content to rely upon the representation as to quantity in the old deed under which they held. Neither before nor after did they cause any survey to be made. It nowhere appears that any inquiry as to the actual quantity of land was ever made by them. This conclusion is in exact accord with that of this court in *Hansford v. Coal Co.*, 22 W. Va. 70. In that case the deed specified \$8,000 as the price, and 400 acres as the quantity of the land. The analysis of the admissible evidence, as given by Judge Snyder in the opinion of the court, is as follows: "Was this a sale in gross? It is *prima facie* such sale, but inasmuch as it appears on the face of the deed that the consideration is an exact multiple of the number of acres specified therein, the deed is thereby rendered ambiguous as to whether it was in fact intended by the parties to be a sale in gross or by the acre; and whether it is the one or the other must be determined by the parol evidence of the circumstances surrounding the parties, their situation at the time of the sale, and their subsequent conduct in carrying it into execution. This evidence, which has been hereinbefore fully stated, in my judgment, not only fails to rebut the presumption of a sale in gross arising from the face of the deed, but it clearly establishes the fact that it was intended and understood to be such by the parties at the time it was made. The conduct of the parties can be reconciled to no other conclusion. They knew at the time that the land had been located by protraction, that it had never been actually surveyed, that constructive or protracted surveys are proverbially uncertain in quantity, and that almost all old surveys exceed the quantity they call for. The sale was for cash. The deed was delivered and the money paid without any demand for a survey by either party, or any provision or agreement made for a future survey. No survey was made or required by the grantors subsequent to the sale, and none made by the grantees until five years after,

when one was made by the latter for their own use, without any reference to the purchase. The vendors never claimed or demanded pay for any surplus land until April, 1876, when by their cross-bill in this cause they for the first time asserted a claim for pay for such surplus, without even their making, so far as the record shows, any personal demand for such pay. Considering these facts and circumstances, the conclusion is inevitable to my mind that it was fully understood and intended by the parties that said sale should be treated as, and that it was in fact, a sale in gross, and not by the acre."

Such being the character of the sale, no action or suit, at law or in equity, based upon the contract, for the recovery of compensation for the excess, can be maintained. The grantee obligated himself to pay \$4,800, and no more. He did not agree to pay a certain sum for each acre of land that might be found in the tract, but to pay a lump sum for the tract of land. It is not suggested or pretended that there was any fraudulent act on the part of the grantee operating as an inducement to the grantors to enter into the contract, or in any other way injuring them. Whether knowledge of the excess on Kay's part, fraudulently concealed from the grantors, would give a right of action against him as for a deceit, need not, therefore, be considered. It would be preposterous to say that an innocent mistake on his part, shared in by the grantors, is a wrong which would give a right of action to them against him. Hence so much of the bill as seeks compensation for the excess is wholly without any foundation in law or equity. A mutual mistake, resulting in the making of a contract which would not have been made, had the parties possessed full information, does not authorize the court to make such a contract for them as they might have made. It cannot be assumed that they would have made any contract at all, had they been in possession of all the facts. *Crislip v. Cain* is conclusive as to this, and is in such perfect harmony with reason and justice that it must be accepted as sound. The language is as follows: "But no court of equity in such case of mutual innocent mistake, neither party being guilty of any fraud in the sense above explained, has a right to modify and alter the contract of the parties so as to make it correspond with what the court may think it probable would have been the terms agreed upon by the parties, had they not by means of such innocent and mutual mistake been ignorant of the actual facts at the time when the contract was entered into. All the court can do in such a case is to rescind the contract. It cannot modify the contract, for that would really be making a contract for the parties against their consent, and then enforcing it, which would be usurpation of a very dangerous power."

There are some instances in which, upon a contract of sale in gross, a recovery may be had by the vendee in case of a deficiency

in the land sold. Specification in the deed of the exact quantity of the land sold, without any qualifying words whatever annexed, renders the contract ambiguous as to whether or not, although it is one of sale in gross, the vendor, by such positive affirmation of quantity, did not warrant the quantity. The effect of this is twofold: First. To overcome the presumption that the grantor did not intend to warrant the quantity, the circumstances which surrounded the parties, their situation, and their conduct in carrying the written contract into execution are admissible. If an intention to warrant is thus shown, there may be a recovery of compensation for deficiency, on the warranty. *Crislip v. Cain* (points 18 and 19, and pages 558 and 559). Here the recovery would seem to be based upon a covenant in the deed or contract. It is a warranty of quantity in the deed in favor of the vendee, binding the vendor, but evidently not binding the vendee beyond his express covenants. In other words, it does not bind the vendee to pay for an excess, though it does bind the vendor to abate for deficiency. Second. Such specification of quantity in the deed is a representation which may or may not be a fraud on the part of the vendor, according to the conduct and intent of the parties; and, to ascertain whether a fraud was in fact perpetrated by the vendor on the vendee, all kinds of relevant parol evidence is admissible. *Crislip v. Cain*, syl. (point 21, and pages 559 and 560). Here the recovery stands upon an affirmative fraudulent act, known as a "suggestio falsi." There is another class of cases in which compensation or abatement on the ground of deficiency may be had, in which the fault of the vendor is the suppression or concealment of knowledge as to the quantity of land, which operates to the injury of the vendee. Thus in *Duval v. Ross*, 2 Munf. 290, it is held that, "whenever it appears that the vendor's own title deeds must have disclosed to him the true quantity of land, he is bound to make compensation for a deficiency, though his deed to the vendee express a quantity 'more or less.'" To the same effect, see *Nelson v. Matthews*, 2 Hen. & M. 164, 8 Am. Dec. 620. If by any other means it appears that the vendor knew the quantity, and withheld the knowledge from the vendee, to his injury, the result will be the same. Here, the recovery is for a negative act of fraud, known as "suppressio veri."

It must be observed that what is said in the preceding paragraph relates to deficiency in quantity, not excess. There may be an act of fraud, giving a right to the vendor to recover compensation for an excess from the vendee, when the sale is in gross, but the foregoing principles laid down in *Crislip v. Cain* are not applicable to cases of excess. Moreover, that case distinctly and emphatically asserts that in such cases, if both parties were mutually and innocently mistaken

as to the quantity, and there turns out to be an excess, there can be no recovery of compensation therefor. But it is declared in that case that the contract itself may be rescinded, torn up, annulled, and destroyed and the parties restored to their former condition. This proposition is announced in at least three other cases decided by this court. *Western Mining & Manufacturing Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406; *Hansford v. Coal Co.*, 22 W. Va. 70; and *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210.

In *Crislip v. Cain* (point 14 of the syllabus) it is declared: "If it be a contract for a sale of land in gross, and the number of acres contained in the tract sold or conveyed is named, and on survey it turns out afterwards that there is either a deficiency or excess in the number of acres in the tract, under some circumstances a court of equity might rescind the contract or annul the deed because of a considerable mistake of the parties as to the number of acres in the tract, though such mistake was mutual and innocent, and neither party was guilty of any fraud, in the sense in which fraud is above explained. Such rescission could not be made unless the mistake was so material as to show that it affected the substance of the contract, and that the minds of the parties had not really come together on the terms stated in the contract or deed." In *W. M. & M. Co. v. P. C. C. Co.* (points 15 and 16 of syllabus) substantially the same proposition is asserted. In *Hansford v. Coal Co.* (point 7 of the syllabus) it is said: "Where such deed is on its face a sale in gross, if it is subsequently ascertained that there is either a deficiency or an excess in the quantity of land specified therein, and it is shown that the error in the quantity arose from a mutual and innocent mistake of the parties, a court of equity may, in some cases, upon proper pleadings and proof, annul the deed and rescind the sale; but in the absence of fraud, actual or constructive, in either party, such court can allow no abatement for a deficiency or compensation for any excess." In *Pratt v. Bowman* the same proposition is asserted, and a recovery for excess decreed because the purchaser had sold the land and put it beyond the power of the vendor to obtain relief by rescission. In the last-named case, sales in gross are divided into three classes, two of which are declared to be sales at hazard, forbidding rescission. The third, in which it is held there may be rescission, is described as follows: "Sales in which it is evident from extraneous circumstances, such as locality, value, price, time, the conduct, conversation, and character of the parties, that they did not or ought not to contemplate or intend to risk more than the usual rates of excess or deficiency in like cases, or than such as might reasonably be calculated on as within the range of ordinary contingency." It is to be noticed that the cases say rescission may be had because of

either deficiency or excess, under the circumstances stated.

It is insisted that these successive enunciations of this rule of rescission are not binding upon the court, for the reason that they are dicta. In the first case (*W. M. & M. Co. v. P. C. C. Co.*) the bill sought the correction of a deed by a change of one of the lines described in it so as to make it conform to what the plaintiffs believed to have been the contract actually made. After making a disposition of this contention adverse to the plaintiffs, Judge Hoffman examined the evidence and pleadings in the case to ascertain whether there could be rescission of the contract because of an admitted excess of 850 acres in the tract, which had been conveyed as one containing 6,123 acres. Evidently this was done to see whether the bill was susceptible of amendment so as to give relief, under the rule that, where a plaintiff has a good case on the evidence, but his bill is defective in its allegations, he is permitted to amend, so that substantial justice may be done between the parties. Finding that about six years had elapsed between the times of the discovery of the excess and the filing of the bill, he concluded that whatever equity the plaintiffs may have had was then barred by their laches. In *Crislip v. Cain* the proceeding was for an abatement from the purchase money on account of a deficiency, but it did not seek rescission. However, if it had been apparent to the court that relief could have been given upon amended pleadings, it is not to be doubted that the defects in the pleadings would have been indicated, and leave to amend granted. But the court seems to have concluded that there was no mistake, and, consequently, no ground for rescission. In *Hansford v. Coal Co.* the court dealt with an appeal from a decree dismissing a cross-bill setting up a claim for compensation for an excess of 68 acres in a tract of land sold as one containing 400 acres, at a price equivalent to \$20 per acre, and from an order refusing leave to file a bill of review to the same decree for error of law. Viewed as one seeking rescission, the cross-bill was defective, there being no prayer for such relief, and no tender or offer of repayment of any money received. It had been dismissed without the interposition of any request for leave to amend. In view of this, no reason is perceived for any discussion of the principles of rescission. As the cross-bill had been dismissed without a request for leave to amend in the court below, the defendants were in no condition to ask any relief at the hands of this court. *Pratt v. Bowman* undoubtedly goes further than any of the other three cases, and it may safely be said, without taking time to fully analyze it, that the decision recognized, and stands, in part at least, upon the proposition now under discussion. Reference is made to the fiduciary character of the vendor, but the decision is clearly not based solely upon his

want of authority. That seems to be treated merely as a circumstance bearing upon the intent of the parties.

One of the best definitions of the term "obiter dictum" is said to be that given by Folger, J., in *Rohrbach v. Ins. Co.*, 62 N. Y. 47, 58, 20 Am. Rep. 451. He said: "Dicta are opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself. Obiter dicta are such opinions uttered by the way, not upon the point or question pending, as if turning aside from the main topic of the case to collateral subjects." In *U. S. v. Clark*, 96 U. S. 211, 24 L. Ed. 628, Mr. Justice Strong said of an expression of opinion in another case, after stating the exact point decided therein: "The case called for nothing more; and, if more was intended by the judge who delivered the opinion, it was purely obiter." Many definitions are more liberal. These give the principle strictness and rigidity, and, even under them, it is manifest that the declaration of the rule in *Pratt v. Bowman* is in no sense obiter. It is applied to the facts, and made the basis of the decision. It would be difficult to reach any other conclusion as to the views expressed in *W. M. & M. Co. v. P. C. C. Co.* But in *Crislip v. Cain* and *Hansford v. Coal Co.* it may be otherwise. In all of them the proposition is formally and solemnly incorporated in the syllabi, as if deliberately stated upon mature reflection and consideration. As it is manifest that the court has, in at least two cases, applied the rule, it is useless to spend further time on the inquiry as to the judicial character of these enunciations.

Search for a precedent in the decisions of Virginia up to the date of the division of the state, and in those of this state prior to that of *W. M. & M. Co. v. P. C. C. Co.*, to sustain the proposition that rescission may be had because of a considerable excess when the sale is in gross and the parties to the deed were ignorant of the quantity in the tract and without fault, will be made in vain. Up until that time, sales in gross had been uniformly held to be contracts of hazard from which no relief could be had, in the absence of fraud, except upon the ground of a mutual and innocent mistake as to some matter going to the very essence and substance of the contract. A difference in quantity, however great, was not deemed to be of the substance of the thing contracted for. Its materiality, by a sale in gross, was deemed to have been eliminated from the contract. Both parties took the risk of variation from the acreage stated in the deed, if any was stated.

Thus, in *Tucker v. Cocke*, 2 Rand. 51, 66, Judge Green, delivering the opinion of the court, in a case similar to this, said: "There are cases in which the mutual error of the

parties, without default in either, may be a just ground for rescinding a contract; as, if the error be in a matter which is the cause of the contract—that is, in the substance of the thing contracted for, so that the purchaser cannot get what he bargained for; as in the case of a purchase of military lands on Paint creek, stated to be located under specified warrants, and the warrants were located elsewhere; and of the purchase of an obligation at the risk of the purchaser, and the paper turned out to be forged, or the obligor to have been previously discharged from the obligation under the statute of bankruptcy. In such cases the contract ought to be vacated, even if it had been executed, and if both the parties, in the first case, verily believed that the warrants were located on Paint creek, and, in the other, that the obligation was genuine and the party bound by it. The object, in the first case, being to buy lands on Paint creek, and, in the other, to buy a valid and subsisting obligation, the error would go to the substratum of the matter contracted for. *Chamberlaine v. Marsh*, 6 Munf. 283; *Armstrong v. Hickman*, 6 Munf. 287. But if, in the one case, the warrant had really been located on Paint creek, and the parties had both been of opinion, from the general character of lands on that creek, that the lands were of great value, and it had turned out that they were of very little value; or if, in the other, the obligation had been genuine and still binding upon the obligor, and both parties believed that he was in affluent circumstances and able to pay, and it turned out that he was, at the time of the contract, utterly insolvent—the purchaser in neither case could have relief, since he has gotten that which was the cause of the contract, and the error was in relation to the very hazard which the purchaser took upon himself. If relief could be given in such a case as the case at bar, a fortiori it should be given if the vendor knew of the deficiency and concealed it. So that in both cases, when the vendor knew, and when he was ignorant, of the deficiency, relief being given, there could no longer be a contract in which a purchaser could take the risk of quantity effectually upon himself. The Court of Appeals have uniformly recognized the validity and obligation of such a contract, and in all cases in which they have given relief it has been founded on circumstances either of fraud, misrepresentation, or concealment, or mistake, in part or in whole, in relation to the substance of the thing contracted for. It is possible that the case of *Quesnell v. Woodlief*, 2 Hen. & M. 173, does not fall within this observation; but, the grounds of the judgment in that case are so uncertain, some of the judges who decided it, the reporter, and the counsel on both sides who argued the cause, differing so materially in their statements of the reasons upon which the judgment was founded, that it cannot be considered an obligatory au-

thority to the point now under consideration; and, if it were so considered, it has been repeatedly overruled."

What Judge Green meant by reference to error affecting the substance of the contract, going, as he says, "to the substratum of the matter contracted for," is illustrated by a number of decided cases. Thus, in *Chamberlaine v. Marsh*, 6 Munf. 284, the vendor intended to sell, and the vendee to buy, lands on Paint creek, and those described in the written evidence of the contract were not on that creek. In *Graham v. Hendren*, 5 Munf. 185, there was a misunderstanding as to the identity of the land, in consequence of which the contract was rescinded. *Glassell v. Thomas*, 3 Leigh, 113, is a similar case. In *Fearon Lumber Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137, this court decreed rescission of sale of lands because of a mutual mistake as to the location of the lands. Perhaps no clearer discrimination between substance and a mere concomitant in a contract of sale of land has ever been made than that given by Judge Carr in *Thompson v. Jackson*, 3 Rand. 504, 15 Am. Dec. 721. He said: "But take the land lost at the largest estimate, and say it was worth a fourth of the whole purchase money (which is contradicted by the surveyor, and cannot, I think, be the fact), yet can it be said that it furnishes one of those cases of mistake which would authorize the rescission of the whole contract? Has not the purchaser gotten the substance of the thing bought? The surveyor says that this slip has no peculiar value; that it is maiden woodland, and there is a sufficiency of timber for the place without it. If you say that for such a deficiency as this, not affecting the bulk of the land, you will rescind, where will you stop? I have shown that equity will refuse a specific execution in many cases where it would not rescind, and yet there are decisions in abundance to show that a trifling deficiency of a few acres in a tract of land will not even present an obstacle to a specific execution, the court saying that such deficiency lies clearly in compensation, and that the party is made whole by abating so much from the purchase money as is an equivalent for it."

These illustrations sufficiently show what is meant by a mistake which affects the substance of the contract. It must be something affecting the identity or actuality of the thing which forms the subject-matter of the contract, going beyond the mere quantity, quality, or value of that thing. And that where the description is correct, and there is no fraud nor any mistake affecting the substance of the contract in the sense indicated, there can be no relief by rescission or otherwise, is maintained by the great weight of authority. "Whenever it appears by definite boundaries, or by words of qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere mat-

ter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case." 4 Kent, Com. 467. Noble v. Googins, 99 Mass. 231; Flagg v. Mason, 141 Mass. 64, 6 N. E. 702; Libby v. Dickey, 85 Me. 362, 27 Atl. 253; Frenche v. Chancellor, 51 N. J. Eq. 684, 27 Atl. 140, 40 Am. St. Rep. 548; Borkenhagen v. Vlandin, 82 Wis. 206, 52 N. W. 260; Estes v. Odom, 91 Ga. 600, 18 S. E. 355. "But where the lands in a conveyance are mentioned to contain so many acres by estimation, or the words 'more or less' are added, if there be a small portion more than the quantity, the vendor cannot recover it; and, if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency; and even a large excess or deficiency has not been considered a ground for relieving a vendor or purchaser." 1 Sud. Vend. § 3, p. 490.

There are a few cases which hold that a considerable excess or deficiency in quantity, the parties having been ignorant of the quantity and free from fault, gives right to compensation or rescission, even though the sale is in gross. The leading case of this class is Harrison v. Talbot, 2 Dana (Ky.) 258. Compared with *Crislip v. Cain*, it will be found to be a gross misinterpretation of the Virginia decisions, and especially of *Quesnel v. Woodlief*, 2 Hen. & M. 173, Id., 6 Cal. 218, and *Nelson v. Matthews*, 2 Hen. & M. 164, 3 Am. Dec. 620. That case also makes a distinction between executory and executed contracts, and was itself of the former class. Other authorities recognize the same distinction. Sug. Vend. ch. 8, § 5, p. 491, says: "Where the contract rests in fieri, the general opinion has been that the purchaser, if the quantity be considered less than it was stated, will be entitled to an abatement, although the agreement contain the words 'more or less,' or 'by estimation,' or even stronger words. But in a case where the estate was stated in the contract to contain by estimation forty-one acres, 'be the same more or less,' and upon an admeasurement the quantity proved to be only between thirty-five and thirty-six acres, and the purchaser claimed an abatement; the Master of the Rolls decided against the claim. Upon a motion in *Portman v. Mill* [2 Russ. 570] it appeared that the lands were described as containing, by estimation, three hundred and forty-nine acres or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less; and the actual number of statute acres was less by one hundred acres than the number stated in the contract. Lord Eldon said that, as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large

a deficiency in the number of acres as was alleged to exist there."

Though the case of *Crislip v. Cain* does not recognize it, the distinction is not without reason. In executory contracts the court is called upon to exercise its discretionary powers to decree specific performance, and the defendant sets up his objection before the transaction is completed. In the case of an executed contract, completed in all respects, the application is for rescission, and here again the court may exercise discretion; and it is well settled that a court of equity will often refuse specific performance, and thereby deprive the party of the benefit of his contract, under conditions which would not move it to a rescission of the contract, whereby the same result would be attained. *Thompson v. Jackson*, cited. Since *Harrison v. Talbot* is predicated upon this distinction, it is hardly persuasive authority in this case, it being one in which the contract has been fully carried into execution. However, in the opinion in that case it is suggested that, had the instrument been a deed conveying the land, instead of a contract to convey, the vendor might still be entitled to relief, but whether by rescission or a decree for compensation as upon the contract, is not indicated.

Among the cases most often cited as authority for the proposition that a sale in gross may be rescinded on the ground of a mutual mistake as to the quantity of the land, is *Harrison v. Talbot*, cited. In it, however, there was no decree of rescission. In spite of the plain, simple, and just rule that a court has no authority to make a contract for the parties, in that case, the court, having ascertained that there was an excess of 90 acres in a tract sold for \$6,000 as one containing 400, decreed a conveyance by the vendor, without his consent, of 400 acres of the land, leaving him the small quantity of 90 acres, thus compelling him to divide his farm into two parts. It was not a case of rescission, nor one merely refusing specific performance. It is a case in which the court virtually made a new contract for the parties and enforced it. It is followed by the case of *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202, another case of specific performance, and not of rescission. That was a case of deficiency, and, though the court did say that, as the contract was executory, there might be an abatement on account of gross mistake, it went further, and ascertained from the evidence that there had been a misrepresentation by the vendor as to the quantity. The decree harmonizes with the last ground of relief, as it abated the purchase money and decreed a specific performance. Hence it is not authority for the principle of rescission.

The Supreme Court of Texas, in *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282, professedly following *Harrison v. Talbot*, decreed a release of a surplus of 348 acres in a tract of land conveyed as containing 750

acres or more, described as being all of a tract of "eight hundred and fifty acres or more" except one hundred acres sold off previously. The deed also contained a covenant binding the vendor to refund in case the quantity should prove to be less than 750 acres. To ascertain the intent of the parties, parol evidence of their verbal negotiations and declarations was admitted and considered. This case goes beyond the Kentucky precedent, for the sale was an executed one. Both treat the contracts as sales in gross, and both violate the rules of interpretation laid down by this court and by the earlier Virginia cases. It is only in cases of ambiguity that parol evidence is admissible to determine the character of the contract, and then the rule allows only evidence of the situation of the parties, the circumstances which surrounded them, and their conduct in carrying the contract into execution. To permit the introduction of evidence of their conversations and declarations of intention would work a plain violation of the rule which forbids the admission of parol evidence to contradict or vary written instruments.

These cases and a few other similar ones were examined by Judge Green in *Crislip v. Cain*, and condemned as unsound, because they decreed compensation for excess, as upon the contract. Whether they were proper cases for rescission, he does not inquire. To this subject his mind does not seem to have been fully directed. He does intimate, and even say, there are instances of mutual mistake as to quantity, where the sales are in gross, which warrant rescission, but he makes no analytical or critical examination of any case of that kind. Evidently he was misled by the previous declarations of Judge Hoffman in *W. M. & M. Co. v. P. O. C. Co.*, who seems likewise to have accepted the proposition without investigation. He cited no authority for his position, and there is no instance of rescission on such ground in any Virginia decision prior to the separation of the state. There are many cases of abatement and compensation in sales made by the acre, and in sales in gross accompanied by warranty of quantity or fraud by misrepresentation or concealment, but none based on mutual mistake as to mere quantity. In connection with *Woodlief v. Quessel*, he mentions *Belnap v. Sealy*, 2 Duer (N. Y.) 579, in which a lot, sold as containing eight acres, proved to have an area of about four acres, as an authority for rescission on the ground of mutual mistake as to quantity, but he does not analyze it or subject it to any critical examination. In that case Duer, J., dissented, and denied that there could be rescission. Emmett, J., adopted the theory of mutual mistake, and rested the case on that. Bosworth, J., was satisfied there had been a fraudulent representation by the vendor. He also thought there might be relief on the ground of mistake. That the contract was executory was deemed important.

No doubt the views previously expressed by Judge Hoffman in *W. M. & M. Co. v. P. O. C. Co.*, cited, were accepted by Judge Green as being sound, practically without investigation on his own account, and it is to be observed that Judge Hoffman announced the proposition apparently without having bestowed upon the question his usual care and consideration. He cites not a single authority for it, and Judge Snyder, in *Hansford v. Coal Co.*, adopts it from *Crislip v. Cain* without question. From these unsatisfactory cases the court assumed, in *Pratt v. Bowman*, that the principle was firmly settled in this state, and adopted the classification made in *Harrison v. Talbot*. Hence it seems to have gotten into our decisions more by accident than as the result of mature consideration.

It being admitted that a sale in gross is a sale at hazard as to quantity, it is a contradiction to say relief may be had on the ground of mistake when there is a deficiency or excess. If there is no risk as to quantity, the sale is clearly not one of hazard nor one in gross. The risk, if any, is as to quantity, and nothing else. Can a man be allowed to avoid his contract of risk, merely because the risk which he assumed has fallen upon him? If, so, how can there be a sale of real estate except by the acre? If it be admitted that the risk is presumed to extend to only a reasonable amount of deficiency or excess, as held in *Harrison v. Talbot* and *Pratt v. Bowman*, under what rule can the element of unreasonableness be ascertained? To say there is a presumption that not more than the difference due to variation in instruments and inaccuracies in surveying is risked, would make every sale in gross equivalent to a sale by the acre. The idea that, under a sale in gross, such is the limit of the risk, unless there be a special contract of hazard, finds no support in the earlier Virginia cases. They clearly put all sales in gross on the same footing, except those in which there are warranties of quantity, namely, those contracts in which the quantities are specified in such manner as to render the deeds or contract ambiguous on their faces as to whether a warranty of quantity was in fact intended. This principle can operate only in cases of deficiency, and there is no case in which it has been applied to an excess. To this principle, and to the rules founded upon fraud, Judge Green refers all the numerous Virginia and West Virginia cases examined by him. There may be fraud on the part of the grantee, affording ground of relief against him for an excess, but how can it be said there is a warranty by him in the deed against an excess? There may be a reservation in the deed of right to compensation for an after-discovered excess, but such reservation is an express contract. "There is no doubt that where an estate is expressly sold at a certain price by the acre, and there is a deficiency in the number of acres conveyed, the purchaser will be enti-

tled to a compensation for that deficiency. Sugden, p. 230, quoting 2 Eq. Ca. Abr. 688, pl. 1. So, too, where the land is neither bought nor sold expressly and professedly by the acre, but both parties, in fixing the price for the land, have regard to the quantity which they suppose the estate to consist of, the same rule as to liability for deficiency will prevail. In such case the demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain. A ratable abatement of price will probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been originally known. Hill v. Buckley, 17 Ves. 401; Sugden, 231. Such sale must be considered as in fact, and according to the intention of the parties, though not expressly, a sale by the acre. But if, on the other hand, the sale be clearly one in gross, it is a contract of hazard, in which each party takes on himself the risk of excess or deficiency, and there can be no relief afforded to either, whatever may be the actual quantity in the tract sold. Keytons v. Brawfords, 5 Leigh, 47. But the court will always require clear proof that the vendee did agree to take the hazard of deficiencies on himself. Jolliffe v. Hite, 1 Call, 329 [1 Am. Dec. 519]; Nelson v. Matthews, 2 Hen. & M. 164 [3 Am. Dec. 620]; Hull v. Cunningham's Ex'or, 1 Munf. 330. Russell v. Keeran, 8 Leigh, 13, 15. Nowhere does it appear that parol evidence is held to be admissible to prove the extent of the risk assumed in a sale in gross. The possibility of such a thing is precluded by the rules and principles deduced and stated by Judge Green in Crislip v. Cain. In every Virginia case prior to the division of the state in which there was not a sale by the acre, a sale in gross with a warranty of quantity, or a sale into which fraud had entered as a vitiating element, relief was denied, nor, with the single exception of Pratt v. Bowman, has relief ever been held by this court to be proper under any other circumstances. Sales in gross, unattended by warranty of quantity or fraud, have been uniformly treated as contracts of hazard, and that precludes any right to rescission on account of variation in quantity.

"In a sale in gross, a contract of hazard on both sides, the vendee is not entitled to relief in case of a deficiency." Keytons v. Brawfords, 5 Leigh, 39. "If a tract of land be sold for 1,100 acres, more or less, at a fixed price, and it turns out that it is less, the purchaser will not be relieved in equity." Pendleton v. Stewart, 5 Call, 1, 2 Am. Dec. 583. Cabell, J., in Russell v. Keeran, 8 Leigh, 19-20, says: "I am of opinion that the decree of the chancellor, of the 13th December, 1828, is wholly erroneous. It declares that although the sale of the land was a sale in gross, yet it was not a sale of haz-

ard as to quantity. This is contrary to first principles; for every sale of land in gross or by the tract is, *ex vi termini*, a sale of hazard as to the quantity; the vendor being debarred from claiming any diminution of the purchase money in case the real quantity shall fall short of the estimated quantity." "Where the contract does not specify the number of acres sold or contracted to be sold otherwise than by the general words 'containing so many acres,' this can hardly be looked on as a warranty of the quantity, but rather as a matter of description. Keytons v. Brawfords, 5 Leigh, 48." Russell v. Keeran, 8 Leigh, 13-15. In Tucker v. Cocke, 2 Rand. 51, the court held: "A conveyance of a particular tract of land without a specification of quantity does not bind the vendor to warrant a particular number of acres, if there has been no false representation, and no concealment of facts within his knowledge; although there may have been an expectation in both parties, founded on documents and other evidence known to both, that the number of acres is greater than it turns out to be upon a subsequent survey." The conclusion indicated by these views is supported by the great weight of authority. It cannot be assumed that, in so many cases of large deficiencies and excesses in which relief has been denied because no warranty or fraud was established, it did not occur to the courts and counsel that it might be had by the shorter and easier remedy of rescission. The manifest import of these decisions is that no relief can be had in any form respecting the subject-matter of the hazard. This is the view expressed by Chancellor Walworth in Veeder v. Fonda, 3 Paige (N. Y.) 94, 98. He said: "It seems now, however, to be generally understood that, where the contract has been consummated without any fraud, misrepresentation, or concealment as to the real quantity, the courts will not inquire whether there has been an actual mistake as to the supposed quantity contained within certain specified boundaries. But this result has been produced more from the necessity of quelling interminable litigation than from the real equity of the principle established by the decisions." This is quoted and approved by the New York Court of Appeals in Faure v. Martin, 7 N. Y. 210, 57 Am. Dec. 515. In Winch v. Winchester, 1 Ves. & Beam, 375, the court held: "Purchaser not entitled to an abatement for a deficiency in quantity; the particular describing the estate, as containing by estimation forty-one acres, be the same more or less." Parol evidence was admitted to prove a representation by the vendor as to quantity. Sir William Grant, Master of the Rolls, said: "As to the admissibility of the evidence, it must depend upon the purpose for which it is produced. If the defendant insists that, the evidence being received, he will be entitled to have the contract performed with an abatement of the price, I think it

is not admissible for that purpose, as the court cannot execute in his favour a written agreement with a variation introduced by parol testimony; but if he says he was deceived by this representation, and therefore was induced by fraud to enter into the contract, and offers the evidence for the purpose of getting rid of such contract altogether, for that purpose, I think, it may be received; as, if such a declaration was made by the auctioneer, it would undoubtedly be fraudulent and unfair in the plaintiffs to insist upon the execution of the contract, not giving the defendant the benefit of that declaration." *Mann v. Pearson*, 2 Johns. (N. Y.) 37, holds: "A deed was delivered to M. and T., describing the lot, and as 'containing 600 acres, be the same more or less.' On actual survey the lot was found to contain only 421½ acres. In an action brought against P. on the bond it was held that the mention of the quantity of acres was matter of description, and that the delivery of the deed for the lot of land according to its actual and known description was a performance of the condition of the bond." Chief Justice Kent concurred in the opinion delivered by Spencer, J., which said: "The enumeration of quantity is not of the essence of the contract; it is matter of description merely. The only certainty in the present case is the lot, and this alone is the subject of the covenants." In *Jackson v. Barringer*, 15 Johns. (N. Y.) 471, it is held: "So, where there is a lease of the farm on which A. B. now lives, to contain 80 acres, and the farm actually contains more than 80 acres, the lessor cannot recover the surplus from the lessee, especially where he has been in possession and paid rent for a length of time." *Jackson v. Defendorf*, 1 Caines, 493, holds: "If a lot be granted by deed, and its number specified with a reference to a map, the whole lot will pass by the deed, though it there be mentioned as containing fewer acres than it absolutely does." In *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67, it is held as follows: "In a deed of conveyance of land as limited by certain monuments, lines, and courses, and also as containing so many acres and rods, the words expressing the quantity do not amount to a covenant that the land contains that quantity, but are merely descriptive of the land." To the same effect, see *Boar v. McCormick*, 1 Serg. & R. (Pa.) 166; *Hall v. Powel*, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; *Snow v. Chapman*, 1 Root (Conn.) 528; *Dagne v. King*, 1 Yeates (Pa.) 322; *Smith v. Evans*, 6 Bin. (Pa.) 102, 6 Am. Dec. 436. Many of these cases were actions at law, but the interpretation and construction of a contract is the same in each forum. In *Stebbins v. Eddy*, 4 Mason (U. S.) 414, Fed. Cas. No. 13,342, a suit in equity for relief in respect to a deficiency, Story, J., after discussing a number of cases, including an anonymous case in 2 Freem. 107, in which a man who had purchased a

tract of land described as containing 100 acres, more or less, which had turned out to contain only about 60, was denied any relief, said: "In short, the latest cases generally concur with the doctrine laid down in the anonymous case in 2 Freem. Ch. 107. It seems to me that there is much good sense in holding that the words 'more or less,' or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus. Nor am I prepared to admit that the fact that the sale is not in gross, but for a specific sum, by the acre, ought necessarily to create a difference in the application of the principle. I do not say that cases may not occur of such an extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. Where the sale is fair, and the parties are equally innocent, and the quantity is sold by estimation, and not by measurement, there is little, if any, hardship and much convenience in holding to the rule caveat emptor."

This review of the authorities concerning the subject of sales in gross without warranty of quantity or fraud perpetrated by either party, and the policy of the law which imposes upon parties some degree of care and prudence in making their contracts, to the end that useless litigation, resulting from carelessness and lack of diligence, may be discouraged, impel the conclusion that the plaintiffs are not entitled to a rescission of the contract. Not a few of the cases hold that under the circumstances of this case the plaintiffs would be precluded from any relief by their negligence. *Anon.*, 2 Freem. 107. In a sense, the mistake complained of is attributable to the negligence of the complainants. It was their property, and some inquiry as to quantity, as by a survey, for instance, before disposing of it, would not have been a manifestation of extreme caution, wariness, or prudence; but they made none. Such survey would have cost them no more, perhaps, than it has cost Kay. They discovered the excess about five years after the sale, by mere accident, as a result of Kay's survey, and now ask to be permitted to take advantage of his industry and enterprise. A leading American case holding this to be inequitable is *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798, holding that: "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person." In the opinion it is said: "The appellees paid their money without even inquiring of any one professing to know where the lines were.

The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it." In *Campbell v. Ingilby*, 1 De G. & J. 392, 405, Lord Justice Turner said: "In this case I think that the existence of the plaintiff's claim can be attributed only to his own neglect, and I am of opinion that, under such circumstances, he is not entitled to the compensation which is claimed by this bill." For similar applications of the rule, see *Manser v. Davis*, 6 Ves. 678; *Jennings v. Broughton*, 17 Beav. 234; *Atwood v. Small*, 6 Cl. & Fin. 338. Though there may be at some time a mutual and innocent mistake as to mere quantity in a sale in gross of such magnitude as to enable the court to say it goes to the substance of the contract, and justifies relief by way of rescission, we are firmly convinced that the principles announced in *W. M. & M. Co. v. P. C. C. Co.*, *Crislip v. Cain*, *Hansford v. Coal Co.*, and *Pratt v. Bowman*, concerning rescission for such cause, are too broad, and are contrary to the great weight of authority, as well as inconsistent with other principles firmly established in this state. Therefore the doctrine of rescission, as therein announced, is disapproved, and to this extent said cases are overruled.

For the reasons aforesaid, the decree complained of will be reversed, and the bill dismissed, with costs both in this court and in the circuit court.

Excess.

BRANNON, P. (concurring). Take the case of a deed conveying a tract of land either not specifying, or simply specifying, quantity, without any qualifying words affecting the quantity, there being no fraud. Shall the grantor have either pay or rescission on the ground of excess in quantity? Such a deed is a sale in gross; that is, one of hazard or risk as to quantity. *Crislip v. Crain*, 19 W. Va. 438; *Depue v. Sergeant*, 21 W. Va. 326; *Hansford v. Coal Co.*, 22 W. Va. 70; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210. The statement of quantity in such a deed is descriptive of the tract, not a covenant or warranty of quantity. 4 Kent, 466; *Caldwell v. Craig*, 21 Grat. 132. To allow pay for excess or rescind would deny the essential character of the deed given it by law—that of hazard. The law would contradict itself. It would in one breath say that the deed is one of hazard, and in the next breath say that it is one of warranty of quantity; for how can either pay or rescission be given unless there is warranty or covenant of quantity? Furthermore, to allow such pay or rescission would deny the

legal character of the deed, contrary to the old rule that a contract in writing shall not be contradicted, altered, or varied by oral evidence. The law stamps such a deed as one in gross. You allow evidence to contradict this. You allow evidence to prove mistake as to quantity, when the deed, as construed by law, says that the grantor was not mistaken, but took the risk as to quantity; that he conveyed the tract, whether more or less in quantity, for a given sum. The law makes the deed have one effect; oral evidence makes it have another. *Depue v. Sergeant*, 21 W. Va. 326, is decided to show that this cannot be done in such case by oral evidence. If the grantor intended to make quantity of the essence of the contract, he would have made it a conveyance by the acre, or inserted a clause for compensation for excess; but he has made a sale in gross. Where there is deficiency, and the grantor has stated in the deed that the tract contains a certain quantity, that is a different case, under our decisions, from excess. Under those decisions it is because, and only because, of that statement of quantity, that deduction from purchase money is made for deficiency. But as to excess, that reason does not exist, since the grantee has made no statement of quantity. In the case of claim for deficiency it is sometimes (only sometimes) granted because of fraud in the grantor in making such statement; but there is no such fraud imputable to the grantee, no such basis for decree against him on account of excess. Judge Green mentions this in *Depue v. Sergeant*, *supra*, and the clear jurist Judge Roane said in *Jolliffe v. Hite*, 1 Call, 312, 1 Am. Dec. 519, "With regard to the case of excess, it may not follow, of course, that when there is abatement for deficiency there should be payment for the excess." For deficiency in our cases relief is granted for legal fraud. If you regard the statement of quantity warranty (you cannot), while the vendee could get relief for loss, the vendor could not for excess. There is difference between excess and deficiency, whether you regard relief as based on fraud or warranty.

But the argument is made that, though no fraud is chargeable to the grantee, there is mutual mistake, and that calls for relief. I respond that the cases say that compensation for excess or abatement cannot be made on the theory of mistake, because that would fly in the face of the deed, which speaks a sale in gross. Judge Green says so in *Crislip v. Crain*, 19 W. Va. 512, and point 10 in syllabus. *Hillard on Vendors*, 328, says: "The general principle is laid down that the vendor of land as containing a certain quantity, more or less, when he knows from the title deeds or otherwise that it contains a much less quantity, is in equity bound to make good the difference. But where a contract has been consummated without any fraud, misrepresentation, or concealment as to the quantity, the court will not inquire

whether there has been a mistake upon that point. Thus, if the vendor sells and the vendee buys a tract of land for so many acres, more or less, and it turns out upon a survey that there is less than the estimated quantity, the buyer shall not be relieved in equity. So it is said the cases in which equity interferes, where the quantity of the land exceeds or falls short of that specified in the deed or contract, are those in which the sale has been made by the acre or foot, or where there has been fraud or willful misrepresentation on the part of the party against whom relief is sought." I repeat that pay for excess or loss cannot stand on the idea of mistake, but only on fraud, actual or legal. But it is said that, while it is true that money compensation cannot be made because of mistake, yet rescission of the deed can be. It is strange to say that you cannot decree compensation for mistake because the deed is a sale in gross, yet you can take the vendee's land from him for that mistake. Do you not, by rescission, deny the legal effect of the sale as one of hazard just as much as you would by decree for money compensation? Do you not thus ignore that legal effect of the deed as one in gross or of hazard? You would, in reason, equally ignore the law of the deed in either case. "Whether the case be one of excess or deficiency, the mistake is not in the substance of the contract, but in relation to the very risk in the contemplation of the parties." *Caldwell v. Craig*, 21 Grat. 137. For the position that in case of such a deed there can be neither compensation nor rescission for excess, in absence of fraud, I cite *Jolliffe v. Hite*, 1 Call, 301, 1 Am. Dec. 519, and *Tucker v. Cocke*, 2 Rand. 51, 66, where Judge Green says that quantity in such case is not of the substance of the contract; that the substance is the tract; that, if the land is sold as on Paint creek, whereas it is elsewhere, that is a mutual mistake as to the "substance," and there will be rescission; but that mistake in quantity is not in the "substance," but covered by the hazard. *Pendleton v. Stewart*, 5 Call, 1, 2 Am. Dec. 583; *Keyton v. Brawford*, 5 Leigh, 39, 48; *Reed v. Patterson*, 7 W. Va. 263; 2 *Warvelle on Vendors*, pp. 974, 976; *Dart on Vendors*, 304. I refer to 29 Am. & Eng. Ency. L. (2d Ed.) 635, saying that excess in quantity "does not entitle him either to rescission, to reconveyance of excessive quantity, or to compensation." See pages 625, 637. On page 627 we find many cases cited for the text: "The theory on which relief is denied is that the purchaser gets the specific land which he contracted to buy, and must be deemed to have assumed the risk of deficiency." In *Hardin v. Kelley*, 39 Va. 333, 15 S. E. 894, our holding is sustained. It says that, where a tract is conveyed for a certain sum within certain bounds, stated to contain a certain quantity, there can be no recovery for excess.

But do our cases hold that in case of excess there can be relief? They say there can be no money compensation decreed unless the purchaser is willing to pay; but some say there may be rescission. I contend that *Western M. & M. Co. v. Peytona*, 8 W. Va. 406, is obiter as to its recognition of right of rescission. It did not enter into the decree. The decree is not based on that. It did not even allow an amendment as to it. *Bouvier, L. Dict.*, word "Dictum." The opinion shows that it was not intended to be decided. The same may be said of *Hansford v. Coal Co.*, 22 W. Va. 70. Certainly expressions in *Crislip v. Cain*, allowing rescission for excess, were obiter, it being a case of deficiency, not excess. As to *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210, we were in error in holding a right to rescission for excess. We were misled by the cases just mentioned. Argument and reargument have brought this matter of excess to close scrutiny in the present case. Those cases were squarely assailed, and a demand made for reconsideration of them as regards this subject. I admit reluctance to depart from a former case—even one, and there is but one—but the law ought to be laid down right when it is to operate constantly in daily transactions in future. Shall we persevere in error when we believe it to be error and it is challenged as error? Is this ruling practically unjust? When quantity is given in deeds, who thinks of its being warranted? When that is designed, the sale is made by the acre. Judge Tucker said in *Keyton v. Brawford*, 5 Leigh, 48, as many of the books say: "I have looked upon such mention of quantity as, in general, matter of description only, and not of itself as giving a character of a contract by the acre. I am satisfied that such a thing is rarely dreamed of by those who execute deeds." Much authority says that mere statement of quantity in a deed, in connection with boundary, is only description, not warranty of quantity. 4 Kent, 466; *Caldwell v. Craig*, 21 Grat. 132; *Wood v. Murphy*, 47 Mo. App. 539; *Jenkins v. Bolgiano*, 53 Md. 420; 29 Am. & Eng. Ency. L. (2d Ed.) 628; *Rogers' Case*, 72 Ala. 529.

Deficiency.

Though deficiency is not involved, I will say that much authority in Virginia and elsewhere can be found denying compensation in case of such a deed as is involved in this case, because the sale is in gross. But we have numerous cases holding that in such cases there may be, under circumstances, compensation for deficiency, where the grantor assumes to represent in the deed the tract to contain a certain quantity. *Crislip v. Cain*, 19 W. Va. 438; *Anderson v. Snyder*, 21 W. Va. 632; *Hansford v. Coal Co.*, 22 W. Va. 70; *Sine v. Fox*, 33 W. Va. 521, 11 S. E. 218; *Depue v. Sergeant*, 21 W. Va. 326. They hold that, where a deed states a tract to contain a fixed quantity, if that was relied on and

induced the purchase, it is ground of compensation for deficiency, as the statement of quantity, whether made in ignorance of the true quantity or not, is, in law, fraud. Such is not the case as to excess. Where a deed makes no statement of quantity, but conveys the tract, there is no compensation. *Allen v. Shriver*, 81 Va. 174. I confess that I do not see that *Crislip v. Cain* is sound in holding that, where a deed merely states quantity, it prima facie gives right either to abatement or rescission for deficiency, in absence of actual fraud. When once the law puts upon the deed the seal of a sale in gross, the statement of quantity is merely further description of the tract, not a warranty of quantity, and therefore cannot be the ground of relief. The law does treat that statement of quantity in that light. See citations above. It is conceded in the *Crislip* Case that mutual mistake of quantity is not the ground of relief, but that the statement of quantity is, because a legal fraud. How can this be when the deed is a sale in gross? By oral evidence you deny the writing. But there is a difference between excess and deficiency where the deed states quantity. There is but one case holding that excess gives right to relief, but many following *Crislip v. Cain*. I would yield to them only on the principle of stare decisis. They are numerous. But they are not cases of excess. It does seem to me that this matter turns on two questions: (1) Is the deed one of sale in gross? (2) Is the statement of quantity in it warranty of quantity? The law says that such a deed speaks a sale in gross, and I assert that the mere statement of quantity is not of the substance, not a statement of a fact as on the grantor's personal knowledge, not made to induce the grantee to purchase, is not a warranty. When the parties intend quantity of the substance—when one states the quantity as within his knowledge, and the other buys on its faith—they say it is a sale by the acre, or in some cases to make quantity of the substance of the contract; but the incidental statement of quantity in description is not prima facie of the substance. The tract is the substance. The fact that the parties have not sold by the acre or otherwise made quantity important shows that they did not intend the statement of quantity as a warranty. *Crislip v. Cain*, 19 W. Va. 480, 481. If the party knows the statement is false, this is actual fraud; but if he states quantity, not knowing it to be false, or does not say it is true on his own knowledge, when he knows the statement is not true, relief is given, though the deed is in gross, because of fraud. When he says he knows the quantity is correct, you relieve for warranty; but when neither is the case there is no rescission, because the deed is in gross.

It seems not necessary to say that I have not been speaking of sales by the acre. I desire to be understood as speaking of deeds

passing legal title, not of executory contracts, or what equity would do in a suit for specific performance.

(57 W. Va. 74)

GIBONEY v. COOPER & COOPER.

(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

APPEARANCE—EFFECT—DEFECT OF PROCESS— APPEAL—JURISDICTION.

1. A general or voluntary appearance in a case by a defendant named therein is equivalent to service of process, and confers jurisdiction of the person on the court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 79-90.]

2. A general appearance waives any defect in the process, and confers jurisdiction of the person.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 118-143.]

3. Where, in an action of assumpsit, judgment is rendered for a greater sum than the damages laid in the writ and declaration, the appellate court will not review such judgment, when such excess of damages is not sufficient to give said court jurisdiction.

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County;
M. H. Willis, Judge.

Action by L. P. Giboney against S. J. Cooper and Hugh Cooper. Judgment for plaintiff, and defendants bring error. Affirmed.

H. B. Woods and McCluer & McCluer, for plaintiffs in error. J. Newman and S. Robinson, for defendant in error.

McWHORTER, J. This is an action of assumpsit brought in the circuit court of Ritchie county by L. P. Giboney against S. J. Cooper and Hugh Cooper, late partners as Cooper & Cooper. The declaration contains only the common accounts, and plaintiff filed with his declaration an account as follows:

Goose Creek, W. Va., Nov. 27, 1902.	
S. J. Cooper & Cooper to L. P. Giboney, Dr.	
To note dated July 22, 1901.....	\$300 00
To interest to Nov. 27, 1902.....	1 80
To protest charges and protest.....	1 10
	<hr/> \$302 90

—accompanied by an affidavit as required by statute. The writ was served only upon the defendant Hugh Cooper, and was returned not found as to S. J. Cooper. An order of publication was taken upon an affidavit of nonresidency of S. J. Cooper, and on the 26th day of February, 1903, the defendants appeared and filed a counter affidavit denying that the defendants, Cooper & Cooper, were indebted in any sum to the plaintiff, L. P. Giboney, on the demands stated in the plaintiff's declaration, and moved to set aside the office judgment had at rules, which was done; and the defendants demurred to plaintiff's declaration, in which demurrer the plaintiff joined, and the demurrer, being considered, was overruled, and on motion of defendants they were given 30 days in which to file special pleas in the case. Afterwards, on

the 20th day of June, 1903, the defendants entered their general plea that they did not owe the plaintiff the amount of money claimed in his declaration, or any part thereof; and a jury was impaneled and sworn to try the issue, and, after hearing the evidence, returned a verdict in favor of the plaintiff, assessing the damages at \$312. The defendants, by counsel, moved the court to set aside the verdict and grant them a new trial because the said verdict was contrary to the law and the evidence, of which motion the court took time to consider; and on the 24th day of June the court overruled the motion to set aside the verdict and grant a new trial, and rendered judgment against S. J. Cooper and Hugh Cooper, late partners as Cooper & Cooper, for the sum of \$312, with interest thereon from the 20th day of June, 1903, until paid, and his costs. Upon the trial of the case the defendants tendered their bill of exception, marked No. 1, which was signed, sealed, and saved to them on the record. The defendants procured from one of the judges of this court a writ of error.

The first error assigned is the overruling of the demurrer to the plaintiff's declaration. The declaration is the ordinary declaration in trespass on the case in assumpsit, on the common counts. No grounds of demurrer are shown, and the declaration appears to be sufficient. See section 29, c. 125, Code 1899.

Defendants, by their counsel, in their brief, claim that the court erred in rendering a personal judgment for any amount against S. J. Cooper, one of the defendants, and in refusing to set aside said judgment, because said S. J. Cooper had not been served with process in the case, and no appearance was ever entered therein by said S. J. Cooper, or any one for him. There were but two defendants named in the writ and declaration—S. J. Cooper and Hugh Cooper—and quite all the orders show that the "defendants" appeared. On February 26, 1903, "the defendants demurred," which demurrer was overruled, and then, "on motion of the defendants, they are given thirty days in which to file special pleas herein"; and in June, 1903, in open court, after stating the style of the case, the order says, "This day came the parties to this action, by their counsel, and the defendants, for plea to the plaintiff's declaration, say they do not owe the plaintiff the amount of money, or any part thereof, in his declaration alleged, and issue is thereon joined, and thereupon came a jury," etc. And all the motions in the case to set aside the verdict and grant them a new trial, and the exceptions and objections to the rulings of the court, were all by "the defendants" in the case, and not by "the defendant." The general appearance in the cause of both of the defendants is too marked to leave any question as to the appearance. "A general or voluntary appearance is equivalent to service of process, and confers jurisdiction of the person on the court. Hence a defendant is

estopped to object for want of jurisdiction where he has appeared generally, and it is held to be immaterial whether he be a resident or nonresident." 3 Cyc. 515, Id. 517. In 2 Enc. Pl. & Pr. 614, it is said: "The prosecution of an appeal by a defendant not summoned, and who did not appear, is an appearance to the action," and Id. 617: "Any acquiescence in the proceedings of a suit in the appellate court will be regarded as a general appearance." Id. 621: "It is a familiar rule that a general appearance waives any defect in the process, and confers jurisdiction of the person." *Smith v. Johnson*, 44 W. Va. 278, 29 S. E. 509.

And it is alleged as error that the court rendered judgment for \$312 damages; being in excess of damages laid in the writ and declaration, which was only \$302.90. If this is error, it is only an error of \$9.10, and this court would have no jurisdiction.

Upon the trial of the case the plaintiff offered in evidence a note, together with the certificate of the notary public protesting said note, dated the 20th day of October, 1902, and the aggregate whereof, of said note and protest fees, was the amount laid in the declaration and summons, \$302.90, to the introduction of which note and certificate of protest counsel for defendant objected for the reason that the note of Cooper & Cooper was not the note of S. J. Cooper & Cooper; the declaration reciting that they were partners as Cooper & Cooper. Objection was made to the note and certificate of protest. The objection was overruled, and the note permitted to be introduced; and the court took time to consider as to objections to the certificate of protest, which was later also permitted to be introduced. The note, with indorsements thereon, is in the following words and figures:

"\$300.00. Cairo, W. Va., July 22, 1902. Ninety days after date, for value received, we promise to pay to the order of L. P. Giboney Three Hundred Dollars negotiable and payable at The Bank of Cairo, Cairo, W. Va. S. J. Cooper & Cooper.

"Former No. Postoffice. [Stamped across the face of note:] Protested Oct. 20, 1902. Geo. H. Carver, Notary Public. [Indorsed on back of note:] L. P. Giboney."

The certificate of protest, as introduced, shows the note to be signed with no marks through the letters "S. J." before Cooper & Cooper.

After the admission of the certificate of protest, the court gave the following oral instruction to the jury: "Gentlemen of the Jury: You are instructed that if you believe from the evidence in this case that, at the time the note was delivered by the maker, it was signed merely in the firm name of Cooper & Cooper, then you will find for the plaintiff in this case the amount of the note in controversy. However, if you should believe from the evidence that at the time it was delivered it was not so signed, but that the

letters 'S. J.' were on the note, and were not erased or marked out, then you should find for the defendant in this case." To which instruction counsel for plaintiff objected and excepted. The note was introduced in connection with the oral testimony of L. C. Giboney, who acted for the plaintiff, his son L. P. Giboney, in selling and delivering to the defendants or S. J. Cooper the wagon, horses, and outfit for which the note was given. The only question in the case is, really, whether S. J. Cooper purchased the property on his individual account, with the knowledge of that fact of said Giboney, or whether he purchased it for the firm of Hugh Cooper and S. J. Cooper, who were engaged in the sawmill business. L. C. Giboney was asked whether he knew under what name and where the defendants were doing business. He stated that Hugh Cooper and Sam Cooper were doing business on Nutter's Fork in the firm name of Cooper & Cooper, in the sawmill business, and was asked if he had business with them as the firm of Cooper & Cooper. "A. Not until I delivered the horses to them." He was then shown the note in question, and asked: "Who made that note? A. My son drew the note up—L. P. Giboney. Q. Who signed it? A. Sam Cooper. Q. Where did he sign it? A. In a grocery that Mr. Cooper (Sam Cooper) was running"—and stated that by "Sam Cooper" he meant S. J. Cooper. He was told to look at the signature of the note, and explain, if he could, how the "S. J." came to be crossed out. "A. Well, he set down to the counter and put it 'S. J. Cooper.' Says, I, 'Mr. Cooper, now is this the way you sign all your paper?' 'We do,' he says. 'We sign all our papers in this way.' And I felt kind of doubtful about it. And this Mr. Cooper's wife [pointing to Mr. Cooper, who was present] set right there [indicating], and I set right there, and Mr. Cooper set right there [indicating respective positions to each other], and I parleyed a good bit in my mind whether to take the note and leave the horses, or to take the horses, and he told me so positively that was the way they signed their papers; and he said to me, 'We have part of the money in the Cairo Bank now, but we don't want to draw all our means out,'—then I took the note. Q. What was the consideration for that note? A. Three hundred dollars. Q. What did you give for that? A. A pair of horses, wagon, harness, and outfit—chains and everything. Q. To whom did you sell the wagon, harness, etc.? A. Sam Cooper. I knowed him by that name. That is the man who came and contracted for the team. Q. For what purpose? A. To log the mill. Q. Do you mean the sawmill of Cooper & Cooper? A. Yes, sir. Q. Where? A. Right there at the mill. Q. But at the time of making the note you would not accept his individual note? A. No, sir; but when he signed it 'Cooper & Cooper'— He first signed it 'S. J. Cooper,' and, when I didn't want to take it, he put '&

Cooper' on it. This Cooper's wife never said pro or con, and the note laid there a good bit, and I thought she couldn't help hearing what was said about this note, and she never gave any objections; but this Mr. Cooper didn't seem to be there, and I asked Mr. Sam Cooper where he was, and he told me, but I don't recollect where he said he was. And I asked him very positively if that was the way they signed their paper, and he said they signed all their paper that way. Question by Robinson: Which way do you mean—"S. J. Cooper' or 'Cooper & Cooper'? A. You see, he only wrote 'S. J. Cooper,' and then he put '& Cooper,' and I objected to it. Q. Now, Mr. Giboney, when that note was signed under your objection, what, if anything, was done to the letters 'S. J.'? Just look at the note? A. They were canceled across. Q. Did you see them crossed? A. I seen S. J. Cooper—I didn't see this one crossed [meaning the second letter], but I did see this one. I took notice to that, and something called my attention, and I turned my head, and when he handed me the note the 'S. J.' was canceled. Q. Did you pay the note when it was protested—take it up out of the bank? A. No, sir; I didn't. My son did. Q. What is your son's name? A. L. P. Giboney. Q. He is the plaintiff in this suit? A. Yes, sir." There was a good deal of conflicting evidence about the erasure of the letters "S. J."—as to whether it was done before or after it was negotiated and paid, or at the time it was made—and it seems to me this is not material. S. J. Cooper and W. H. Cooper were brothers doing business together as Cooper & Cooper in the sawmill business, and, according to the evidence of Hugh Cooper himself, S. J. Cooper was the most active member of the firm. He says that he and S. J. Cooper were members of the firm, and when asked: "Was there any limited powers upon either one of you as to the right to sign papers? A. I believe not. Q. One had as much power as the other? A. Nothing was ever said about that, as I know of. Q. You have the sawmill over there, have you not? A. Yes, sir. Q. That belonged to the firm of Cooper & Cooper? A. Yes, sir. Q. You ran a bank account in the Bank of Cairo? A. Yes, sir; the business was all done in the name of Cooper & Cooper. Q. Who signed the checks? A. I done some of it. Q. Did S. J. Cooper ever do any of it? A. He has, I believe. Q. Anybody else? A. Yes; my son Will. Q. You cannot say that S. J. Cooper at the time had not the right to sign the name of Cooper & Cooper to that note? A. As a member of the firm, I suppose he had. Q. He brought the horses there to the mill? A. No, sir; Mr. Giboney brought them to the mill." This firm was carrying on the sawmill business, and the purchasing of this team was in the line of their business—"for logging the mill"—and the team was used for that purpose, as stated by the resident defendant, Hugh Cooper, as a witness

for defendants; but he claimed that he (S. J. Cooper) worked the team for the firm by the day, and was so paid for it by the firm. That was a matter between themselves, however. S. J. Cooper, being an active member of the firm, and having a right to make such purchase and to execute the paper of the firm in payment for the property, was reasonably taken by Giboney to be representing the firm in making the purchase; and there is no direct evidence of the fact that the plaintiff or his father, L. C. Giboney, had notice that S. J. Cooper was dealing for himself individually, and not for the firm, even if that were true. That was a question purely for the jury, which rendered its verdict for plaintiff notwithstanding the instruction so favorable to the defendants given to it by the court. I am unable to see that the verdict of the jury should be disturbed.

The judgment is therefore affirmed.

(57 W. Va. 80)

BOSWORTH et al. v. WILSON et al.
(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

APPEALABLE ORDER.

An order merely sustaining a demurrer to a bill in equity, not dismissing the bill, is not appealable.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by A. S. Bosworth and another against W. G. Wilson and others. From an order sustaining a demurrer to the bill, complainants appeal. Dismissed.

W. B. Maxwell, for appellants. Dailey & Bowers, for appellees.

BRANNON, J. To a bill in equity in the circuit court of Randolph county filed by Bosworth and Rumbarger against Wilson and others a demurrer was entered, and the court made an order which sustained the demurrer and gave leave to file a second amended bill. From this order an appeal has been taken.

This court cannot consider the merits. The law gives it no jurisdiction of an appeal from such a decree, for want of finality. The order is interlocutory. The court can retract it and make an opposite ruling. An order merely sustaining a demurrer, but not dismissing the bill, is not appealable. It is a mere opinion not carried out. *Gillespie v. Coleman*, 98 Va. 276, 38 S. E. 377; 2 Ency. Pl. & Prac. 114; 2 Cyc. 605. The case of *White v. C. & O. R. Co.*, 26 W. Va. 800, rules this case. It holds that an order sustaining a demurrer and giving leave to amend a declaration is not appealable. Even if the feature of leave to amend were absent, and it were only an order sustaining a demurrer, no appeal would lie, but that feature makes it plainer that the order is not

final. 2 Cyc. 605, 607; 2 Ency. Pl. & Prac. 114. See *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152. The case of *Gillespie v. Coleman*, supra, holds that there is no appeal, whether the order sustains or overrules a demurrer. *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285, holds that an order overruling a demurrer will not support an appeal.

We dismiss the appeal as improvidently granted.

(57 W. Va. 63)

STERINGER v. JOHN MACKIE & CO. et al.
(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

**EXECUTION—VALIDITY—JUSTICE OF THE PEACE
—JUDGMENT—FILING TRANSCRIPT
—APPEARANCE.**

1. An execution issued by the clerk of the circuit court upon a judgment of a justice, without a transcript of such judgment having been filed in such clerk's office as required by section 118 of chapter 50 of the Code of 1899, is void as between the parties.

2. The filing of an abstract of a judgment of a justice in the clerk's office of the circuit court of the county in which the judgment was rendered is not a compliance with the provision of said section which requires a transcript of such judgment to be filed. The filing of such abstract confers no authority upon the clerk of said circuit court to issue an execution on such judgment.

3. Where a party appears generally and resists a motion to quash an execution, without objection for want of notice of the motion, he thereby waives the notice thereof required by section 17 of chapter 140 of the Code of 1899.

(Syllabus by the Court.)

Error to Circuit Court, Tucker County; John Homer Holt, Judge.

Action by J. A. Steringer against John Mackie & Co. and others. Judgment for plaintiff. Defendant John Mackie brings error. Reversed.

Charles L. Finnell, for plaintiff in error. W. B. Maxwell and J. Wm. Harman, for defendant in error.

COX, J. This is a writ of error from an order of the circuit court of Tucker county overruling the motion of plaintiff in error, John Mackie, late a member of the firm of John Mackie & Co., to quash two executions purporting to be issued by the clerk of the circuit court of said county upon a judgment of a justice. The first was issued on July 1, 1895, and the second on November 26, 1903. The evidence on the motion appears by bill of exceptions, which includes a copy of a judgment from the docket of the justice.

In determining the validity of these executions, it is material to inquire upon what they were based. Section 118 of chapter 50 of the Code of 1899 provides how executions upon a judgment of a justice may be issued by the clerk of the circuit court of the county in which the judgment was rendered. This statute requires that a transcript of such judgment of the justice shall be filed

before the clerk is authorized to issue executions on the judgment. A transcript, according to its derivation, and as generally used and understood, is in effect a copy. Bouvier's Law Dictionary defines a transcript to be a copy of an original writing or deed. The Legislature has provided that, by filing a transcript of a judgment of a justice in the clerk's office of the circuit court of the county in which the judgment was rendered, the clerk may issue executions thereon in the same manner and with like effect as if the judgment had been rendered by the circuit court. The transcript evidence of the judgment filed in the clerk's office is the authority of the clerk to issue an execution on the judgment. The filing of the transcript is a prerequisite to the issuing of an execution by the clerk. Without it he has no authority to issue an execution upon a judgment of a justice. In examining this record, we find the only pretense of the filing in the clerk's office of a transcript of the judgment of the justice, supporting the two executions in controversy in this case, is a paper copied in the printed record at page 9, which copy is a part of the bill of exceptions. This paper has the following caption: "Second, a copy from the records in the office of the clerk of the said circuit court, showing that a transcript of said judgment was filed in the office of said clerk on the 1st day of July, 1895, and an execution issued on the same day, marked 'Petitioner's Exhibit No. 2,' in the words and figures following." To this paper is appended the following certificate of the clerk: "Transcript of judgment rendered by Wm. B. Talbott, a justice of the peace for Tucker Co., W. Va., on the 11th day of June, 1892, and entered here on the execution docket on this the 1st day of July, 1895, by order of plaintiff's counsel. Teste: C. W. Minear, Clerk." The body of this paper is not a transcript of the judgment of the justice, but, at best, a most imperfect abstract of the judgment of the justice. In styling the judgment there is added an additional defendant, as appears when compared with the copy from the justice's docket. It does not give the date of the judgment, the name of the justice rendering it, or the county in which it was rendered. This is the only instrument found in the record which could be claimed to give any authority to the clerk of the circuit court to issue an execution on the judgment referred to. An abstract of a judgment ordinarily means a mere brief, and not a copy of that from which it is taken. *Dickinson v. R. R. Co.*, 7 W. Va. 413.

Where the existence of a judgment is put in issue, a mere abstract will not be received as proof of the judgment, and dispense with the necessity of producing an authenticated copy of such judgment. *Anderson v. Nagle et al.*, 12 W. Va. 98. The filing of a mere abstract will not meet the requirements of the statute providing for a transcript. We are not unmindful that the imperfect abstract mentioned, with its caption and certificate as above set forth, was originally filed by the plaintiff in error with his petition for stay of proceedings upon said executions, and is therein referred to as a copy from the execution book; but this does not change the character of the paper when it comes here by bill of exceptions as part of the evidence. It speaks for itself, and is not sufficient to support the executions issued by the clerk of the circuit court. The executions are not simply voidable, but are void, as between the parties, for want of any authority in the clerk of the circuit court to issue them, and the motion of the plaintiff in error should have been sustained by the circuit court, and the executions quashed.

The attorney for the defendant in error claims in his brief, and cross-assigns as error, that reasonable notice of the motion to quash was not given the defendant in error, as required by section 17 of chapter 140 of the Code of 1899. This may be true, but is this error? The defendant in error appeared generally and resisted the motion in the circuit court, without any objection for want of notice, and he must be taken to have waived the notice and his right to object for want thereof. He stands in the same positions as if such notice had been given and properly served upon him. *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. 186; and other cases before this court.

For the reasons above stated, the judgment of the circuit court of Tucker county entered on the 20th day of June, 1904, overruling the motion to quash the two executions mentioned, is reversed and annulled, and, this court proceeding to enter the judgment which the circuit court should have entered, it is ordered that the motion of plaintiff in error, John Mackie, to quash the two executions issued by the clerk of the circuit court of Tucker county, the first on the 1st day of July, 1895, and the second on the 26th day of November, 1903, be sustained, and that the said executions and each of them be quashed.

(57 W. Va. 81)

STATE v. BONER et al.(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)**SUPREME COURT—JURISDICTION—RECOGNIZANCE—JUDGMENT—RES JUDICATA—RELEASE.**

1. Judgment for the state for \$100 on a scire facias on a recognizance of bail. At a subsequent term an order is made setting aside the judgment. As the principal and interest exceeded \$100 when the order of release was made, this court has jurisdiction of a writ of error sued out by the state.

2. A judgment on a scire facias upon a recognizance of bail is a bar to defenses which might have been made against the scire facias.

3. A court cannot at a later term release a final judgment entered at a former term upon a writ of scire facias upon a recognizance of bail.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 668-671.]

(Syllabus by the Court.)

Error from Circuit Court, Barbour County; John Homer Holt, Judge.

Action by the state against J. L. Boner and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. T. George, for plaintiff in error. W. B. Kittle and J. Blackburn Ware, for defendants in error.

BRANNON, J. At one term of the circuit court of Barbour county upon a writ of scire facias on a recognizance entered into by E. M. Ray and others, with condition that Ray appear before the court to answer the state in a prosecution for selling liquor, the court rendered judgment and awarded execution in favor of the state against the defendants for \$100 and costs. At a subsequent term the court made an order reciting that the sureties had taken and lodged Ray in jail to answer the charge, and setting the said judgment aside and discharging the debtors from its payment, and the state has sued out a writ of error.

First, it is urged that this court has no jurisdiction of the writ of error, because the judgment is not over \$100. When the order setting aside the judgment was made, there had accrued nearly four months' interest on the \$100, as Code 1899, c. 131, § 18, says "every judgment, except where otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or not." Therefore this order ag-

grieved the state to the extent of \$100 plus interest. By this order the state loses \$101.80. It is from the order taking from it that sum that the state appeals. That the writ of error lies is shown by *Arnold v. County Court*, 38 W. Va. 142, 18 S. E. 476. The Constitution excludes costs, but not interest, in ascertaining the amount for appeal. It is argued that, under this rule, a man who recovers \$98 could wait until interest would bring the amount to over \$100, and then appeal. No. He appeals from the one judgment. But here it is the later order releasing the debt that is assigned as the error. It is that order that supports the writ of error. It is that which does the harm, just as the second judgment—that on certiorari—aggrieved *Arnold* in the case cited.

Certain defects in the recognizance or bail bond are suggested in defense of the order of discharge. Those defects were proper for consideration as defenses against the writ of scire facias, but they are foreclosed by the final judgment upon it. A scire facias ought to be regarded in some instances as an original action, and in others not such. It might not be where used to revive a judgment, but, where based on a recognizance, it should be so regarded, just as an action of debt on it would be, and a judgment upon it is a finality and res judicata. In fact, whether regarded as an original action or not, it is res judicata. *Freeman on Judg.* § 448; 19 *Ency. Pl. & Prac.* 283, 264. The judgment could not be set aside after the term. *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. 662.

It is said that the court after judgment had power to remit or release the recognizance by reason of Code 1899, c. 162, § 9, saying, "When, in an action or scire facias on a recognizance, the penalty is adjudged to be forfeited, the court may, on application of a defendant, remit the penalty, or any part of it, and render judgment on such terms and conditions as it deems reasonable." Plainly, this section limits the power of remission to the pendency of the proceeding on the recognizance. The words "In an action or scire facias" show this. The word "is" supports the argument. It is the present tense, not the perfect, "has been." The words "render judgment" make it clear and conclusive. The recaption of Ray, I may add, could not be pleaded after final judgment.

We will reverse the order of release made 27th February, 1904.

(137 N. C. 449)

FALKNER v. PILCHER & CO. et al.

(Supreme Court of North Carolina. March 8, 1905.)

TRIAL—SUBMISSION OF ISSUES—REQUEST—DUTY OF COURT—ISSUES ON COURT'S OWN MOTION.

1. While a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, the issues submitted must in themselves be sufficient to dispose of the controversy and enable the court to proceed to judgment, since in that respect the duty of the court to submit issues is mandatory.

2. Where, at the outset of the trial, the court announced that it would not submit a certain issue, it was not incumbent on the plaintiff to tender the issue nor to offer evidence to support it.

3. On appeal to the superior court from the judgment of a justice, all litigated matters in the action are to be tried de novo.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Justices of the Peace, §§ 660-664.]

4. In an action against a nonresident for damages for breach of a contract an attachment was issued and levied on certain corn, and on trial the court submitted no issue save the ownership of the corn. *Held*, that such issue was merely ancillary to the issue as to liability, and the finding of the jury that defendant did own the corn was not sufficient to authorize the court to enter judgment.

Appeal from Superior Court, Vance County; Shaw, Judge.

Action by Eugene Falkner against Pilcher & Co. and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Plaintiff sued defendants Pilcher and the American National Bank before a justice of the peace to recover \$200 "due for damages for breach of contract in failing to deliver 600 bushels of corn in good condition after payment for same and demanded by plaintiff." The defendants, being nonresidents, were brought into court by publication, and an attachment was issued and levied on another and later shipment of corn. Pilcher did not appear, and judgment by default was rendered against him for \$141, with interest and costs. It was further adjudged that Pilcher owned the corn which had been attached, and, it having been sold, the proceeds in the hands of the constable were condemned to the payment of the judgment against him. The bank, who had appeared by attorney, and resisted the suit, appealed from the judgment. At the trial in the superior court the judge ruled that "the ownership of the corn was the sole question for trial," the burden being upon the bank to show its title. Plaintiff excepted. The court, after the testimony had been introduced, submitted this issue: "Was the corn attached the property of the American National Bank?" Plaintiff excepted to this issue upon the ground that it was insufficient to determine the rights of the parties, because, if the jury should find that the bank is the owner of the corn, he would still be entitled to recover damages from the bank for the

breach of the contract mentioned in the summons and in the return of the justice. The court declined to submit any other issue, and instructed the jury that the only question for them to consider was the ownership of the corn, and then gave further instructions as to the law upon that issue. Plaintiff in apt time excepted. The jury answered the issue "Yes." A motion by plaintiff for a new trial was overruled, and he again excepted. Judgment was rendered for defendants, and plaintiff appealed.

H. T. Powell and T. M. Pittman, for appellant. T. T. Hicks and A. J. Harris, for appellees.

WALKER, J. (after stating the case). It may be conceded, as a general proposition, that a party cannot complain because a particular issue was not submitted to the jury unless he tendered it; but the rule is subject to this qualification; that the issues submitted must in themselves be sufficient to dispose of the controversy and to enable the court to proceed to judgment, for in that respect the duty of the court to submit issues is mandatory. *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45; *Burton v. Mfg. Co.*, 132 N. C. 17, 43 S. E. 480. It was certainly not incumbent on the plaintiff to tender the issue when the court had already announced at the outset that it would not submit it, nor to offer evidence in support of such an issue. *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718. In this case the plaintiff alleged distinctly in the summons a cause of action against defendant bank as well as one against Pilcher. The justice's return to the court also shows that such a cause of action was alleged, and it further appears therein that the bank denied its liability. So that here was an issue squarely made between the plaintiff and the bank as to the alleged breach of the contract to sell the plaintiff sound corn. The appeal of the bank brought to the superior court for trial not only the issue as to the ownership of the corn, but also the issue as to the bank's liability for a breach of the contract, for the trial was de novo, and therefore embraced all litigated matters pending between the plaintiff and the bank. When the court, in the beginning, refused to submit an issue as to the breach of the contract, the plaintiff excepted; and when the evidence had been introduced, and the court undertook to settle the issues, the plaintiff again excepted to the submission of the single issue as to the ownership of the corn and to the exclusion of any other issue. We have seen that all material issues must be submitted unless waived. *Gordon v. Collett*, 102 N. C. 532, 9 S. E. 486. How has the plaintiff waived his right to have the issue submitted? At every turn he has insisted upon it. It was surely not necessary to make a formal tender of the issue when the court had positively ruled that it would not submit it. It would have been indecorous to

do so. Again, the issues submitted must present the material facts in controversy, and they must, when answered, be sufficient to enable the court to proceed to judgment, and must also support the judgment rendered. *Vaughan v. Parker*, 112 N. C. 96, 16 S. E. 908; *Paper Co. v. Pub. Co.*, 115 N. C. 147, 20 S. E. 367; *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Pearce v. Fisher*, 133 N. C. 333, 45 S. E. 638. The jury have found that the bank is the owner of the corn, but how can the court, upon this finding, when considered with reference to the case made by the pleadings, proceed to judgment? The issue as to the ownership of the corn was ancillary to the main issue in the case as to liability, and was necessary only to determine whether, if the liability was established, it could be enforced by a condemnation of the corn or its proceeds, the defendant being a nonresident, and the property having been attached in order to give the court jurisdiction, and to secure the payment of any judgment recovered. *Fisher v. Ins. Co.*, 136 N. C. 217, 48 S. E. 667. If the bank is liable to the plaintiff, and is the owner of the corn, the latter can be applied to the satisfaction of that liability. If the bank is liable to the plaintiff, but is not the owner of the corn, the latter, of course, cannot be so applied. The liability is therefore the principal question involved, and the court cannot give judgment upon the verdict as it now stands. It must be supplemented by another finding as to the liability of the bank for a breach of the contract alleged in the pleadings, or, more correctly speaking, in the summons and the return of the justice, and the case will therefore be remanded, with direction to submit an issue or issues presenting that question. The verdict upon the issue as to ownership of the corn will not be disturbed. If the jury find for the plaintiff upon the new issue, he will be entitled to judgment, and to have the corn, or its proceeds, applied to the payment of the amount so found to be due; otherwise the bank will be entitled to the judgment.

Error.

(137 N. C. 431)

J. L. ROPER LUMBER CO. v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. Feb. 28, 1905.)

TRESPASS — STIPULATION AS TO FACTS — EFFECT — REFERENCE BY AGREEMENT — ISSUES — EFFECT OF VERDICT — NOMINAL DAMAGES — COSTS.

1. In an action for trespass on land, the parties prepared issues for submission: "(1) Is the plaintiff the owner of the land described in the complaint, or any part thereof? (2) If so, what part?"—and at the same time stipulated in writing that, "if the jury should answer the first issue 'Yes,' then it is admitted that defendant has trespassed." *Held*, that the stipulation was binding on the parties, whether the question of trespass was involved in the first issue or not, or whether defendant understood such question to be involved.

2. A party to an action is bound by a stipulation as to facts made by his attorney of record.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 155-160.]

3. Code 1883, § 398, provides that an issue of fact must be tried by a jury unless a jury is waived or a reference is ordered. Section 416 provides that trial by jury may be waived by the parties to an issue of fact in actions on contract, "and with the assent of the court in other actions." Section 420 provides that, except in certain actions, all or any of the issues "may be referred" on the written consent of the parties. Const. art. 4, § 13, provides that in all issues of fact "the parties may waive the right to have the same determined by a jury." *Held* that, in an action for trespass on land, the amount of damages cannot be referred for determination by stipulation of the parties without the consent of the court.

4. In an action for trespass on land, counsel agreed that, if the jury should answer the first issue submitted as to title "Yes," then it was admitted that defendant had trespassed, and that the amount of damages should be ascertained by reference. The first issue was whether plaintiff was the owner of the land described in the complaint, or any part thereof, and was answered "Yes." The second was, "If so, what part?" The court, of its own motion, submitted a third issue—as to whether defendant had trespassed on land described in the complaint, and which was inside a certain grant to plaintiff—and this issue was answered "No." *Held*, that as the agreement must be enforced in so far as it can be reconciled to the verdict, and so much of either be rejected as conflicts with any valid portion of the other, plaintiff is entitled to nominal damages under the agreement; rejecting the clause in the agreement as to a reference, and the finding of the jury on the third issue.

5. Where a judgment is reversed for error to which an exception was duly taken, appellant is entitled to costs on appeal, though he recovers only nominal damages.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 900-907.]

Petition for rehearing. Petition allowed on plaintiff's appeal, and dismissed on defendant's appeal. For report of prior opinion, see 47 S. E. 757.

This is a petition to rehear the above-entitled case which was decided at February term, 1904, and is reported in 135 N. C. 744, 47 S. E. 757. The action was brought to recover damages for cutting timber on land which plaintiff alleges was owned by it at the time the trespass was committed by the defendant, and to which it claimed ownership by virtue of a grant to Weeks and Valentine, and mesne conveyances by which it acquired the title so granted and conveyed to them. The defendant, not denying that plaintiff is the owner of whatever land is covered by the Weeks and Valentine grant, denies that the grant includes any part of the land on which it has cut any timber, though it admits that it has cut timber on a tract of land in the lower part of Camden county, which it had a lawful right to cut, as it owned the land. Issues were submitted to the jury, which, with the answers thereto, are as follows: "(1) Is the plaintiff the owner of the land described in the complaint, or any

part thereof? Yes. (2) If so, what part? Ans. All the land conveyed to Weeks and Valentine by accurate measurement, except the M. D. Gregory and Joseph Burgess grants. (3) Has the defendant cut timber or committed other acts of trespass on the land described in the complaint, and inside the Weeks and Valentine grant? Ans. No." Before these issues were submitted, the parties, through their counsel, in open court, entered into the following agreement in writing: "In this cause it is agreed that, if the jury should answer the first issue as to title 'Yes,' then it is admitted that defendant has trespassed, and the amount of damages is reserved to be considered by a reference under the Code." This agreement was filed with the papers, and made a part of the roll in the case. After all the evidence was introduced, and after all the speeches had been made, except the last speech on each side, the court decided to submit the third issue, and to restrict the consideration of the jury, under the first issue, to the question of title as conveyed by the grant and deeds under which the plaintiff claimed, and under the third issue to the location of the said grant and deeds. Counsel on both sides had, prior to this ruling, argued the question of the location of the grant and deeds under the first issue, treating it as involved in that issue. The plaintiff objected to the third issue, the objection was overruled, and the plaintiff excepted. Evidence was introduced by the plaintiff tending to show that the grant and deeds covered the locus in quo, and defendant introduced evidence tending to show that they did not. The court charged the jury upon the first issue that the grant and deeds were sufficient to vest the title to the land described in the complaint in the plaintiff, and that, if they believed the evidence, they should answer the first issue "Yes"; that they should not consider the question of location, under that issue, but simply the question of title, as the location should properly be considered under the third issue. As to the third issue, the court charged that, if the plaintiff had located its land by the evidence, the jury would answer the issue "Yes"; otherwise "No." Plaintiff excepted. The plaintiff then insisted that the submission of the third issue, in view of the agreement of counsel, was erroneous, and that the court should instruct the jury to answer that issue "Yes," in accordance with the admission in the agreement. After the return of the verdict the plaintiff moved to strike out the third issue, and the answer thereto, as immaterial, and for judgment declaring the plaintiff to be the owner of the land, as agreed by the jury, and ordering a reference to ascertain the damages. The court refused to order a reference, and entered judgment declaring that the plaintiff was the owner of the land, in accordance with the findings of the jury, and further adjudged that the plaintiff take nothing by its suit, but that

defendant go without day, and recover of plaintiff the costs of the action. Plaintiff excepted and appealed.

Rodman & Rodman, W. M. Bond, and Shepherd & Shepherd, for petitioner. E. F. Aydlett and W. W. Clark, for respondent.

WALKER, J. (after stating the case). When this case was before us at a former term, the learned justice who wrote the opinion of the court assumed in the course of the argument that the first issue, as prepared at the time of the agreement of counsel, embraced all the land described in the complaint, and called for a finding of the jury as to whether the plaintiff was the owner of all, and not merely the owner of a part, thereof, and that afterwards the issue was so divided as to require the jury to determine not only whether the plaintiff owned all the land, but, if it did not, whether it owned any part thereof. And so the court thought at the time. It now appears that no change was ever made in the first issue. It is in precisely the same language now as it was when the agreement was made. The erroneous assumption of the court led to the conclusion that the agreement of the counsel had been annulled, as the change in the form and substance of the issue rendered the contingency upon which the admission was to operate impossible. The fact is that, as the agreement and the first issue were drawn, the parties intended, as the law construes their agreement, that, if the jury answered "Yes" to the first issue (that is, if they found that the plaintiff was the owner of the land, or any part thereof), the defendant had trespassed upon the land described in the complaint, and in that event there should be a reference to assess the damages. The court was led into a misapprehension of the true state of the issues, we suppose, by reason of the fact that the second issue required the jury to find what part of the land was owned by the plaintiff, if it owned not all but only a part thereof. But that was one of the issues when the first issue was prepared and when the agreement was drawn, and was intended only to complete and perfect the finding under the first issue, if the jury answered that the plaintiff was the owner only as to a part of the land. It now appears most clearly that the first issue was never so drawn as to be confined to all the land, and require a response only as to the entire tract, but has remained intact from the beginning to this time, and required the jury to find whether the plaintiff was the owner of the land, or any part thereof. The jury answered that issue "Yes," and therefore the agreement between the parties became operative, but, as we will presently see, not in its entirety.

The defendant contends that we should not enforce the agreement, as the parties contemplated at the time that the question

of trespass should be tried under the first issue, or, in other words, should be considered as of the substance of that issue, and a material part of it. We cannot so hold. We are not permitted to introduce any new provision into the agreement of the parties without the consent of both, nor can we embody in the issue something that, in law, constitutes no part of it, without a like consent of the parties. We cannot make a contract for the parties, but only construe it as they have themselves made it. Their words must be given their natural and ordinary meaning, and in this case the issue referred to in the agreement must be interpreted according to its plain legal import. How an issue as to ownership can involve the question of a trespass on the land, we are unable to conceive. If the plaintiff is the owner of the land, he has the constructive possession of it, which will support an action of trespass to recover damages for an unlawful invasion of his right, but this does not include the idea that the defendant has made an unlawful entry on the land. Therefore it follows that the question of trespass was not germane to the first issue, and we cannot consider it in passing upon the agreement of the parties. The fact, if conclusively established, that the parties actually intended to try that question under the first issue, would not help the defendant. It is not the understanding, but the agreement, of the parties that controls, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled. *Brunhild v. Freeman*, 77 N. C. 128; *Pendleton v. Jones*, 82 N. C. 249; *Prince v. McRae*, 84 N. C. 674; *McRae v. Railroad*, 88 N. C. 526, 43 Am. Rep. 745; *King v. Phillips*, 94 N. C. 555. In *Bailey v. Rutjes*, 86 N. C. 520, it is held that, however reasonably one of the parties to an agreement may be induced to act with reference thereto in a particular way by the conduct of the other, the latter is not bound by such conduct, as evincing the measure of his contractual duty or obligation, unless there is some equitable element or an estoppel involved, which, in law, binds him, by his conduct, to assume that duty or responsibility, as if he had expressly promised to do so. To the like effect is *Thomas v. Shooting Club*, 121 N. C. 238, 28 S. E. 293. The same idea is differently expressed in *Gregory v. Bullock*, 120 N. C. 262, 26 N. E. 820, namely, when the terms of an agreement are ascertained, its effect is determined by the law, and does not depend upon the uncertain or undisclosed notion or belief of either party. But the case of *Stump v. Long*, 84 N. C. 18, would seem to be conclusive against the defendant upon this point. In that case the plaintiff had instituted proceedings supple-

mentary to execution against the defendant. During the course of those proceedings the parties agreed to the appointment of a receiver, and an order by consent appointing a receiver to take charge of defendant's assets, and apply the same to the payment of his debts, was accordingly entered; nothing being said therein about defendant's exemption. He afterwards asked the court to modify the order by providing for his exemptions, upon the ground that his counsel had misunderstood him, and that he did not intend to waive his exemption, and did not believe that he had done so. The court refused the application, and, after holding that the defendant was bound by the act of his attorney, who had implied authority to consent to the order, it proceeded, by *Ruffin, J.*, who wrote the opinion, to say: "We are bound, then, to treat the case as if the petitioner had been actually present and given his assent to the order as drawn. He agreed to it because his attorney did. Can a party, after having given his assent to a judgment or order of the court, be afterwards heard to say that such assent had proceeded from a mistake on his part as to the effect thereof, and for that reason have the same modified? If so, then the court would be making a consent judgment for the parties, not according to the agreement of both, but according to the understanding of one of them. If this was a bill for the correction of a mistake in a deed, the plaintiff could get no relief upon the facts stated in his application, for in such a case one of two things must appear—either that the mistake was that of both the parties, or that of one, with a fraudulent concealment on the part of the other. There is no pretense here of any fraud or mutuality of mistake, and we cannot see why the same principle does not apply." That the parties are bound by the acts of their attorneys of record in making agreements is too well settled to be now disputed. *Morris v. Grier*, 76 N. C. 410; *White v. Morris*, 107 N. C. 92, 12 S. E. 80; *Stevenson v. Felton*, 99 N. C. 58, 5 S. E. 399. Nor are we able to see why the admission of the trespass was made, if the first issue involved that question, because, if it did, an affirmative response by the jury would have determined the mere fact of trespass as certainly as any agreement of the parties could have done, however explicitly it may have been drawn. It was just because an answer to that issue did not, in law, include any such finding, that the defendant made the admission. At least, it so appears to us.

While we are compelled to enforce the agreement, we do not concur with the plaintiff's counsel in his view as to its scope and extent. Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into, and are committed to writing, and when, too, they bear directly upon the mat-

ters involved in the suit. Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them as substitutes for legal proof, and there is no good reason why they should not. "Admissions of attorneys bind their clients in all matters relating to the progress and trial of the cause, and are, in general, conclusive." 1 Greenleaf on Ev. 186. "Unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission, which the court will proceed to act upon, not as the truth in the abstract, but as a formula for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice." Id. 206; Wharton on Ev. 1184, 1185, 1186. While this is so, the court will not extend the operation of the agreement beyond the limits set by the parties or by the law. The agreement in this case contains two branches: The first is an admission of a fact, to wit, that defendant had trespassed; the second is a stipulation to refer the question of damages. The parties had the right to make the admission, but did they have the right to agree to the reference without the assent of the court thereto? By Code 1883, § 416, it is provided that trial by jury may be waived by the parties to an issue of fact in actions on contract, and, with the assent of the court, in other actions. This section appears under the chapter entitled "Trial by the Court," and that chapter further provides for the trial of the issue by the court when a jury trial is waived. Section 398 provides that an issue of fact must be tried by a jury unless a trial by jury is waived under section 416, or a reference is ordered. Section 420 provides that all or any of the issues, whether of fact or of law, or both, "may be referred," upon the written consent of the parties, except in actions to annul a marriage or for divorce and separation. This section is in the chapter entitled "Trial by Referees." The Constitution (article 4, § 13) provides "that in all issues of fact joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict of the jury." We do not think it was intended by this provision that the waiver should operate, proprio vigore, and without the assent of the court, to dispense with a trial by jury. The Constitution confirmed and guaranteed the ancient right of trial by jury, and section 13 of article 4 was intended merely to permit that right to be waived, and to substitute the findings of the judge for the verdict of the jury, with all the force and conclusiveness of the latter. To extend its effect and meaning so as to take away the power and jurisdiction of the court to control its own proceedings, as it had theretofore been ac-

customed to do, is a construction not required by the exigencies of the case. What is said arguendo in *Stevenson v. Felton*, 99 N. C. 58, 5 S. E. 399, does not militate against this view, and, if it did, we can easily see that such a question was not at all involved in that decision. In that case the judge who ordered the reference had, of course, assented thereto, and it was not competent, as the court correctly decided, to another judge to set aside the report of the referee upon the ground that the reference was improperly ordered by his predecessor. The Constitution provides only for a trial by the court upon waiver of a jury trial, and says nothing about a reference. Unless restricted by that instrument, as it is not, the Legislature undoubtedly had the right to provide not only that there should be no waiver of trial by jury in actions other than actions on contract, without the assent of the judge, but it could also provide that all references should be with his consent. Any other conclusion would, we think, be contrary to the accepted construction of the Constitution and statute, as indicated by the uniform practice in the courts since their adoption.

While we have not been able to find any case in our own Reports directly bearing upon this question, there are cases which have been decided in the other states, upon substantially similar constitutional and statutory provisions, which sustain the views we have expressed. In *Wittenberg v. Onsgard* the court thus refers to the subject: "The authorities are generally, if not uniformly, to the effect that the judge may disregard the waiver of a jury by the parties, and, on his own motion, require the issues of fact to be submitted to a jury; that this is a matter addressed to his sound discretion." Citing *Burke v. Breazeale*, 1 Rob. (La.) 73, and other cases. The court further says: "The authorities seem to be also to the effect that a waiver of jury trial, so long as not yet acted on, may be withdrawn, with the consent of the court, and a trial by jury demanded; at least where the withdrawal will not prejudice the opposite party. All that is decided in *State v. Bannock*, 53 Minn. 419, 55 N. W. 558, is that the waiver cannot be recalled at will or as a matter of right. The law zealously guards the right of trial by jury. Waivers of the right are always strictly construed, and are not to be lightly inferred or extended by implication. It is reasonably apparent that the waiver of a jury in this case was made only with reference to the exigencies of the then current term of court, and should not be extended so as to apply to a subsequent term. The action of the court in ordering the case to be tried by a jury may be sustained on any of these grounds." 78 Minn. 348, 81 N. W. 16, 47 L. R. A. 141. "The right of trial by jury is deemed a valuable right, and is guaranteed in actions at law by our Constitution. The effect of the above statutes merely is to

allow the parties to waive that right, if they should see fit to do so; but they do not extend so far as to oblige the judge to try the issues of fact in a case at law, although requested so to do by both parties, if he should deem it a proper case for trial by a jury. Ordinarily the judge will accede to the wishes of the parties where they waive a jury, and try the issues of fact himself [or, it may be added, will refer the same]; but there may be reasons in the breast of the judge why he should call a jury, although parties may prefer that the issues should be tried by him [or referred]. Whether he will do so seems to be, like many other matters relating to the conduct of civil trials, a question for the exercise of a sound discretion on his part, which exercise of discretion will not be reviewed on appeal, except in manifest cases of abuse. Not only is there no abuse of discretion apparent in this case, but, as the question is here presented, the very statement of it seems to suggest its answer. What more is it then, than the case of one party to an action at law objecting that the facts were tried and ascertained in the usual mode pointed out by the Constitution and the laws?" *McCarthy v. Railroad*, 15 Mo. App. 388. "The court, however, has the right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury. Besides this, it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues of fact being tried by a jury instead of by the court. [Citing *Doll v. Anderson*, 27 Cal. 249.] The action there, as in the case at bar, was upon a contract." *Bullock v. Lumber Co. (Cal.)* 31 Pac. 367. Even if it were not for these authorities, and for what we conceive to be the reasonable construction of the Constitution and statute, we would still be reluctant to hold that it was intended to deprive the trial court of a function so essential to its efficiency, and so important in every well-regulated system of judicial procedure, unless compelled to do so by the expression of that intention in a clear and unmistakable manner.

Having reached the conclusion that the court had the power to submit the third issue notwithstanding the agreement of counsel, it only remains to be considered what effect that issue and the response of the jury there-to have upon the result. The agreement admitted the fact of a trespass, and to this extent it is valid and effective, and the court could not in any way disregard it. The issue directs the jury to inquire not only whether the defendant had cut any timber on the land described in the complaint, inside the Weeks and Valentine grant, which was the particular trespass alleged, but whether defendant had committed any other acts of trespass. The finding of the jury, so far as it is responsive to the last branch of the issue, is in direct conflict with the agreement of the parties as to the technical trespass, and must be disregarded; but the finding that there had been no substantial trespass upon the

land is not at variance with any valid stipulation of that agreement, and it must stand, and receive from us its proper weight in the determination of the case. The agreement ascertains only that there has been a trespass; that is, a technical violation of the plaintiff's right, or a simple invasion of his possession. Nothing else appearing, this would entitle plaintiff to nominal damages only, and, as the finding of the jury excludes the existence of actual damages, the recovery must be confined to that compensation which the law gives for the technical wrong, or, in other words, to nominal damages. *Chaffin v. Mfg. Co.*, 135 N. C. 95, 47 S. E. 226; s. c., on rehearing, 136 N. C. 364, 48 S. E. 770. While we will enforce the agreement, it must be done only to the extent that it does not interfere with the legitimate powers of the court; and, as the court submitted the issue in the rightful exercise of its authority or jurisdiction, we must reconcile the verdict upon the third issue and the agreement, if it can be done, and reject so much of either as conflicts with any valid portion of the other, and in doing so the result is that plaintiff is entitled to a judgment for nominal damages by virtue of the agreement and non obstante veredicto—both the clause in the agreement as to the reference, and the finding of the jury that not even a technical trespass had been committed, being rejected. *Harris v. Sneed*, 104 N. C. 369, 10 S. E. 477.

We do not agree with counsel in the contention that the jury have found by their answer to the first issue that plaintiff is the owner of the land on which the timber was cut. Defendant says in its answer that it has cut no timber on the land described in the complaint, and the jury have so found. The plaintiff must have shown, even if there had been a reference, that the cutting of timber was done on its land, as described in the complaint, in order to recover actual damages. The agreement goes no further than to admit a technical trespass. There may have been such a trespass on the lands described in the complaint, and yet not a tree have been cut, or other substantial injury done on the land. Because the defendant is admitted to have trespassed upon the lands described in the complaint, it does not follow, therefore, that those are the same lands upon which defendant cut the timber. Indeed, the verdict would seem to show that no trespass at all was committed; but we are bound by the admission to hold that there was a trespass, though there was none in fact, or at least a technical though not a substantial trespass. *Harris v. Sneed*, *supra*.

The former decision is modified in accordance with this opinion, and judgment will be entered in the court below in favor of the plaintiff for a penny and the costs. As there was, in contemplation of law, substantial error in the judgment of the lower court, to which exception was duly taken, the plaintiff is also entitled to costs in this court, al-

though it does not recover more than nominal damages.

Petition allowed.

Defendant's Appeal.

The plaintiff has also asked us to rehear the decision in this appeal, though no separate petition has been filed, as should have been done. From an examination of the record and the former opinion, it appears that two points only were made and considered by the court, namely: (1) Is the act of 1889, p. 256, c. 243, § 3, amending section 2522 of the Code, constitutional? This involved the question whether the Legislature could by said act declare a forfeiture of land to the state, and vest title to the same in the board of education, for failure to list and pay the taxes properly assessable against it, without provision for some judicial inquiry before condemnation or forfeiture. We decided then (135 N. C. 742, 47 S. E. 757), as we had before in *Parish v. Cedar Co.*, 133 N. C. 478, 45 S. E. 768, after an able and exhaustive discussion of the subject by Douglas, J., for the court, that no such power existed, as it would be a violation not only of the natural but of the constitutional right of a citizen to take his property without notice, hearing, or judgment. We adhere to the decision, which by the way, was in favor of the plaintiff; and we take it that he does not intend to except to that ruling, but to the one we are now about to consider.

We further decided that it was error to include in the judgment a declaration, although pursuing the language of the verdict upon the first and second issues, to the effect that the plaintiff is the owner of the land inside the Weeks and Valentine patent, not including any part of the land described in the Gregory and Burgess grants, because this is not an action for the recovery of real property (ejectment), but solely for the recovery of damages for an unlawful entry upon the land described in the complaint (trespass). The issue as framed was not appropriate to an action of trespass, which should be, substantially, did defendant trespass upon the land of the plaintiff, as alleged in the complaint? And this, coupled with an issue as to the damages, is quite sufficient to present the matter in dispute. Proof of title may be competent under the first of those issues, but an inquiry as to the title is no part of the issue itself. The form of the issue, though, worked no harm to the plaintiff, as the answer of the jury merely ascertained that, being the owner, the plaintiff was entitled constructively to the possession which will support trespass for any injury to the close. But the fact so found by the jury was not proper to be stated in the judgment, and it was ordered by this court to be stricken out. We do not now see any error in this ruling. The plaintiff's recovery must be limited to nominal damages for the admitted technical trespass and

the costs, as we have held in the plaintiff's appeal, and this is all that should be stated in the judgment.

There is no other ruling of the court below, as far as appears in the defendant's appeal, which prejudiced the plaintiff, or to which he is entitled to take exception. This dismisses his petition.

Petition dismissed.

HOKE, J. (concurring). I do not understand the proceedings in the court below in the same way as stated in the opinion of the court, nor put exactly the same interpretation upon them. The parties litigant had a right to make the agreement set out in the case, and the court was required to accept it. But in my judgment, there is nothing to indicate that the agreement has been disregarded, for the reason that, by the finding of the jury, the agreement never came into effect. As the issues were originally drawn, the first two were addressed to the question of title, and, on the pleadings, there were two additional issues—one to the question of trespass, and one to the amount of damages. There were two elements in this question of title: (1) That the claimant should connect himself with the state grant by valid and proper deeds; (2) that the claimant should locate the deeds so as to cover the land in controversy. Instead of submitting these two elements of title in the issues as framed, his honor had the second element determined by the jury on a third issue framed by himself. This was, no doubt, done because the court thought the evidence addressed to the question of location could be more clearly presented by a charge on the issues as framed by him. The issue was unfortunately worded, because in its terms the same is in apparent conflict with the agreement of the parties. But it is not really so. The true interpretation of the agreement was simply to this effect: That, if the parties plaintiff could show title covering the land in controversy, then the defendant admitted the physical act of trespass, and the question of amount should be referred. The verdict on the issues determined that, while the plaintiff had a line of deeds connecting him with the Weeks and Valentine grant, he had not been able to locate either the grant or the deeds, and therefore had shown no title covering the locus in quo. The facts stated in the case on appeal and the charge of the court show clearly that on the third issue the parties debated the question of location, and the jury determined that the plaintiff had failed to locate any land. Note the charge of the judge on the issues: (1) That upon the first issue they were to consider only whether the plaintiff had title to the Weeks and Valentine grant, and he further charged that the grant and the deeds introduced by the plaintiff were sufficient to pass that title, and if they believed the grantors in the deed to the plain-

tiff were the heirs of Jacob Valentine—and, if they believed the evidence, they were—then it was their duty to answer the first issue “Yes.” (2) That they were not to take into consideration, in answering the first issue, the location of the grant, but it was only a question whether or not the plaintiff had the title to the land of the Weeks and Valentine grant, without reference to the fact whether or not it could be located; that, under the issues as now submitted by the court to the jury, the question of title simply arose under the first issue, as to the land described in the complaint; that its location was to be considered by the jury in passing upon the third issue. (3) The court charged the jury upon the third issue, among other things, that, when they came to consider the same, they would consider whether or not the plaintiff had located its land; that, if they find from the evidence that the land was not located, they would answer it “No”; if they find the plaintiff had located it, then they would answer it “Yes.” Under the charge the jury answered the third issue “No.” This shows that on the third issue the jury passed upon the question of location, and determined that the plaintiff had shown no title covering the land. The agreement, which was simply as to acts of physical trespass, in case this was done, never came into operation. I think that, on the verdict, the judgment should simply be that the defendant go without day and recover costs. Inasmuch, however, as the judgment of the court substantially carries out the results of the trial as understood and contemplated by the parties, I concur in the decision as made.

(137 N. C. 497)

HANCOCK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. March 8, 1905.)

TELEGRAMS—FAILURE TO DELIVER—LAWS GOVERNING CONTRACT—QUESTION FOR JURY—MENTAL ANGUISH—EVIDENCE OF DAMAGES.

1. Where a telegram is delivered to the company in one state to be transmitted to another state, the validity and interpretation of the contract of transmission and delivery, as well as the measure of damages for its breach, are to be determined by the laws of the former state.

2. The testimony as to the law of another state, consisting of the deposition of an attorney as to what he believed it to be, is to be passed on by the jury as to its credibility and value.

3. Mere “disappointment and regret” is not the “mental anguish” for which damages may be recovered, but the latter is a high degree of mental suffering.

4. The mental anguish naturally arising from the loss of a relative is no part of the mental anguish for which recovery may be had of a telegraph company for its negligence in transmission and delivery of a telegram announcing the death.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 64, 69, 70.]

5. In an action for mental anguish for failure to deliver a telegram sent by plaintiff to his father announcing his coming with the body of his brother, the contention being that, if it had been delivered, his father would have met him promptly, and all preparations would have been made, so that the interment would have taken place seven hours earlier than it did, plaintiff must prove that the father could and would, had the telegram been properly delivered, have met him promptly and had the necessary arrangements made, avoiding the delay, there being no presumption that he could have done these things.

Appeal from Superior Court, Craven County; Council, Judge.

Action by H. S. Hancock against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed.

Civil action for damages on account of mental anguish. The court submitted the following issues: “(1) Did the defendant negligently fail to transmit and promptly deliver plaintiff’s telegram as alleged in the complaint? Ans. Yes. (2) What damages has plaintiff sustained by reason of defendant’s nondelivery of such telegram? Ans. \$300.” The defendant appealed from the judgment.

F. H. Busbee & Son and W. W. Clark, for appellant. W. D. McIver, for appellee.

BROWN, J. We gather from the record these facts: The plaintiff and his brother resided in North Carolina, and their father, S. M. Hancock, at New Church, Va. The family burial ground is Goodwill Cemetery, in Maryland, 8 or 10 miles from the father’s home. Its nearest depot is Pocomoke City, Md., $4\frac{1}{2}$ miles away. New Church and Pocomoke City are about 11 or 12 miles distant. On Saturday, July 11, 1903, the plaintiff was at Johns Hopkins Hospital, with his brother, Thomas, and his wife. Thomas had gone there for an operation, under which he died. At the defendant’s office in the hospital, about 6 p. m. Saturday, the plaintiff filed a telegram as follows: “S. M. Hancock, New Church, Thomas dead. Will arrive at Pocomoke 3 a. m. H. S. Hancock.” This telegram was not delivered until Monday, 13th. There being no earlier train, the plaintiff, with his brother’s body, and the widow, arrived at Pocomoke City Monday morning a half hour late, at 4 o’clock. A storm prevailed, which prevented the plaintiff leaving the train until 6:30 a. m. There was no one to meet him, and no preparation had been made for the burial. The plaintiff again telegraphed by the Postal Company to his father, who arrived between 9 and 10 a. m. Preparations were made, and the interment took place about 5 p. m.

1. The contract in this case was made in Maryland, and the contracting parties are presumed in law to have had in contemplation only such damages arising from the breach of it as could be awarded under the law of Maryland at the date of the telegram.

In this case the sender was in Maryland at the time he filed his telegram. The sendee was in Virginia. The defendant, we judge by depositions in the record, was under the belief that the law of Virginia in some way affects this contract. The law of Virginia has no relation to it. If a telegraphic message is delivered to the company in one state to be transmitted by it to a place in another state, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former state, where the contract originated. *Bryan v. Tel. Co.*, 133 N. C. 607, 45 S. E. 938, citing *Reed v. Tel. Co. (Mo.)* 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609. If, under the law of Maryland, as interpreted and expounded by its highest court, damages on account of mental anguish, not connected with or growing out of a physical injury to the plaintiff's person, could not be awarded, then the plaintiff in this action can recover only the costs of the telegram and costs. Where, as on the trial had in this case, the defendant relied upon the testimony of an attorney at law in Maryland, who testified by deposition as to what he believed the law of that state to be, the court very properly submitted to the jury the testimony to be passed on by them as to its credibility and value. If the jury render a verdict in any case contrary to the clear weight of the evidence, the remedy is, and it is the duty of the trial judge, to set it aside; but we cannot ordinarily review the exercise of such power. Possibly the jury were not satisfied from the deposition of the attorney (Mr. Cross) as to what is the law of Maryland. The defendant will have an opportunity on the next trial to further enlighten the court and jury more specifically upon the law as to the proper measure of damages for mental anguish as it is administered in Maryland.

2. The judge, among other things, charged the jury that: "Upon the question of damages, the message upon its face disclosing its urgency and relating to death, the defendant had notice that a failure to deliver might reasonably cause mental anguish to the sender; and in such case the damages for mental anguish are such damages as the jury shall find the plaintiff has suffered from disappointment and regret occasioned by the fault or neglect of the company in its failure to notify the sendee, in order that preparations and arrangements might be made for the reception and interment of the body." The court erred in using the words "disappointment and regret." There is a very material difference between the significance of those words and that keen and poignant mental suffering signified by the words "mental anguish." The right to recover damages for purely mental anguish not connected with or growing out of a physical injury is the settled law of this state, and it is too late now

to question it. Our authorities are up to this time uniform and unanimous as to the general doctrine. Differences, of course, arise as to its application in particular cases. *Young v. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, to *Hunter v. Tel. Co.*, 135 N. C. 459, 47 S. E. 745. The language used in nearly all the cases in this and other states where such damages are allowed is "grief and mental anguish." We do not find anywhere that damages are allowed for "disappointment and regret." The lexicographers define anguish to be "intense pain of body or mind." It is derived from the Latin words "angulus," a snake, referring to the writhing or twisting of the animal body when in great pain. *Stornmouth's Dict.* Mr. Justice Douglas, speaking for the court, said: "We use the word 'anguish' as indicating a high degree of mental suffering, without which the plaintiff could not recover substantial damages. Mere disappointment would not amount to mental anguish, or entitle the plaintiff to more than nominal damages." *Hunter's Case*, 135 N. C. 459, 47 S. E. 745. The addition of the word "regret" by his honor does not help the matter. Regret indicates no greater degree of mental suffering than does disappointment. Both are of very frequent occurrence in the lives of most men, and with some scarcely disturb their mental poise. In this connection we desire to supplement what was said by Judge Douglas in *Hunter's Case* as to what particular mental anguish is to be considered by the jury in awarding damages. Jurors may possibly confound the mental anguish naturally arising from the loss of a near relative with that which grows out of the defendant's negligence. The jury have no right to consider anything except the latter in awarding damages. We commend to the careful consideration of the superior court judges the language of the opinion in the *Hunter Case* upon that subject, and that they explain the law in reference thereto with great care to the juries, whether requested to do so or not, lest injustice be done the defendant by confounding the natural grief at the loss of a near kinsman with that anguish which is claimed to result from the negligence of telegraph companies.

3. The judge charged the jury that they might consider the failure of the father to arrange for the interment of the deceased, if they should find from the evidence that such arrangements would naturally be presumed to have been made by the sendee if the telegram had been delivered prior to the arrival of the train on Monday. It is plain that the plaintiff has no cause for complaint that his father did not meet the 3 a. m. train Sunday, for the plaintiff did not arrive until Monday at 4 a. m. The only contention the plaintiff makes is that, if the telegram had been delivered with reasonable promptness, his father would have met him promptly on Mon-

day morning, and would have had all arrangements made for the interment, so that it would not have been delayed from about 10 a. m. until 5 p. m. Monday, in consequence of which delay the plaintiff avers he suffered great mental anguish, and claims damages on that account. The plaintiff must therefore prove that his father could and would have met him promptly on Monday morning on arrival of the train at 4 o'clock, and that he could and would have made on Sunday, or prior to the plaintiff's arrival, all necessary arrangements for the prompt interment of his brother's body on Monday morning, and avoided the delay in the obsequies from 10 a. m. until 5 p. m., thereby saving the plaintiff from the pangs of mental anguish which he avers he endured. The law does not presume that the father could have done these things. Many contingencies, such as illness, absence from home, inability to get the work done on Sunday, may have prevented, however willing the father may have been to discharge such a parental duty. There was no evidence tending to prove such facts, and the jury had no right to presume them. In *Bright's Case*, 132 N. C. 326, 43 S. E. 844, Justice Walker says, referring to defendant's objection to the testimony of Cooper, the addressee, that he would have gone to Wilkesboro had he received the telegram, that the testimony was not only competent, but indispensable; and uses the following language: "We are unable to understand why this is not competent. It tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plaintiff to prove in order to recover substantial damages; and it was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for the mental anguish which resulted from his failure to go to Wilkesboro."

As there is to be a new trial, it is unnecessary to consider the defendant's further exceptions. They relate to alleged errors that may not again occur.

New trial.

(137 N. C. 460)

H. G. WILLIAMS & CO. v. HARRIS, Sheriff.
(Supreme Court of North Carolina. March 8, 1905.)

TRIAL—INSTRUCTIONS—ABSTRACT PROPOSITIONS—EXCEPTIONS.

1. It is error to charge an abstract proposition of law not supported by any view of the evidence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

2. Under Code, § 550, providing that an appellant, within 10 days after judgment, shall prepare a concise statement of the case embodying the instructions, if there be an exception thereto, and Sup. Ct. Rule 27 (Clark's Code, p. 920), providing that appellant shall file his exceptions in the clerk's office within 10 days after the end of the term at which judgment is rendered, an

error upon the face of a charge may be availed of by an exception entered within 10 days after adjournment for the term, and is only waived by failing to enter such an exception within that time.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 680-682.]

Appeal from Superior Court, Edgecombe County; Moore, Judge.

Action by H. G. Williams & Co. against J. R. Harris. From a judgment for defendant, plaintiffs appeal. Reversed.

Bunn & Bunn and F. S. Spruill, for appellants. Gilliam & Bassett, for appellee.

CLARK, C. J. This is an action to recover one barrel of whisky. The evidence was that the plaintiffs shipped the barrel of whisky to one Cuthrell without any order from him, and without his knowledge; that he wrote plaintiffs at once that he had not ordered it, and would not receive it, but had taken it out of depot to save storage charges against plaintiffs, paying freight on it for them (which they paid back); that it was subject to their order, though, if they chose to let it stay till he should want it for use, he would take it, but could not use it at that time. To this plaintiffs assented by letter. Cuthrell never included the whisky in any settlement with plaintiffs, and on an execution against him declined to allow this barrel to be included in the allotment of his exemption, because not his property. The defendant is the sheriff who seized the property under execution against Cuthrell. The only issue found was whether the plaintiffs were the owners of the whisky, to which the jury responded "No." The court charged the jury that upon the evidence Cuthrell did not order the whisky, and that plaintiff's reply to Cuthrell's letter did not constitute a sale; but added that invoicing the whisky to Cuthrell was an offer to sell, and "if Cuthrell, in receiving it from the common carrier, and taking it into his possession, did so with the intention of accepting the offer thus made, this amounted to an acceptance, and vested title to the whisky in Cuthrell." This was excepted to. This instruction was unsupported by the evidence, which was uncontradicted that Cuthrell had then no such intention. Upon the question whether the subsequent offer by Cuthrell to hold the whisky till he should have use for it did not constitute a conditional sale, the court charged that the plaintiffs' reply was not sufficient to constitute such sale, and the defendant is not appealing.

It was error in the judge to give to the jury an abstract proposition of law not supported by any view of the evidence. *Brown's Heirs v. Patton's Heirs*, 35 N. C. 446; *King v. Wells*, 94 N. C. 344. It has been uniformly held by this court that a failure to instruct the jury that there is no evidence (cases cited in Clark's Code [3d Ed.] p. 511), or, indeed, an omission or failure to give any proper in-

struction, is waived unless there is a prayer for such instruction (Clark's Code [3d Ed.] p. 514, and numerous cases cited). But none the less, if there is an error in the instructions given, an exception thereto is valid if entered within 10 days after adjournment for the term. Code, § 550. An error upon the face of the charge (unlike a mere failure to charge, which is waived by not requesting an instruction) is only waived by not entering an exception thereto in the time allowed by law. Rule 27; Clark's Code (3d Ed.) pp. 512, 513, 777, 778, 920; Code, § 550. The instruction here given of a proposition of law without any evidence to support it (King v. Wells, 94 N. C. 344) was duly excepted to, and was error.

(137 N. C. 491)

KING et al. v. BYNUM et al.

(Supreme Court of North Carolina. March 8, 1905.)

**JUDICIAL SALE—INFLUENCE ON BIDDERS—
HEARSAY EVIDENCE.**

In a suit to hold the persons in whose name land was bought at a sale to pay the debts of testator, as trustees for all the persons to whom it was devised, it being claimed that the person who bid it off had agreed with his mother to buy it for the benefit of all of them, and that, because this agreement was known at the sale, no one else bid, testimony of a witness that the reason the land, which he said was worth \$2,500, brought only \$800 at the sale, was that it was understood the mother was to buy the land for the children, and people did not want to bid against her—"at least, several told me so"—is hearsay, in that it refers to what was told him after the sale; he having previously testified that he did not know whether there was any general understanding among persons present at the sale for whom it was to be bid in, or whether it was talked or understood among such persons that the land was to be bought for all the devisees, or whether that was the reason the land did not sell for more.

Connor, J., dissenting.

Appeal from Superior Court, Pitt County; Council, Judge.

Action by T. B. King and others against A. S. J. Bynum and another. Judgment for plaintiffs. Defendants appeal. Reversed.

Jarvis & Blow, for appellants. Skinner & Whedbee and Moore & Fleming, for appellees.

BROWN, J. Although the record in this case is voluminous, and the exceptions many, a brief statement only is necessary to a proper understanding of the exceptions of the defendants sustained by this court, in consequence of which a new trial is made necessary: R. A. Bynum, deceased, by his will devised the land described in the pleadings to the plaintiffs and defendants as tenants in common owning equal interests therein. The executor of R. A. Bynum, to wit, J. N. Bynum, instituted a special proceeding to sell this and other tracts of land belonging to the testator's estate to pay debts. At the sale made in pursuance of the decree in said pro-

ceeding, the defendant A. S. J. Bynum, called Zeb Bynum, purchased the tract of land described in the complaint, known as the "Askew Land," for \$800, and had it set down to himself and his brother and codefendant, Ben Bynum. They paid the purchase money, and a deed was made to them by the executor. The feme plaintiffs, Mary King and Priscilla Turnage, bring this suit to convert said defendants into trustees for their benefit in respect to one undivided fourth, each, of the land. The plaintiffs allege that they are tenants in common with the defendants; that the land was sold to pay the assessment agreed upon as necessary to liquidate the testator's debts; that the feme plaintiffs were minors, and their mother was their general guardian; that she was aged and infirm, and relied solely on Zeb Bynum, her son, to attend to her business affairs; that Zeb Bynum attended to the proceeding to sell the land, and represented the interests of the plaintiffs; that he agreed that this Askew land should be assessed at \$800, and agreed with his mother to buy it in for the benefit of all the owners thereof. The plaintiffs further alleged that it was known at the sale that the land was to be bid off for the mother by Zeb, and in consequence no one bid, and Zeb secured the land at \$800—worth \$2,500. Upon the trial the court below submitted two issues, one of which is: "(1) Did the defendants purchase the land described in the complaint for the joint use and benefit of themselves and the plaintiffs, their co-tenants, as alleged in the complaint?" Upon the trial of that issue much evidence was introduced.

We do not deem it necessary to consider the many interesting questions argued, or to pass upon all the exceptions in the record. As a new trial is to be had, they may not again arise.

There is one exception in the record which we feel compelled to sustain. That relates to the erroneous admission of evidence, and the error is of sufficient importance to justify another trial. (Exception 7.) P. J. Bynum testified for the plaintiffs that he was at the sale, and that "he did not know whether there was any general understanding among bystanders present as to who was bidding for the land, for whom it was to be bid in, and to whom it was cried off." In response to another question he again stated that he did not know "whether it was talked or understood among those present at the sale that the land was to be bought for all the children of J. P. Bynum [meaning the plaintiffs and defendants], and did not know that was the reason the land did not bring a larger price at the sale." This witness was then asked by the plaintiffs "why was it that the land you say was worth \$2,500 did not bring but \$800 at the sale?" The witness answered: "The reason was that it was understood my mother was going to buy the land for the children, and people did not want to bid against her; at least, several told me so."

The question and answer were both objected to in apt time by the defendants, and their objections were overruled, and they excepted. In the admission of this evidence we are of opinion there is reversible error; the evidence being both incompetent, very material, and well calculated to influence the jury in a manner prejudicial to the defendants. The objection to the evidence is that it is hearsay. We are of opinion that the evidence comes clearly within the rule prohibiting hearsay evidence, and that it is hearsay of a vague and indefinite character. The evidence of a person present at the sale as to what was done at the time of the sale, and as to the general understanding prevailing among the bidders and bystanders, tending to explain why the land sold for so small a price, is competent. We do not mean to hold otherwise. This witness does not pretend to testify to that. He states he was at the sale, but from his answers to the questions asked him, it is plain he did not undertake to testify to what occurred there. In response to questions by the plaintiffs for the purpose of eliciting such information, he stated he did not know. He was permitted, over the objection of the defendants, to state that several persons told him why it was the land sold for so little, viz., because it was understood the mother was to buy the land for the children. From the entire testimony of this witness, we are bound to conclude he referred to what "several persons" told him after the sale. This is evidently hearsay; the words not implying personal knowledge of the facts, but merely information derived from others. *Snodgrass v. Caldwell*, 90 Ala. 323, 7 South. 834. It is not under oath, not subject to cross-examination, not a part or *res gestæ*, and not in presence of the defendants, and could not be corroborative. The witness does not even give the names of those "several persons" who told him. "Evidence, oral or written, is called 'hearsay' when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 Am. & Eng. Enc. 520, and cases cited; *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; *State v. Haynes*, 71 N. C. 79. There are exceptions to this general rule excluding hearsay evidence laid down in the text-writers on Evidence, such as admissions, confessions, dying declarations, declarations against interest, ancient documents, declarations concerning matters of public interest, matters of pedigree, and the *res gestæ*. The most ingenious mind can hardly bring the testimony pointed out within any recognized exception to the general rule excluding hearsay evidence. 1 Greenleaf, Ev. Ch. 6 (13th Ed.) gives the recognized exceptions to the general rule. The case of *Cheek v. Watson*, 85 N. C. 196, is relied upon by the plaintiffs. The distinction is very apparent. In that case Chief Justice Smith says: "It

would seem this general impression controlling the conduct of bidders was susceptible of proof as a fact in the case. * * * If the offer was to ascertain from the opinion of one witness the opinion of others, it was properly refused." "If the purpose was to prove as a fact the influence operating on a large number of others, which restrained the brother-in-law from participating in the sale, it was certainly competent evidence in charging the estate thus acquired with a trust." This authority is well sustained by Judge Gaston's opinion in *Neely v. Torian*, 21 N. C. 410. The witness Bynum did not testify to what was the general understanding at the sale, as a fact. Under the high authority quoted, that would have been competent, had he known of his own knowledge gathered at the sale. He had already stated twice that he did not know what that general understanding was, and it was in response to the repeated questions of the plaintiffs' counsel that he stated finally why the land brought so little, and qualified what he said with the words, "At least, several persons told me so." This falls far short of proving as a fact within his own knowledge, gathered at the sale, what that general understanding was. To constitute reversible error, the evidence admitted must not only be incompetent, but it must be prejudicial and calculated to influence the minds of the jury against the appellant. In our view, the testimony was highly prejudicial to the defendants. The chief contention of the plaintiffs (in fact, before the jury, doubtless their strongest plea) was that the land was bought in by the defendants at a third of its value because the bystanders believed it was being purchased for the mother and the young girls, as well as for the defendants themselves, and therefore no one would bid. The hearsay evidence improperly admitted was well calculated to sustain this plea, and to greatly influence the minds of the jurors.

It is unnecessary to notice the other exceptions. They refer to alleged errors which may not arise on another trial. We deem it proper, however, to observe that the first issue is rather indefinite in form, and, while we do not formulate the issue, we suggest that the first issue tendered by the defendants more nearly presents the issue raised by the pleadings, but this is not intended to preclude the submission of others. The second issue is correct. While the plaintiffs in an action of ejectment would be confined to three years' rents and profits preceding suit, in this action it is necessary to ascertain the entire rents and profits. They can be charged off against the purchase money and betterments in case the plaintiffs shall finally succeed, if such claim is made by the defendants.

For the error pointed out, there must be a new trial.

CONNOR, J., dissents.

(137 N. C. 439)

DISOSWAY v. EDWARDS.

(Supreme Court of North Carolina. March 8, 1905.)

BONDS—ACTION—ISSUES—INSTRUCTIONS.

In an action on a bond given by the seller of a business to the purchaser, conditioned that defendant would not engage in the business in the town within a specified time, the first issue was whether the bond was an agreement to pay stipulated damages, and not a penalty, and the court charged that the question for the jury was whether the contract to pay stipulated damages, "the language of which is the substance of the bond entered into between the parties," was entered into at the time of the sale to plaintiff. *Held*, that the charge was erroneous, it being necessary that it appear that the sum named in the bond was for stipulated damages, and not a penalty.

Appeal from Superior Court, Craven County; Council, Judge.

Action by Mark Disosway against A. M. Edwards. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. D. McIver, for appellant.

CLARK, C. J. The defendant sold out his liquor business in New Bern to the plaintiff, and stipulated that he would not engage in said business in the limits of said town for the space of 20 years. He executed his bond in the sum of \$1,000, conditioned that, if he should violate that stipulation, "then this bond to be in full force and effect; * * * otherwise to be null and void." The first issue was whether such bond was, in substance, an agreement to "pay the plaintiff the sum of one thousand dollars as stipulated damages for the breach" of such stipulation. The court charged that the question for the jury was whether such contract (to pay stipulated damages), "the language of which is the substance of the bond entered into between the parties," was entered into at the time of the contract of sale made by the defendant to the plaintiff; that is, whether it was part of the trade and understanding between the parties. This was error. It was not merely essential that such contract should be made as a part of the contract of sale, but it must appear that the \$1,000 was for stipulated damages, and not a penalty. When the case was here before (134 N. C. 254, 43 S. E. 501) the court pointed out that the \$1,000 bond did not state that it was intended to cover stipulated damages; that the presumption was that it was a penalty, and this could be overcome only by evidence. And in *Wheedon v. Am. Bond. & Trust Co.*, 128 N. C. 69, 38 S. E. 255, it was held that, even if it had stated that it was for "liquidated damages," it would not be conclusive, but the true intention of the parties must be ascertained, whether in truth the sum stated was not in fact a penalty against which the courts would relieve upon ascertainment of the true damages. It is

true the second issue left it to the jury to determine whether stipulated damages were intended, but the judge on the first issue had already told them that was the purport of the bond. There are other exceptions, but it is not necessary to discuss them.

Error.

(137 N. C. 473)

CARRAWAY et al. v. STANCILL et al.

(Supreme Court of North Carolina. March 8, 1905.)

ACTION TO RECOVER REAL ESTATE—BOND REQUIRED OF DEFENDANT—FAILURE TO FILE BOND—JUDGMENT BY DEFAULT.

1. Clark's Code, § 390, provides that, in all actions for the recovery of real property, if defendant fails to file a bond conditioned for the payment to plaintiff of all costs and damages, including loss of rents and profits, plaintiff shall have judgment for the relief demanded in the complaint, unless defendant is excused from giving the bond before answer. *Held*, that where, in an action for the recovery of real estate, defendant in possession gave the bond, plaintiff properly asked no judgment against him.

2. The bond may be increased, in the discretion of the court, if defendant shows a disposition to delay the trial.

3. Where, in an action for the recovery of real estate, certain defendants are not in possession, their failure to file a bond under Clark's Code, § 390, is no ground for a judgment against them.

4. After foreclosure of a mortgage by the executor of the mortgagee, and sale under the judgment, the sole devisee and legatee of all the estate of the mortgagee, who claimed she had not been a party to the foreclosure, and the administrator de bonis non of the mortgagee, sued to recover the land, and damages for waste, as against the purchaser at mortgage sale, and to recover the mortgage debt and for foreclosure as against the administrator and heirs at law of the mortgagor. The purchaser, who was in possession, claimed that the purchase money paid by him had been applied to the mortgage, and that the plaintiff, legatee and devisee, had received the benefit of it. Defendants other than the purchaser filed no answer or bond under Clark's Code, § 390. *Held*, that a motion by plaintiffs for judgment against the purchaser for recovery of the land, and as against the others for judgment by default and for foreclosure, was properly denied, as an injustice to the purchaser, and as a judicial sale of the land before settling of the title would be a cloud on the same.

Appeal from Superior Court, Pitt County; Council, Judge.

Suit by G. W. Carraway and others against G. A. Stancill and others. From an order denying a motion for judgment, plaintiffs appeal. Affirmed.

Geo. M. Lindsay, for appellants. Moore & Fleming, for appellees.

BROWN, J. The plaintiffs moved the court, in writing, for judgment, under section 390 of Clark's Code, "for the failure of the defendants to file a bond required by law for defendants in actions to recover land; as against G. A. Stancill, for recovery of the land described in the complaint, without

damages; and, as against all of the defendants except G. A. Stancill, for judgment by default final for the debt set out in the complaint, and for foreclosure of the mortgage set out in the complaint, upon the ground that the defendants other than G. A. Stancill have been duly made parties and served with process, and the plaintiffs having filed their verified complaint, and the defendants having failed to appear either in person or by attorney, and having failed to file any bond or answer or demurrer." The court permitted the defendant Stancill, who is solely in possession of the land, to file the bond required. The motion was denied by his honor, and, as he states in the order, in his discretion. Plaintiffs excepted and appealed.

Notwithstanding the able and well-considered argument of Mr. Lindsay for the plaintiffs, we have no difficulty in reaching a conclusion that the court below committed no error.

It appears from the pleadings that on February 5, 1878, B. S. Atkinson executed a deed of mortgage to his mother, S. V. Whitehead, for \$19,200, with interest at 8 per cent. from date. Atkinson died intestate in 1884, and the defendant S. V. Joyner qualified as his administrator, and the other defendants (except G. A. Stancill) are his widow and heirs at law. His estate has never been settled. Prior to her death, which occurred in December, 1895, S. V. Whitehead instituted an action to foreclose said mortgage against the widow and heirs at law of Atkinson, which action was pending at her death. She made a will in which she devised and bequeathed to her granddaughter Inez B. Carraway (née Atkinson) one of the plaintiffs, all of her property, real, personal, and mixed, and appointed R. L. Davis her executor. He proved the will, and made himself a party to the action to foreclose the mortgage, and at November or December term, 1897, of Pitt superior court, a consent judgment was rendered. The plaintiff Inez B. Carraway, sole devisee and legatee for life under said will, claims that she was not made a party to the action. The judgment provided for a sale by a commissioner of the land conveyed by the mortgage. The sale was made by the commissioner, and the defendant G. A. Stancill became the purchaser. The sale was reported and confirmed, and Stancill went into possession, and is still in sole possession. This action is brought by G. W. Carraway and wife, Inez, Geo. M. Lindsay, administrator d. b. n., c. t. a., of S. V. Whitehead, to recover the land, and damages for waste, as against G. A. Stancill, and to recover the debt due by the mortgage, and for foreclosure as against the defendants, the administrator and heirs at law of B. S. Atkinson. The defendant Stancill employed counsel to file an answer. The administrator and heirs at law filed neither answer nor bond.

From these facts appearing in the complaint of the plaintiffs and the answer of the

defendant Stancill, it will be seen that the plaintiff Inez Carraway seeks to recover possession of the land from defendant Stancill, and in the same action G. M. Lindsay, administrator of S. V. Whitehead, seeks to recover a judgment on a certain note, and to foreclose a mortgage securing said note on the same land, which note and mortgage were given to S. V. Whitehead by B. S. Atkinson, deceased, who was a former owner of the land. The defendant Stancill is the only person in possession of the land, and, as far as we can see, is the only defendant who is interested in setting up a defense and traversing the allegations in the complaint.

It is true, the defendant Stancill had not filed the bond required by section 390 of Clark's Code, securing the rents and profits of the land; but his honor, in his sound discretion, permitted it to be filed, and therefore the plaintiffs properly asked no judgment against Stancill. Clark's Code (3d Ed.) § 390, and cases cited. The bond required by section 390 is not for costs only, but secures to the plaintiff such damages as he may sustain in the loss of rents, and may be increased, in the discretion of the court, if the defendant shows a disposition to delay the trial. It is not required to be given by the defendant in an action where the plaintiff alleges that such defendant is not in possession of the land, and is not, therefore, in receipt of the rents and profits. Therefore the fact that the defendants other than Stancill had failed to file such bond was no ground for judgment against them. The failure of Stancill's codefendants to file an answer should not be allowed to prejudice him, and his honor acted with a due regard to the merits of the controversy in exercising a sound and wise discretion in refusing the plaintiffs' motion.

We have carefully examined the cases pressed upon our attention by Mr. Lindsay, and cited in his brief. None of them are of value in determining this motion. *Hall v. Hall*, 131 N. C. 186, 42 S. E. 562, was an action for divorce, and decides, among other things, that an appeal lies from the refusal of a judgment to which a party is entitled. The plaintiff's right to his appeal in this case has not been questioned. *Timber Co. v. Butler*, 134 N. C. 50, 45 S. E. 956, was an action to remove a cloud from title. *Griffin v. Light Co.*, 111 N. C. 434, 16 S. E. 423, was a motion for judgment upon a failure or refusal to verify a complaint. *Curran v. Kerchner*, 117 N. C. 264, 23 S. E. 177, was an action on two notes, the liability on one of which the defendant had not denied. None of those cases are pertinent.

It is claimed by the defendant Stancill that he purchased the land at a large price at a judicial sale to foreclose the S. V. Whitehead mortgage referred to in the complaint; that he has paid the purchase money, and that it was applied to the discharge of B. S. Atkinson's debts, which were liens on this

land; that the plaintiff Inez Carraway received the benefit of it; and that when he purchased he had the right to believe the court was giving him a good title. He further claims that the plaintiff Inez was a party to that action, and is bound by the decree in it. It will be observed that one of the plaintiffs is now endeavoring to get judgment, as administrator of S. V. Whitehead, against the administrator and heirs of B. S. Atkinson, upon the same debts embraced in the decree under which Stancill bought, and also to foreclose the same mortgage again, and to have another judicial sale, and offer the same land to an uninformed public by a decree in this cause, utterly regardless of the possibility that Stancill may establish a good title to the land, and the innocent purchaser get nothing. Courts of equity do not knowingly offer a disputed and litigated title for sale to the public, and especially by decree in the very action in which one of the defendants sets up a bona fide title to the land. Bidders and purchasers at execution sales have to look out for themselves, and they get only such title as the sheriff can convey. They may get something. They may get nothing. They know this when they bid. Judicial sales are decreed and conducted upon entirely different principles. Under such sales the purchaser has a right to look to the court to protect him. If the title fails, and the money is still in custodia legis, the court will refund it, or make such orders and decrees as are necessary and proper to perfect the title, if that be practicable. If the court had made the decree asked for, it would really be perpetrating a wrong on the public in ordering a judicial sale of a tract of land, the title to which is energetically contested in this very action. Besides, it would be a gross injustice to the defendant Stancill, who is really the only defendant, so far as we can see, interested in the result of the action. All the other defendants, as well as the plaintiff Inez and the former administrator of S. V. Whitehead, as Stancill avers, have received their money from him for the interest they had formerly owned in the land. To grant the plaintiffs' motion would be a serious disadvantage to Stancill, and possibly a fatal one, in working out the equities Stancill will doubtless invoke in case his legal title fails. In such event he may seek to be subrogated to the original rights of S. V. Whitehead under her mortgage; he may seek to charge the land with the purchase money he has paid, upon the ground that it discharged liens on the land. A judicial sale of the land before the title is settled would put a cloud upon the title, and, if Stancill should win, this cloud would be hanging over his title, and he would be compelled to seek the aid of the court in removing it.

The judgment of the superior court is affirmed.

(137 N. C. 462)

DAWSON v. THIGPEN et al.

(Supreme Court of North Carolina. March 8, 1905.)

CHattel Mortgages—RENEWAL—DISCHARGE—QUESTIONS FOR JURY—CLAIM AND DELIVERY—INTERPLEADER—RIGHTS—NONSUIT.

1. In an action involving the title to property, an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such title.

2. Where defendant in claim and delivery retains the property by filing an undertaking for plaintiff's benefit, a claimant who interpleads may, by filing the affidavit and undertaking required by Code, § 331, either secure possession of the property, or an undertaking for its delivery or the value thereof, and is not entitled to any judgment, other than for costs, against plaintiff, who may therefore take a nonsuit.

3. Where plaintiff in claim and delivery takes a nonsuit, and the cause continues between interpleaders, plaintiff is bound by the result of the suit as privy thereto, and cannot again assert title to the property.

4. The mere taking of a new note and mortgage by a mortgagee does not discharge the original security unless it is intended so to operate.

5. On an issue of priorities between chattel mortgages, whether a new note and mortgage, accepted by one of the mortgagees, was taken with intent to discharge and renew her original note and mortgage, which antedated the liens of the other parties, or whether the original lien was intended to be preserved, *held*, under the evidence, a question for the jury.

Appeal from Superior Court, Edgecombe County; Moore, Judge.

Action by N. B. Dawson against I. L. Thigpen and another; L. E. McDuffie and G. A. Stancill, interpleaders. From the judgment rendered, interpleader McDuffie appeals. Reversed.

The plaintiff, N. B. Dawson, instituted this action on February 12, 1902, against the defendants Thigpen and wife for the recovery of four mules, one mare, carts, etc., and all crops raised by defendants during the year 1901. At the time of issuing the summons the plaintiff obtained an order for the immediate delivery of the property. Defendants executed an undertaking pursuant to the statute, retaining possession thereof. Defendants Thigpen and wife filed an answer denying the plaintiff's right of action, and alleging that the indebtedness for which the plaintiff's mortgage was executed had been paid, except a small sum, which was tendered in full satisfaction. G. A. Stancill filed an application to interplead in said action, setting forth that the defendants were indebted to him in the sum of \$550, which indebtedness was secured by mortgage registered on the 15th day of March, 1900, on the mules and other personal property claimed in plaintiff's complaint and seized by him as aforesaid. No formal order was made permitting said Stancill to interplead, but plaintiff filed an answer to his affidavit, denying his right to the property. L. E. McDuffie filed an affidavit as a basis for the application to interplead,

setting forth that she was the owner of the property claimed by the plaintiff, by virtue of a crop lien and chattel mortgage recorded February 2, 1901. An order was duly made, making her party defendant, and permitting her to file an answer setting up any right or title she might have to the property in controversy. She thereupon filed her interplea alleging that she was the owner of the property described in the complaint by virtue of two crop liens and chattel mortgages executed by defendants Thigpen and wife, one recorded January 27, 1900, and the other February 2, 1901, and that there was due her on account of the indebtedness secured therein the sum of \$760. The plaintiff filed an answer to her interplea, denying that she was entitled to the property, and further alleging that the mortgage of January 27, 1900, had been fully discharged, and that in respect to the mortgage of February 2, 1901, said mortgage was filed for registration on February 2, 1901, but was withdrawn from the office of the register of deeds by the interpleader and was not returned to said office until February 2, 1902, when it was actually recorded; that plaintiff's mortgage was recorded May 8, 1901.

The case on appeal states: "When the case was called for trial, the plaintiff caused the following entry to be made in the record: 'The plaintiff, N. B. Dawson, comes into court and states that he has been settled with for the amount of his claim upon the agreement of the original defendants to pay the cost, and thereupon prays the court for a nonsuit of the action so far as he is concerned. Thereupon the interpleader Mrs. L. E. McDuffie comes into court and applies to the court for leave to amend her pleading' by alleging that since the last continuance she has learned that the plaintiff in this action received into his possession before the commencement of this action a large amount of the crops grown on the land of the defendant Thigpen, described in the mortgage and lien held by her; that said crops were not taken by the sheriff pursuant to the process in this action; that the plaintiff should account to her for the value of the said property and crops so received. Thereupon the following entry is made: 'The court in its discretion would permit the interpleader to file the amendment to her pleadings as above requested, but believing the court has no power to allow such amendment, after the announcement made by the plaintiff, declines to allow the amendment to be made for want of power, to which ruling the interpleader Mrs. McDuffie excepts.'"

The court thereupon submitted the following issues: "(1) Is the interpleader Mrs. L. E. McDuffie the owner, by virtue of the crop lien and chattel mortgage introduced, of the crops in controversy? Ans. Yes. (2) What was the value of said crops at the time of the seizure? Ans. \$189.25. (3) Is the inter-

pleader Mrs. L. E. McDuffie the owner, by virtue of the crop liens and chattel mortgages introduced by her, of the personal property in controversy, or any part thereof, and, if only a part, what part? Ans. Yes; all of the personal property except the hoes, the hames, and the weeder, but the mules and mare are subject to G. A. Stancil's mortgage. (4) What was the value of said personal property at the time of the seizure? Ans. The value of the mules and mare is \$335, and the value of the other property is \$54.63. (5) Are the defendants indebted to the interpleader Mrs. McDuffie on account of the bond and crop lien and chattel mortgage introduced, and, if so, in what sum? Ans. One thousand dollars and interest, as shown by the note, less \$300, as credited on note. (6) Is the interpleader G. A. Stancil the owner, by virtue of the chattel mortgage and crop lien introduced by him, of the personal property in controversy, or any part thereof, and, if of only a part, what part? Ans. Yes; of the mules and mare. (7) What was the value of such personal property at the date of the seizure? Ans. \$335. (8) Are the defendants indebted to the interpleader G. A. Stancil on account of the chattel mortgage and crop lien introduced, and, if so, in what sum? Ans. Yes; \$550, with interest from November 1, 1900. (9) As between the interpleaders Mrs. L. E. McDuffie and G. A. Stancil, which has the first lien on the mules and mare in controversy? Ans. G. A. Stancil."

Mrs. McDuffie introduced testimony tending to show the value of the property seized in this action. She also introduced a bond dated January 19, 1901, for \$1,000 for agricultural advances, subject to a credit of \$300; also bond for \$1,000 payable to her, dated January 11, 1900, the witness testifying that Mrs. McDuffie delivered the papers to her attorney, that she had them in her possession, that he was not and had never been her agent, that he did not know there was anything due on the 1900 note, and that it was in the possession of the interpleader, and not marked "Paid."

The interpleader Stancil put in evidence the original mortgage and lien made to him by defendants, recorded March 5, 1900, for \$750. He then introduced the defendant Thigpen, who testified that he did not owe anything on the note of 1900 to Mrs. McDuffie; that the note of 1901 was given to renew the note of 1900; that he borrowed \$1,000 from her in 1898, and executed a mortgage on his property and crops; that each year he gave a new note and mortgage; that in 1901 he gave the note to D. E. Cobb for Mrs. McDuffie, who was away from home. "We had no agreement. I prepared a new note and lien, and gave it to Cobb for Mrs. McDuffie. After she came back, I asked Cobb to get it for me. Mrs. McDuffie boarded at his house. The note of January, 1901, was given to take up a prior note. It was

given to renew a debt due November 1, 1900." To this testimony Mrs. McDuffie excepted. The witness further testified that he executed a lien and mortgage to G. A. Stancil, and that there was due on it a balance of \$550; that Mrs. McDuffie did not furnish any money to make the crop; that each year he would go to her with a new note and mortgage, and that she was satisfied; that he kept the lien and paid her interest on it; that the team described in the mortgages of Mrs. McDuffie was the same as described in the mortgage to Stancil.

The court charged the jury that if they believed the evidence, and if there was a balance due on the Stancil debt, he was entitled to recover the possession of the property, and that they should answer the sixth issue "Yes" and the ninth issue "G. A. Stancil." Mrs. McDuffie excepted. She assigns as error, first, the refusal of the court to permit her to amend her plea, and permitting the plaintiff to take a nonsuit; second, the instruction to the jury that the mules, etc., were the property of Stancil. She appealed from the judgment rendered.

G. M. T. Fountain and John L. Bridgers, for appellant. Gilliam & Gilliam, for appellee.

CONNOR, J. (after stating the facts). The assignments of error present but two questions for our consideration: First, the right of the plaintiff to withdraw from the action pending the controversy, by taking a nonsuit. He had, by the order of the court, at the institution of the action, procured the seizure of the property, and the defendants had retained it by filing the undertaking, which was available to the plaintiff only in the event of a recovery. While the complaint does not set out the source of the plaintiff's claim to the property, it does allege an indebtedness by the defendants, and they in their answer admit the execution of a mortgage to the plaintiff to secure the payment of the same indebtedness. It is also manifest from the pleadings that the controversy arose out of conflicting claims, based upon several mortgages executed by defendant Thigpen to the plaintiff and the interpleader. It is well settled that, in an action involving the title to property, an interpleader is restricted to the issue as to his title or claim to the property; and cannot raise or litigate questions or rights which do not affect such title. McLean v. Douglass, 28 N. C. 233. He does not, speaking with accuracy, become a party to the action in the same sense and with the same status as the original parties, or those made so pending the action either by the court ex mero motu or upon application. In McKesson v. Mendenhall, 64 N. C. 502, Rodman, J., states the rule in regard to the rights of the original plaintiff to take a voluntary nonsuit: "The principle seems to be that a

plaintiff may elect to be nonsuited in every case when no judgment, other than for costs, can be recovered against him by the defendant, and, when such judgment can be recovered, he cannot." If the plaintiff had taken the property into his possession and retained it, he could not, either as against the defendant or the interpleader, have submitted to a nonsuit and gone out of court by simply paying the costs. Manix v. Howard, 82 N. C. 125. In the case before us, the property having been retained by the defendants, it was open to the interpleader, by complying with the provision of section 331 of the Code, to either secure possession of the property or an undertaking for its delivery or the value thereof. It would seem to be clear that in no event could the interpleader recover any other judgment against the plaintiff than for costs. If he had received from the defendants crops to which the interpleader was entitled, he was liable therefor in a separate action. By moving for judgment of nonsuit, the plaintiff conceded that he was not entitled to the property in controversy. This was all that in any event the interpleader, as against the plaintiff, was entitled to. We are of opinion that his honor properly permitted the plaintiff to submit to the nonsuit. In McKesson v. Mendenhall, supra, it is held that, although nonsuited, the action would go on for the interpleader, and the person nonsuited would be bound by the result of the suit as privy thereto. This is an additional reason for sustaining the ruling of the court below. The plaintiff is bound by his action, and cannot again assert title to the property. This in no degree affected the right of the interpleaders to litigate, as between themselves, the title to the property and their interests therein.

In regard to the second assignment of error—the instruction of the jury that the mules were the property of Stancil. We are of opinion that his honor should have submitted to the jury the question as to the intent with which the second mortgage was executed by Thigpen and received by the interpleader. It will be noted that she held the mortgage on the personal property, recorded January 27, 1900, and that on February 2, 1901, the mortgagor signed and sent to her a mortgage by one D. E. Cobb. Cobb testified that he was not her agent and had never been, and that he simply delivered the mortgage to her. The defendant Thigpen testified that he executed a mortgage of January, 1900, and that he prepared a new note and lien and gave it to Cobb in January, 1901; that there was no agreement between them; that it was given to renew the debt due November 1, 1900. She retained both notes and mortgages. It may well be that she accepted the note and mortgage of 1901 for the purpose of securing a mortgage on the crop of that year, retaining the original mortgage as the first lien on the personal property. Thigpen had executed a

mortgage on the same property to Stancil, recorded March 5, 1900. If she had notice of this mortgage, it would explain her conduct in retaining her mortgage registered prior thereto. However this may be, it was a question for the jury to decide.

In *Smith v. Bynum*, 92 N. C. 108, it was held that when there was a settlement between the mortgagor and mortgagee, and a new note and mortgage taken, the property in the first mortgage was released. Ashe, J., says: "If the plaintiff had not come to a settlement with the mortgagor, and taken a new note with another mortgage to secure it, his lien under that mortgage would have continued, and he would have had the right to recover in this action, but by his settlement * * * the mortgage of January, 1882, was discharged." The decision is based upon the fact that the parties came to a settlement. In *Joyner v. Stancil*, 108 N. C. 153, 12 S. E. 912, the referee expressly found that Stancil "accepted said note in full satisfaction of and in payment of and in discharge of said Rountree & Co's. note, * * * and treated it as a discharge of pre-existing securities." Shepherd, J., after reviewing the decision, says that "the finding of the referee is explicit upon this point, that the new note was accepted in full satisfaction of and in payment of the former one." These cases are distinguished from *Hyman v. Devereux*, 63 N. C. 624, *Vick v. Smith*, 83 N. C. 80, and *Collins v. Davis*, 132 N. C. 106, 48 S. E. 579, by the fact that a settlement was had, and a new note taken in payment of the discharge of the original. The general rule is well settled that the taking of a second note and mortgage, of itself, does not discharge the original security unless it is intended so to operate. *Jones on Mortgages*, § 924. "Whether a new note shall be treated and have effect between the parties as a payment of a former one for which it is substituted will depend upon the purpose and understanding of the parties to the transaction, but not only will the intention of the parties be determined by the express agreement of the parties, but, in the absence of this, by the circumstances attending the transaction from which such intention may be inferred. * * * In the absence of any express agreement and of any circumstances showing intention, the renewal of the note does not affect the security. The burden is upon the mortgagor to show the existence of an agreement that the mortgage lien should be released upon the execution of the new note, and not upon the mortgagee to show an agreement that the mortgage should continue as a security for the debt covered by the new note." *Id.* § 926. Again: "The taking of further security for the mortgage debt, whether it be by a second mortgage upon the same land, or real or personal security upon other property, is generally no waiver of the original mortgage." *Id.* § 929.

There was evidence fit to be considered by the jury upon the issue with what intent Thigpen executed, and Mrs. McDuffie received, the note and mortgage of January 1, 1901. This exception of Mrs. McDuffie therefore must be sustained, and a new trial ordered upon the third, sixth, and ninth issues. In view of our decision, we are of opinion that the costs should be divided equally between the appellant, Mrs. McDuffie, and the interpleader Stancil. Let this be certified to the court below.

New trial.

(137 N. C. 453)

KIRKMAN et al. v. WADSWORTH et al.
(Supreme Court of North Carolina. March 8, 1905.)

TRUSTS—DEEDS—POWERS—CONVEYANCE BY
DONEE—HUSBAND AND WIFE—HUSBAND AS WIFE'S TRUSTEE.

1. Where there was added to the tenendum of a deed the words, "free and discharged of any and all incumbrances in fee simple absolutely forever," and then followed a warranty in fee to the grantee, his heirs and assigns, against the claims of all persons whatsoever, the deed conveyed a fee simple.

2. If a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass, although the power is not referred to in the deed.

3. When a trustee, having power to sell land in fee by the written direction of the cestui que trust for life, joins with her in a conveyance of the property on valuable consideration, with warranty, it is a valid execution of the power, though no written direction was given.

4. Where a husband gave a trust deed in favor of his wife to his father, on the death of the father the grantor in the deed, as the father's heir, was clothed with all the powers and trusts declared in the deed.

Appeal from Superior Court, Craven County; Council, Judge.

Suit by Emeline Kirkman and another against Enoch Wadsworth and others. From a decree in favor of defendants, complainants appeal. Affirmed.

On the 15th day of April, 1841, Joseph Merrell executed a deed in fee simple for the locus in quo to his father, John Peter Merrell, upon the following trusts: "In trust for the sole and separate use of Caroline M. Merrell, wife of the said Joseph Merrell during the life of the said Caroline M. Merrell so that said real estate, slaves and their increase and other personal property hereby granted shall not be liable or in any manner subject to the debts, contracts or engagements of the said Joseph Merrell and further to grant and convey said property or any part thereof to such person or persons for such consideration and for such interests and estates as the said Caroline M. Merrell shall by any writing under her hand and seal during her coverture direct, limit or appoint and upon the dissolution of the said marriage by the death of the said Caroline

M. Merkell and on her failure to make the appointment above mentioned in trust to surrender and deliver up said property to such child or children of the said Joseph Merkell and Caroline M. Merkell, his wife as may be living at her death to be held by such child or children in absolute property, but should said Caroline M. Merkell die and leave no issue living at her death then in trust to surrender and deliver up said property hereby granted to the said Joseph Merkell or if he should die before said event then to the proper heirs at law and next of kin of the said Joseph Merkell to be held by him or them as their absolute and indefeasible estate." Prior to May 6, 1843, John Peter Merkell, the trustee under said deed died, leaving Joseph Merkell, the grantor in said deed, his only son and heir at law, to whom said trust estate descended. On the 6th day of May, 1843, while said trust estate was vested in Joseph Merkell, the said Joseph Merkell and his wife, Caroline M. Merkell, the donee of the power of appointment under said trust deed, executed a deed in fee simple for the locus in quo to A. Mitchell. A. Mitchell immediately entered into the possession of the locus in quo, and he and those claiming under him, down to and including the defendant S. E. Wadsworth, have been in possession thereof ever since. On the 9th day of December, 1843, Joseph Merkell and his wife, Caroline M. Merkell, executed a deed to J. T. Lane, as trustee, for the locus in quo; providing that the property conveyed therein should be held upon the same trusts as those expressed in the original deed to John Peter Merkell. The plaintiff Emeline Kirkman is a surviving child of the said Joseph Merkell and Caroline M. Merkell, both being dead at the commencement of this action. The plaintiff Ella Moore is the only child and heir at law of another child of the said Joseph Merkell and Caroline M. Merkell, who died during the lifetime of the said Caroline M. Merkell. Caroline M. Merkell died on the 27th day of December, 1903. The plaintiffs claim the locus in quo under the provisions of the deeds in trust to the said John Peter Merkell and J. T. Lane, and the defendant S. E. Wadsworth claims said property under the deed from the said Joseph Merkell and Caroline M. Merkell to A. Mitchell, and by mesne conveyances in fee.

W. D. McIver, for appellants. W. W. Clark, for appellees.

BROWN, J. (after stating the facts). The plaintiffs contend that the deed of May 6, 1843, from Joseph and Caroline Merkell to A. M. Mitchell, while purporting on its face to convey a fee, conveyed in fact only the life estate given to said Caroline by the deed to John Peter Merkell, trustee, by Joseph Merkell, dated April 15, 1841, and that Caroline Merkell having died December 27,

1903, without having properly exercised the power of appointment given her by said deed, the plaintiffs are now entitled to the property as the beneficiaries under the provisions of the trust. The defendants contend that, under the terms of said trust deed, Joseph Merkell not only gave his wife, Caroline, a life estate in the property, but he also gave her, by express words, a valid power of appointment, whereby, by a "writing under her hand and seal during her coverture," said Caroline could direct, limit, or appoint, through the trustee, a conveyance of said property in fee. Defendants contend that when John Peter Merkell died the fee descended to his only heir and son, Joseph Merkell, husband of Caroline, and that thereafter Caroline and her husband, who was her trustee, executed to A. Mitchell the deed in fee of May 6, 1843, with full covenant of warranty; that the execution of this deed was a valid exercise of the power of appointment given to said Caroline, although in it there is no reference to the power.

In the appellants' brief it is stated that "his honor below announced his opinion as adverse to the claim as an execution of the power, but held that the plaintiffs were barred by the statute of limitations." Our view is quite to the contrary of his honor's. We are of opinion that the statute of limitations would not bar a recovery, but that the execution of the deed of May 6, 1843, does. The court below rendered the correct judgment, but put it on the wrong ground. This deed is a conveyance in fee simple, and nowhere purports to convey a less estate. The draftsman, as if "to make assurance doubly sure," has added in the tenendum the words "free and discharged of any and all encumbrances in fee simple absolutely forever," and then follows a covenant of warranty in fee "to Alexander Mitchell, his heirs and assigns, against the claims of all persons whatsoever." If the English language is capable of making known the thoughts and intentions of the mind, the words used in that deed convey the most unmistakable purpose and intention on the part of Caroline Merkell and her husband, Joseph, to convey a fee-simple estate in the property described therein.

The plaintiffs contend in reference thereto (1) that the deed must refer to the power, otherwise it is not a valid exercise of the power; (2) that the husband cannot be trustee to the wife, and that the conveyance is void as an exercise of the power of appointment, because no legal trustee joined in it. We are against the plaintiffs on both propositions. We take it that the following propositions are established law: If a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass, although the power is not referred to in the deed. If the donee of the power has an

estate in the property outside and independent of the instrument creating the power, or any separate estate in the property, however created, and makes a deed, the terms of which will be fully satisfied by such independent estate, which deed contains no reference whatever to the power, his conveyance will be referred to his own independent estate, and it will be presumed that the donee intended to convey his independent estate only, and that he did not intend the deed as an exercise of the power of appointment under a trust. Caroline Merkel had no interest or estate whatever in the property conveyed to Mitchell, except what was given her in the deed creating the power. Having no estate whatever in herself that can satisfy the terms of that deed, when she and her husband and trustee executed it, for a valuable consideration, in fee, and with full warranty, she manifested a most unmistakable purpose to convey under the power given her, and to its full extent. It is not necessary that the deed should refer to the power. Under such circumstances, it is a valid exercise of the power of appointment without it.

The authorities are full and in complete accord upon these propositions. Ashe, J., says, "It is not necessary to refer to the power if the act shows that the donee had in view the subject of the power at the time." Taylor v. Eatman, 92 N. C. 607; 4 Washburn, R. P. (4th Ed.) 658; 4 Kent, Com. marg. p. 334. "An intent apparent upon the face of the instrument to dispose of all the estate is deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not be otherwise satisfied." 1 Sugden on Powers, 460.

It is not necessary that Joseph Merkel, the trustee, and his wife, the donee of the power, should have executed separate instruments. Neither is it necessary that she should have requested or directed the trustee, in a separate writing, to make the deed. Joining in the same deed with the trustee was the most effectual manner of indicating her wishes and purposes by a writing under seal. When a trustee, having a power to sell land in fee by the written direction of the cestui que trust for life, joins with her in a conveyance of the property on valuable consideration, with warranty, this is a good and valid execution of the power, although the conveyance does not refer to the power. Glndrat v. Gas Co., 82 Ala. 604, 2 South. 327, 60 Am. Rep. 769. Where the deed would be useless and inoperative, and convey nothing except as an exercise of a power, it will be so construed, although there be no reference in it to the power. Matthews v. Capshaw, 109 Tenn. 480, 72 S. W. 964. The estate Mrs. Merkel acquired under the trust deed was a life estate. It could not satisfy the terms of the deed to Mitchell.

The authorities are abundant to the effect that, where one who owns an estate in property is also clothed with a power resulting from a trust in the same property, if the donee executes a conveyance under such circumstances as to make it apparent that it was his intention to execute the power, the conveyance will be referred to the execution of the power, and not to a disposition of the estate owned by him in the property. Lumber Co. v. O'Neal, 131 Ala. 119, 30 South. 466, 90 Am. St. Rep. 22, and cases cited. Where a person conveys land, for a valuable consideration, in fee, he engages with the grantee to make the deed as effectual as he has the power to make it. In addition to the authorities cited, the propositions laid down are fully sustained by the following cases: Warner v. Ins. Co., 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962; Campbell v. Johnson, 65 Mo. 439; Yates v. Clark, 56 Miss. 212; Rinkenberger v. Meyer, 155 Ind. 152, 58 N. E. 913; Ladd v. Chase, 155 Mass. 417, 29 N. E. 637; also by an elaborate opinion of Judge Taft in the Circuit Court of Appeals, in which many authorities are cited—Smith v. McIntyre, 95 Fed. 591, 37 C. C. A. 177.

It is insisted by the plaintiffs that it is against the policy of the law for a husband to be a trustee for his wife, and that Joseph Merkel, the husband, when the trust estate vested in him by descent from John Peter Merkel, had no power to convey under the appointment of his wife. The plaintiffs' position as to this is equally as untenable as their first contention. In Oroom v. Wright, 39 N. C. 250, Chief Justice Ruffin says: "He [meaning the husband] therefore can take no beneficial interest in the property under the will, whether the legal estate be vested in his wife's brother, as trustee, or be vested in the husband himself for want of the interposition of another trustee, since it has been long held that, where there is a clear intention to give a separate estate to a married woman, it shall not fall for want of a trustee, but be effectuated by converting the husband in respect to the legal estate, which comes to him jure mariti, into a trustee for her." In Stearns v. Fraleigh, 23 South. 18, 39 L. R. A. 705, the wife appointed her husband her trustee. The Supreme Court of Florida sustained the appointment, and declared that the husband's acceptance binds him to execute the trust according to its terms as fully as any other trustee, and that the husband becomes vested with the same powers and responsibilities, and no others, as any other trustee. If the husband trustee attempts to coerce the wife, she may have him removed. 25 Am. & Eng. Enc. of Law, 431, where many authorities are collected.

When John Peter Merkel died, the estate in the land descended upon his only heir, Joseph Merkel, clothed with all the powers, and charged with all the duties, responsibilities, and trusts, declared in the deed, which trust the courts will enforce. When

Joseph and his wife afterwards conveyed in fee, for value, and with warranty, their grantee acquired a good title to the fee.

The judgment is affirmed.

(108 Va. 702)

GATES & SON CO. v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

OBSTRUCTING STREETS—CONSTRUCTION OF ORDINANCE.

For one, as occasion requires, to obstruct a sidewalk by a skid from his store door to a delivery wagon for purposes of moving merchandise between them, is not within an ordinance declaring a penalty for constructing or placing any portico, porch, door, window, step, fence, or other projection which shall project into a street, and a like penalty for every day that said portico, porch, door, window, step, gate, fence, or other projection shall be continued; the ordinance applying only to obstructions of a permanent character.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1446.]

Error to Hustings Court of City of Richmond.

The Gates & Son Company was fined under an ordinance of the city of Richmond, and brings error. Reversed.

George Bryan, for plaintiff in error. H. R. Pollard, for defendant in error.

WHITTLE, J. The plaintiff in error, a corporation, whose place of business fronts on Fourteenth street in the city of Richmond, was fined by a police justice for the alleged violation of an ordinance of the city in obstructing said street.

The obstruction complained of was occasioned by the use of a movable gang plank or skid, a contrivance composed of two parallel pieces of timber about 12 feet long and 12 inches apart, sheathed with iron, and held together by wooden crosspieces. The skid was extended from the front door of the storehouse across the sidewalk to delivery wagons in the street, and the goods of the company were carried over the skid to the wagons on hand trucks.

Upon appeal to the hustings court of the city the judgment of the police justice was affirmed, and the case is here on writ of error to the judgment of affirmance.

The sole question for determination, therefore, is whether the above-mentioned facts, of which there is no denial, constitute a violation of the ordinance in question.

The ordinance is as follows: "No person shall construct or place, or cause to be constructed or placed, any portico, porch, door, window, step, fence, or other projection which shall project into any street, or any gate which shall open outside over any sidewalk, under a penalty of not less than five nor more than fifty dollars for each offense, and a like penalty for every day that the said portico, porch, door, window, step, gate,

fence, or other projection shall be continued as aforesaid after notice to remove the same. Whenever in any part of said city a street has been or shall hereafter be encroached upon or obstructed by a fence or any inclosure, or by any building or any part thereof, the owner or owners thereof shall remove the same to the proper line of said street when ordered by the committee on streets to do so. If such removal be not made within twenty days after notice of such order, the owner or owners thereof shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offense."

This is a penal ordinance, and is therefore to be construed strictly. It is not to be extended by implication, and must be limited in its application to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute. Fox's Adm'r's v. Com., 16 Grat. 1; Harris v. Com., 81 Va. 240, 59 Am. Rep. 666; Street v. Broadus, 96 Va. 825, 32 S. E. 466.

In *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37, Marshall, C. J., observes: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded in the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not the judicial, department * * * The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so.

"It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated."

"There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute." Chief Justice Fuller in *U. S. v. Lacher*, 184 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080.

These and many other cases which could be cited to the same effect tend to illustrate the jealousy with which courts regard any substantial departure from this time-tested canon of construction. Its violation involves a most dangerous innovation, and places persons accused of crime at the mercy and arbitrary discretion of the judge who may chance to preside in the particular case.

There are two other kindred principles of construction to be considered in arriving at

a correct interpretation of this ordinance, namely, that of *noscitur a sociis* and *eiusdem generis*.

The former rule is succinctly stated as follows: "It is a fundamental principle in the construction of statutes that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, though apparently general, may be limited in its operation or effect, where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions." 26 Am. & Eng. Enc. Law, p. 608; citing, among other cases, *Orange & Alex. R. Co. v. Alexandria*, 17 Grat. 176.

The rationale of the principle of *eiusdem generis* seems to be that, if the Legislature has intended the general words to apply, uninfluenced by the preceding particular words, and without restriction, it would, in the first instance, have employed a compendious word to express its purpose. *Rex v. Wallis*, 5 Term R. 379. The rule is illustrated and applied in the comparatively recent case of *American Manganese Co. v. Va. Manganese Co.*, 91 Va. 272, 21 S. E. 466, where this court, in construing section 3299 of the Code of 1887 [Va. Code 1904, p. 1740], with respect to special pleas of set-off, held that the language "or any other matter," occurring in a statute which in part reads, "Or any other matter as would entitle him [the defendant] either to recover damages at law from the plaintiff * * * or to relief in equity, in whole or in part, against the obligation of the contract," is restricted to the preceding enumerated defenses, and that no set-off can be relied on by the defendant that does not grow out of the original contract. The court says: "One of these rules of construction is that general words may be limited to the same genus or class as the specific words which precede them. In *Sutherland on Statutory Constr.* § 268, it is said that, 'Where there are general words following particular and specific words, the former must be confined to things of the same kind.' In *Broom's Legal Maxims* (side page 651) the rule is laid down as follows: 'Where a particular class (of persons or things) is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *eiusdem generis* with such class; the effect of general words, where they follow particular words, being thus restricted.' *Sedgwick*, in his work on *Construction of Statutes* (page 361), says: 'Where general words follow particular words, the rule is to construe the former as applicable to things or persons particularly mentioned.' The decisions of the courts fully sustain the text-writers that this is the true rule of construction in such cases, subject to certain limitations, not necessary to be mentioned here."

Lynchburg v. N. & W. R. Co., 80 Va. 237; *C. & O. Ry. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

"In construing penal statutes the legislative intent 'is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.'" *Sarlls v. U. S.*, 152 U. S. 574, 14 Sup. Ct. 720, 38 L. Ed. 556.

Applying the foregoing well-settled principles to the case in judgment, it is quite apparent that the offense charged is not embraced by the provisions of the ordinance under consideration. The ordinance is plainly intended to apply to obstructions and encroachments on the streets of a permanent character, and cannot, without unwarranted enlargement of the ordinary scope and meaning of the language used, be made to embrace temporary obstructions, such as are caused by the use of skids and similar appliances employed in loading and unloading wagons.

If, in the judgment of the city council, the use made of the streets in this instance amounts to an undue interference with the rights of the public, the evil can be remedied by appropriate legislation. But the courts must construe the ordinance as they find it, and cannot enlarge its operation to meet the exigencies of particular cases.

It follows from these views that the judgment complained of must be reversed, and the case remanded for further proceedings.

(103 Va. 563)

PRISON ASSOCIATION OF VIRGINIA v. RUSSELL'S ADM'R et al.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

WILLS—CONSTRUCTION—RESIDUARY LEGATEE.

Testatrix, after disposing of certain specific articles of personalty, bequeathed all the residue of her estate to a charitable corporation. Some time thereafter she made a codicil reciting that by her former will she had left all her property to the charitable corporation, and changing the same so as to give a specific sum for another charitable purpose. This latter bequest was void. *Held*, that the charitable corporation mentioned in the will was the general residuary legatee entitled to take the amount of the void bequest.

Appeal from Chancery Court of Richmond.

Bill by the Prison Association of Virginia against Russell's administrator for construction of the will of Adeline Pitt Russell, deceased. From the decree, the Prison Association of Virginia appeals. Reversed.

Stiles, Powers & Stiles, for appellant. Overton Howard and James E. Heath, for appellees.

KEITH, P. Testatrix died leaving a will dated April 12, 1890, which, together with a codicil dated May 9, 1898, was duly

admitted to probate in the chancery court of the city of Richmond in February, 1902. The will and codicil are as follows:

"I, Adeline Pitt Russell, do make, constitute and appoint this my last will and testament, hereby revoking all other wills and testaments and writings in the nature of wills and testaments heretofore made by me, and particularly my will made some years ago and now in the possession, as I believe, of A. M. Kelley. I revoke that will because of certain conditions therein, which, owing to circumstances which have since arisen and which could not be then foreseen, might possibly defeat my chief object in making a will; and I believe that the purpose of that will can be better accomplished by this. I therefore revoke that will and all other wills heretofore made by me, and make this my last will and testament.

"My jewelry, silver, wearing apparel, &c., I give and bequeath to the person whose name will be found in a memoranda amongst my papers, stating what I give and to whom.

"All the residue of my estate, both real and personal, of every kind whatsoever of which I may die entitled, seized or possessed, I give, devise and bequeath to the Prison Association of Virginia, to use in establishing or in aiding in establishing anywhere within the Commonwealth of Virginia a reformatory, house of correction, work-house or other institution of like aim and character for such criminals, youthful offenders and persons convicted of petty crimes, under the age of twenty-one years, as the courts and magistrates of the Commonwealth of Virginia may see fit to commit to such institution, with full power to said Prison Association of Virginia, or to its board of directors to use any of my said estate in kind for said reformatory or other institution of like aim and character, or, if in the judgment of the said Prison Association, or of its board of directors it seem better to sell any or all of my said estate, real or personal or both, then authority is hereby conferred upon said Prison Association of Virginia or its board of directors to sell the same and to use the proceeds, principal and interest, in establishing and maintaining or in aiding to establish and maintain a reformatory, workhouse, or house of correction, or other institution of like aim and character anywhere within the limits of the Commonwealth of Virginia, for such criminals under the age of twenty-one years as the courts and magistrates of the State of Virginia may see fit to commit to said institution.

"Witness my hand this 12th day of April, in the year of our Lord, 1890.

"Adeline Pitt Russell."

Codicil: "By will, written by, and in the possession of Mr. Overton Howard of this city, the date of said will not being now remembered, I left all the property belonging to me at the time of my death, to the Prison Association, or Reformatory School at Lau-

rel, Va. I desire now to add this codicil to said will: I had purposed leaving a bequest to the Mechanic's Institute at Richmond, Va., but as there is a move on foot to change the title of that institution, I hereby give and bequeath to Rt. Rev. Augustine Van De Vyver, Roman Catholic Bishop of Richmond, Va., or his successor in that office, the sum of six (\$6000) thousand dollars, for the purpose of establishing an orphan asylum for negro female children in Richmond, Va., the said asylum to be conducted by the Sisters of the Holy Family (Colored Sisters) of New Orleans, Louisiana—and I do this in loving memory of my old black mammy and daddy, and the other servants who have belonged to me in the past. As a memento of my affection, I give one (\$100) hundred dollars to each of the following gentlemen, to Howard T. Vaughan, of Norfolk, Va., to Rev. Herbert M. Hope, of Petersburg, Va., to William O. Hope, of Portsmouth, Va., to Mrs. Russell Tyler Barrett, of Newport News, Va., I also give one (\$100) hundred dollars, my diamond ear rings, broach, large cluster ring, ruby ring and long watch chain, and to her child Tyler Barrett my silver mug; to Mrs. Emma Vaughan I give the diamond and emerald ring I wore constantly; to Mrs. Herbert M. Hope of Petersburg, Va., the enameled solitaire diamond ring and the short watch chain, and to Mrs. William O. Hope my cameo, cat's eye ring and watch. I have left sealed instructions with Miss Ellen M. Kelley as to the disposition to be made of my wearing apparel and furniture. To Katie, daughter of Wm. O. Hope, my large emerald and diamond ring.

"Adeline Pitt Russell."

The bill in this case was filed to obtain a judicial construction of this will. All interested were made parties, and by its decree, which is before us for review, the chancery court of the city of Richmond held that the \$6,000 legacy given to the Roman Catholic bishop of Richmond, or his successor in office, was void, and from that feature of the decree there has been no appeal.

The chancery court was further of the opinion that the testatrix, with respect to the void legacy, had died intestate, and that it passed to her next of kin.

The Prison Association appealed from that decision, and its contention is, first, that as there was no express revocation of the will by the codicil, and the disposition made by the codicil having become ineffectual by reason of the incapacity to take of the legatee therein named, it will not be allowed to take effect as a revocation. In other words, that "the only idea and intent ever entertained by the testatrix of revoking the will of April 12, 1890, was in immediate connection with and dependent upon the substitution of the new disposition of the \$6,000 in place of the old, and that her general testamentary intent will be doubly and shockingly frustrated if her new disposition fail

to be effectuated while the old is held to have been revoked."

The second point presented in the argument is that the Prison Association is, by the terms of the original will, the residuary legatee of all the estate, real and personal, of every kind whatsoever, of which the testatrix died entitled, seized or possessed, and that as residuary legatee it takes everything not otherwise effectually disposed of by the will.

We shall only deal with the latter of these two propositions.

By the will of April, 1890, testatrix disposed of certain articles of personal property, her jewelry, silver, wearing apparel, etc. "All the residue of my estate, both real and personal, of every kind whatsoever, of which I may die entitled, seized or possessed, I give, devise and bequeath to the Prison Association of Virginia," etc.

"No particular form of words is necessary to constitute a residuary legatee; any expression is sufficient from which the testator's intention is discernible that the person designated shall take the surplus. Nor is it of controlling consequence that the clause is not the last of the disposing provisions, though such is the usual position." Woerner's American Law of Administration (2d Ed.) § 462.

"The residue is that part of a testator's estate not otherwise disposed of; hence a general residuary bequest carries with it everything not in terms disposed of, and, with such exceptions as are pointed out in connection with the subject of lapsed and void legacies, everything not effectually or well disposed of, as well as lapsed legacies, unless a contrary intent clearly appear from the will." Id.

"Such words as 'rest,' 'residue,' 'remainder,' are not indispensable to a residuary bequest of personal estate, but in various instances words and expressions quite informal have been given this effect, out of regard to the testator's obvious intention. A devise of this character has been held, agreeably to the intent of the will, to carry all the real estate, although 'money' was the term employed. While the residuary clause in a will is usually the last of its disposing provisions, still, the fact that it is not the last is not of controlling consequence as against the true intent to be gathered from the whole will; and, where the words of a residuary clause are sufficient to constitute one a general residuary legatee, it will not be readily assumed from other terms of the will that a less beneficial interest was intended." Schouler on Wills (3d Ed.) § 522.

It is hardly necessary to multiply authorities to show that by the will under consideration the Prison Association of Virginia was the residuary legatee of the testatrix. It is true that only a small portion of the property was specifically disposed of, but the whole scope of the final clause of that will

discloses the intent of the testatrix, and uses apt words to convey her meaning. The association is expressly named as the legatee of the "residue" of the entire estate.

It is said in 1 Jarman on Wills, at page 760: "It scarcely need be added that it is immaterial that the enumeration comprises trivial things only, and omits all the important items of the personal estate. To hold the contrary would involve the admission of evidence to prove what the testator's personal estate consists of at the date of the will, which we have before seen is inadmissible. The disposition of the judges of the present day is to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

In the first clause of the codicil it is stated that "by will written by, and in the possession of Mr. Overton Howard of this city, the date of said will not being now remembered, I left all the property belonging to me at the time of my death, to the Prison Association," etc. That language was plainly used merely for the purpose of identifying the instrument to which she referred, and not for the purpose of changing the character of the disposition made by it. It had for its sole object the making of a bequest of \$6,000 to the Roman Catholic bishop of Richmond, and it left the Prison Association just where it found it—the residuary legatee of all her estate not otherwise disposed of. The bequest to the Catholic bishop having failed, does it fall into the residuum or pass to the next of kin?

The contention of appellees is that the codicil undertook to dispose of a part of the residue, and, this attempted disposition having failed, the bequest does not pass with the residuum, but goes to the next of kin.

The law on this subject is thus stated in Jarman on Wills, vol. 1, p. 764: "When the disposition of an aliquot part of the residue itself fails from any cause, that part will not go in augmentation of the remaining parts, as a residue of the residue, but will devolve as undisposed of. In illustration of this well-settled rule it will suffice to mention the case of Skrymsher v. Northcote, 1 Swanst. 568, where a testator gave his residuary estate equally between his two daughters, but, in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave 500 pounds to H., and 'the remainder of that moiety' to the other sister. The testator revoked the gift of 500 pounds without making any fresh disposition of it, and Sir T. Plumer, M. R., held that it went to the next of kin. 'Residue,' he said, 'means all of which no effectual disposition is made by the will, other than the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to

the other would be to hold that a gift of a moiety shall eventually carry the whole.' And this rule has been held to prevail, though the testator directed that in a certain event (which happened) the aliquot part should sink into the residue and be disposed of accordingly; this not being equivalent to saying it should belong to the other residuary legatees. But it is a mere question of intention, and in *Evans v. Field*, 8 L. J. (N. S.) 264, where a testatrix directed her executors to stand possessed of her residuary personal estate, after satisfying legacies, and also of so much of her personal estate the trusts whereof should fail, upon trust for division in elevenths, one share being separately given to each one of eleven named persons, one of these died before the testatrix, and it was held by Sir L. Shadwell, V. C., that the whole residue went to the other ten. He said the gift of the residue was in the first place among the eleven; but then the testatrix directed that so much of her personal estate, the trust whereof should fail, should be disposed of according to the same trusts, and, one share having lapsed, he thought the necessary effect of that direction was to make the residue divisible into ten parts instead of eleven."

It will be observed that Jarman uses the word "aliquot" throughout this quotation. His whole text, and the cases cited in support of it, refer to residuary bequests where there is more than one residuary legatee, and the aliquot part given to one of such legatees fails. In such case the part so failing goes, not in augmentation of the share or shares of the other residuary legatees, but passes as undisposed of to the next of kin. This clearly appears from the case of *Skrymsner v. Northcote*, cited by Jarman, where the residuary estate was divided equally between the testator's two daughters, and the Master of Rolls held that, the disposition of one of these moieties having become ineffectual, it went to the next of kin. "For," he said, "'residue' means all of which no effectual disposition is made by the will, other than the residuary clause."

Redfield on the Law of Wills (3d Ed.) vol. 2, p. 115, says: "It seems to be well settled that a residuary bequest as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of, as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee, as to personalty, against every other person except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee."

In *Reynolds v. Kortright*, 18 Beav. 417, 427, it is said that everything which is ill-given falls into the residue.

"A general residuary bequest of personal estate, or of chattels real, carries to the residuary legatee not only such estate and such inter-

ests therein as the testator did not attempt to dispose of by his will, but also such as by lapse or otherwise have not in fact been effectually disposed of by him." *King v. Strong*, 9 Paige, 94.

Morton v. Woodbury, 153 N. Y. 243, 47 N. E. 283, is a case of much interest, and is pertinent to several questions considered in this case. It decides that: "While the residuary clause in wills is usually the last of its disposing provisions, still the mere fact that it is not the last is not of controlling consequence, and can have no effect except as it bears upon the question of the intent of the testator."

"In seeking to discover the intent of the testator, all the provisions of the will are to be treated as valid; and the fact that a certain provision is invalid is irrelevant in determining the intent."

"Where the words of a residuary clause are of themselves sufficient to constitute the person named therein a general residuary legatee, a clear expression in the will or special words of unmistakable import are required to render him the legatee of a particular, instead of a general, residue."

"Where there is a disposition of a part of the residue, and it fails, it will not go in augmentation of the remaining parts as a residue of a residue, but will devolve as undisposed of."

The quotations made are from the syllabus of the case, and we shall quote from the opinion in explanation of the last paragraph. In support of the principle announced, the citation is made from Jarman on Wills which we have already quoted. The opinion says: "Where there is a disposition of a part of the residue, and it fails, it will not go in augmentation of the remaining parts as a residue of a residue, but will devolve as undisposed of. "'Residue' means all of which no effectual disposition is made by the will, other than [by] the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other would be to hold that a gift of a moiety shall eventually carry the whole.'" 1 Jarman on Wills, 704, and cases cited. We find no such principle involved in this case. Here was a residuary clause, following which there was a provision by which the testatrix sought to dispose of a portion of her estate to hospitals and homes for women. This bequest was void, and consequently lapsed, and, as it cannot be properly regarded as a residue of a residue under the rule previously adverted to, it fell into the residuum, and passed to the respondent as general residuary legatee."

If the legacy which failed in *Morton v. Woodbury* had been effectual, it would have, to that extent, diminished the interest of the residuary legatee. As it was void, it left the residuary legatee unaffected. And this is true of all void or lapsed legacies. The residuary legatee not only takes that which

is not otherwise effectually disposed of by the will, but he takes that which the will attempts, ineffectually, to dispose of, and which from any cause lapses or is void, except where the residuary clause itself, or some part of it, fails to become effectual, in which case it is denominated a residue of a residue, and passes to the next of kin.

The court in *Morton v. Woodbury*, supra, refers to a class of English cases "where the courts seem to have inferred that a bequest in general terms could not have the effect to carry the entire residuum if particular portions were subsequently given to other persons, of which *Crichton v. Symes*, 3 Atk. 61, may be regarded as an illustration. This ground of inference is said by Redfield in his work on Wills, to be 'entirely unsatisfactory, since the testator may have accidentally omitted some one whom he intended to remember in his will, until after the insertion of the residuary clause; or he may have chosen to begin his will by naming the residuary legatee.'" Adverting to the terms of the will in the case, the court further said: "It is plain that she intended to divert a portion of her estate from the general residuum, and to give it to homes and hospitals; but that fact is not controlling, as in most cases of lapsed or void legacies such an intention exists. Nor do we think it denotes any intention on her part to make her executors, or the objects of her bounty, her residuary legatees. We feel assured that the fifth article of the testatrix's will contains no such special words, nor any such express terms, as to show an intention to exclude that portion of her estate from the residuum, in case it should fail, as the rule relating to the subject requires."

In the case of *Skrymsher v. Northcote*, supra, the intention of the testator was manifest that the part of the residuum which failed should not augment that portion of the residuum which took effect. The two daughters of the testator were the objects of his bounty. It was the manifest purpose of the testator that each should have only a half; and it was tersely said by the court: "To hold that one moiety lapsing shall accrue to the other would be to hold that a gift of a moiety shall eventually carry the whole."

Redfield on Wills, vol. 2, at page 119, discussing the proposition that, where a portion of the residuary bequest fails to become operative at the death of the testator in the manner provided, "the portion thus falling will not go to increase the other portions of the residuum, as a residue of a residue," shows very clearly the extent and limitations of this principle. Referring to *Skrymsher v. Northcote*, 1 Swanst. 566, which seems to be the leading case upon the subject, in which the residue was given in moieties, one of which lapsed, and it was held that the moiety lapsing should not accrue to the other, but would be held to pass

to the next of kin as undisposed-of property, he says: "It is not very apparent how the above reasoning may not apply with equal force to a gift of a residue after particular legacies, which is really rendered as definite by deducting the prior legacies, as if it had been expressed as one-half, or one-eighth, or any other definite proportion of the estate. And to adopt the principle that, if all the particular legacies lapse, the residuary clause shall carry the whole estate, involves the same departure from the expressed intention of the testator as, where the residuary clause is divided into moieties, and one of them fails, to let it go to the other. But this distinction is based upon a presumed intention of the testator to give his whole estate to the residuary legatee, except as it shall be cut down by the deductions necessary to meet the particular legacies. But in regard to the residuary bequest, where it is divided into distinct portions, no such presumption as to increasing the several portions by the failure of the others can so directly arise. And it has been upon this presumed difference of probable intention that the distinction has been made. And having been once established, upon ground however uncertain, it should not now be disregarded, unless upon some satisfactory grounds arising out of the context of the will, or the extrinsic proof of circumstances proper to be received in aid of the construction."

We have examined text writers and a number of adjudicated cases upon this subject, and all of them state the proposition substantially as it is presented by Jarman and Redfield; and all of the adjudicated cases are of the class of *Skrymsher v. Northcote*, supra. Every case which we have been able to consult involved the construction of wills where the residuary bequest has been to two or more in aliquot parts, which has failed to become operative in the manner provided as to one or more of them. As Redfield in the quotation just given remarks, the distinction as an original proposition is not clearly defined, but it rests upon the presumed intention, and, having been established, "should not now be disregarded unless upon some satisfactory grounds arising out of the context of the will, or the extrinsic proof of circumstances proper to be received in aid of the construction."

In this connection see *Creswell v. Cheslyn*, 2 Eden's Chy. R. 123; *Sykes v. Sykes*, 4 Eq. Cas. 200; *Ford v. Ford*, 1 Swan, 431; *Wain's Estate*, 156 Pa. 194, 27 Atl. 59; *Smith v. Haynes*, 111 Mass. 346.

This court considered this general subject in construing the will of Manus Rowan in *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. 121. The will in that case was as follows: "I give and bequeath to my beloved wife, Fanny P. Rowan, my estate called the 'Grange,' during her life, and at her death I give it to my adopted daughter, Minnie E. McCarty, and to her heirs forever. Should

she die without issue, in that event it is to be sold in the customary way, on one, two and three years credit. One-half of the proceeds of the land thus sold to be appropriated to the cause of domestic and foreign missions; the other half to be equally divided between the heirs of my brother, Gilbert Rowan, and the heirs of my four sisters," naming them. After making sundry bequests, the testator, by the fifth and last clause of his will, provided as follows: "All my remaining estate, real and personal, I give and bequeath to my dear wife during her life, and at her death to my dear Minnie McCarty." The bequest to foreign and domestic missions was held to be void for uncertainty, and the question was, to whom should the proceeds of the land thus bequeathed go; and it was held that it fell into the residuary fund, and passed to the husband, as distributee of his wife, Minnie McCarty.

Among other cases cited by Judge Lewis in his opinion is that of *Miers v. Bedgood*, 9 Leigh, 361, where it is said: "There are many cases to show that property not intended to pass under a residuary clause, as where it is given to charitable uses void by the statutes of mortmain, or where the legacy lapses, or where the specific legatee cannot claim in consequence of fraud practiced on the testator, does yet go to the residuary legatee."

"These authorities," said the court in *Gallagher v. Rowan*, "are sufficient to show the extensive operation which the courts ordinarily give to a residuary bequest; and the reason is obvious. When a man makes his will, the presumption, as already remarked, is that he intends thereby to dispose of his whole estate, especially where the will contains a general residuary clause, and hence very strong and special words are required to show that the testator intended the residuary bequest to have a limited effect, and thus to rebut the presumption in favor of the residue."

"The courts have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy, unless absolutely forced upon them. This has been done partly as a rule of policy, perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator. For the fact of making a will raises a very strong presumption against any expectation or desire, on the part of the testator, of leaving any portion of his estate beyond the operation of his will. Hence, where a general residuary bequest was accompanied with expressions favoring a more limited construction, and pointing only to a particular surplus beyond the property specifically mentioned, it was nevertheless held to pass the residuum of his property at the time of his decease, as well that which he held at the date of the will as that afterwards acquired. Lord El-

don here said that was the general rule in regard to residuary bequests, to avoid partial intestacy, and that it required very special words to confine a residuary bequest to the property belonging to the testator at the date of his will."

The controlling purpose with courts in the construction of wills is to ascertain and give effect to the intention of the testator, if it be possible; and, seeking for the intention of the testatrix in this case, it seems plain that she intended by her will to dispose of the whole of her estate, and not to die intestate with respect to any part of it. In other words, the conclusion to be deduced from a consideration of the particular will but strengthens the presumption which attaches to all wills. If the codicil had constituted a part of the original testamentary paper, if it had preceded the residuary clause, there would have been no room for controversy. But, as we have seen, the position of the residuary clause has no effect upon the construction of the will. The whole will is to be read; it speaks, every line of it, at the testator's death; it is to be construed in its entirety, and the intention of the testator gathered, not from any one part of it, but from the whole, and that intention, when ascertained, if it be lawful, governs and controls.

We are of opinion that there is error in so much of the decree of the chancery court as directs the \$6,000 mentioned in the codicil to be paid to the next of kin. The decree must therefore be reversed, and the cause remanded, to be further proceeded in, in accordance with the views herein expressed.

(103 Va. 687)

NORFOLK & W. RY. CO. v. FRITTS.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

RAILROADS—FIRES—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. Where it is shown that a fire was set by a locomotive, the railway company is presumptively guilty of negligence, and it has the burden of proving that it used the best mechanical contrivances in known practical use to prevent the escape of fire, and exercised reasonable precaution in selecting competent employes and in operating its train.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1709-1711.]

2. A railway company, in regulating the speed of its trains, must consider the dryness of the season, the strength and direction of the wind, the danger to adjacent property, and the surrounding circumstances which increase the danger from fire thrown out by the engines; and a high rate of speed, when taken in connection with the circumstances, may be negligence.

3. Where, in an action against a railway company for the destruction of property by fire set by sparks from an engine, it was shown that a freight train too heavily loaded for one engine was drawn by two engines at double the speed of the schedule time and up a grade, that the engines emitted an unusual quantity of sparks, that the property destroyed was exposed to danger by reason of its nearness to the track, the

dryness of the season, and the strong wind blowing directly to it from the passing engines, and it was not shown that the speed adopted, in view of the prevailing conditions, was a necessity to the railway service or a duty owed by the company to its patrons or the public, the question whether the company was guilty of actionable negligence was for the jury.

Error to Circuit Court, Warren County.

Action by R. S. Fritts against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Downing & Richards and Marshall McCormick, for plaintiff in error. Scott & Staples, for defendant in error.

HARRISON, J. This action was brought to recover damages for the destruction of certain property of the plaintiff, alleged to have been caused by fire communicated from the engine or engines of the defendant company, in consequence of its negligent equipment, management, and operation of such engines.

There was a demurrer to the evidence of the plaintiff, and thereupon the jury assessed his damages at \$2,366.70, subject to the opinion of the court upon the law. Upon consideration thereof, the learned judge of the circuit court overruled the demurrer, and gave judgment for the plaintiff in accordance with the verdict of the jury. From this judgment the case is before us for review.

No reasonable doubt can be entertained that the fire was set out by sparks from the engines of the defendant. Where this fact is established, the law is well settled that the railway company is presumptively chargeable with negligence, and must assume the burden of proving that it had availed itself of the best mechanical contrivances and inventions in known practical use to prevent the burning of property by the escape of fire, and had exercised and observed every reasonable precaution in selecting competent employees and in operating its trains. *Patterson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *White v. N. Y., etc., Ry. Co.*, 99 Va. 357, 38 S. E. 180.

Assuming that the defendant has shown that it had availed itself of the best mechanical contrivances to prevent the burning of property by the escape of fire, and had observed reasonable precaution in the selection of its employees, we come to the real question at issue—whether or not the defendant was guilty of negligence in its operation of the engines and train here involved.

It appears that the plaintiff, R. S. Fritts, was conducting a mercantile business at Success, a station on the line of the railroad of the defendant company, and that the buildings occupied by him for this purpose were wooden structures situated about 35 feet from the railroad track. The fire which destroyed these buildings and their contents occurred on March 26, 1902, at 1 o'clock in

the daytime, it being a bright, warm day, and in the midst of a very dry season. At the hour mentioned, a freight train of the defendant, consisting of 30 cars, carrying 841 tons of freight, and drawn by two engines, passed Success going south. The schedule time allowed 15 miles an hour for the speed of the train. It was behind its schedule time, and endeavoring to make it up, and did make up five minutes between White Post and Riverton, a distance of 10 miles.

When the train passed the property of the plaintiff at Success, it was running upgrade at the rate of 30 miles an hour, double its schedule speed, and laboring very hard. The two engines were throwing out an unusual quantity of sparks and cinders, and there was a high wind blowing directly from the engines in the direction of the plaintiff's property.

The question presented is, would the jury, from the facts stated, have been justified in drawing the conclusion that the defendant company was operating its engines negligently?

The defendant insists that the speed of its train was not negligence per se, and that in regulating such speed it was under no obligation to take cognizance of the dryness of the season, the strength and direction of the wind, the danger to the plaintiff's property, nor any of the surrounding conditions and circumstances which increased the danger to others from fire thrown out by its engines; that, if such obligations were imposed, the regular operation of railroads would be impossible.

This position is not reasonable, and is not sustained by authority. It is a well-settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Mere rate of speed, though unusual, is not negligence per se. But taken in connection with other circumstances rate of speed may be dangerous, and a dangerous rate of speed is negligence. *C. & O. Ry. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833. In this case Judge Keith says: "We cannot say, as a matter of law, that the mere rate of speed is negligence, although it may be unusual. It is true that 'negligence' is a relative term; that what may be negligence under one condition of facts would not only not be negligence, but the highest prudence, under a different condition of facts. The question for the jury always is, was the act, taken in connection with all of its attending circumstances, negligent?"

It cannot be doubted that it is the duty of a railway company to exercise every reasonable precaution to avoid injury to others by scattering fire along its right of way. It is equally clear, upon principle and authority, that when the danger of doing such injury is increased by the nearness of wooden buildings to its track, the accumulation of combustible material, either on its own or the

adjoining land, the dryness of the season, and the direction of high winds, greater caution is required than is necessary when such conditions do not prevail. While ordinary care requires the employes of a railway company to recognize such conditions for the purpose of avoiding, as far as possible, injury to others, such care is to be exercised while at the same time giving due consideration to the interest of the railway service and the duty of the company to its patrons and the public. *Thompson on Negligence*, § 2283; *Elliott on Railroads*, § 1228.

In the section just cited from *Elliott on Railroads*, the law is stated thus: "It is a well-settled principle that care in doing any particular act must be exercised in proportion to the danger attending the act. Where the doing of any particular act is attended with unusual hazards, unusual care must be exercised, but, where the performance of the act is attended with only ordinary hazards, a less degree of care is required. These principles have frequently been applied in railway fire cases, for the circumstances under which fires are likely to occur and do occur are so varied that this degree of care must necessarily be employed. In proportion as the hazards increase, there should be a corresponding increase in the care exercised. Thus, it has been held that it is the duty of a railway company, in an unusually dry season, when all inflammable material is like tinder and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons. So, when the wind is blowing directly from an engine towards wooden buildings or combustible material, greater precautions may be required; and when a train is running through a densely populated country or village, where there are a great number of buildings exposed to the hazards of fire, greater precaution must generally be exercised than is necessary when running through the country, where there are no buildings. Unusual precautions are not required, such as the purchase and use of tarpaulins or other similar means to protect against fire."

This statement of the law is fully sustained by the adjudicated cases. *Marvin v. Chicago, etc., R. R. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; *Pittsburg, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Fero v. Buffalo & State Line R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Riley v. Chicago, M. & St. P. Ry. Co.*, 71 Minn. 425, 74 N. W. 171.

The case last cited was an action for damages caused by fire scattered from one of defendant's locomotives. It appeared that the country was unusually dry, and vegetation very inflammable, particularly along that part of the defendant's road where the fire in question occurred; also, that on the occasion there was a very high wind. Upon review, the Supreme Court of Minnesota

held that it was not error to instruct the jury that "ordinary care" was a relative term, and depended on circumstances and conditions; that in passing upon the management of defendant's engine they were to consider the conditions then prevailing, such as the dryness of the grasses, stubble, and other vegetation near the track, and the speed and direction of the wind; but, on the other hand, they must give due consideration to the necessities of the railway service, and the duty of the defendant to its patrons and the public.

In the case at bar, as already seen, a freight train of the defendant with a load too great for one engine was speeding by the property of the plaintiff at the rate of 30 miles an hour—twice the speed contemplated by its schedule—and emitting an unusual quantity of sparks and cinders. There can be no question that, the harder an engine is worked, the more sparks and cinders it will discharge. The danger of fire is therefore necessarily augmented by the speed of a train, especially when it is pulling upgrade, as it was here. At this time the property of the plaintiff was greatly exposed to danger by reason of its nearness to the railroad, the dryness of the season, and a strong wind blowing directly to it from the passing engines. The burden was on the demurrant to show the exercise of reasonable care in the operation of its train and engines.

It does not appear that the speed adopted, particularly in view of the prevailing conditions, was a necessity to the railway service, or a duty owed by the defendant to its patrons or the public. This was an ordinary freight train, and not one word is offered in explanation of the high rate of speed at which it was moving. The fire was set out by the engines of the defendant, and it was for the jury to say whether or not the act, taken in connection with all the attending conditions and circumstances, was the result of a negligent operation of its engines by the employes of the defendant. A consideration of this question was withdrawn from the jury by the demurrer to the evidence, and we are unable to say that they would not have been justified in finding a verdict for the plaintiff.

Sundry exceptions were taken during the progress of the trial to the action of the circuit court in admitting certain evidence offered on behalf of the plaintiff, and in refusing to strike out certain answers of the witness Robert Grigsby on his cross-examination. In the view we have taken of the case, it is unnecessary to pass upon these exceptions, for, if their solution were in favor of the defendant company, it could not alter the conclusion we have reached.

For these reasons the judgment of the circuit court must be affirmed.

WHITTLE, J., absent.

(108 Va. 591)

STEVENSON v. LEVINSON.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

APPEAL AND ERROR—RECORD—NEW TRIAL.

It cannot be held that the court erred in granting a new trial, a ground of the motion therefor being misdirection of the jury, and the instructions not being in the record.

Appeal from Circuit Court of City of Newport News.

Suit by one Stevenson against Max Levinson. Judgment for defendant. Plaintiff brings error. Affirmed.

A. C. Garrett and Jno. W. Friend, for plaintiff in error. Lett & Massie, for defendant in error.

KEITH, P. Stevenson brought suit in the circuit court of the city of Newport News to recover damages for an injury received by him, due, as he alleges, to the negligence of Max Levinson. After the evidence was introduced, the court gave certain instructions, and the case was submitted to the jury, which found a verdict in favor of Stevenson for \$650. Thereupon the defendant moved the court to set aside the verdict as being contrary to the law and the evidence, and because of misdirection on the part of the court.

The verdict was set aside and a new trial awarded, to which action of the court the plaintiff excepted, and made the evidence part of the record by a bill of exceptions. There was, however, no exception to the instructions given and refused by the court.

At a subsequent term the case was submitted to a jury, and, the plaintiff not introducing any testimony, a verdict was found for the defendant, upon which the court entered judgment, and the case is now before us for review upon the bill of exceptions taken at the first trial to the action of the court setting aside the verdict.

One of the grounds upon which the court was asked to set aside that verdict was that it had misdirected the jury. As the instructions given are not before us, we cannot say that the court erred in setting aside the verdict upon this ground. The presumption is in favor of the propriety of the court's action.

"The judgment of a court of competent jurisdiction is always presumed to be right until the contrary is shown, and a party in an appellate court, alleging error in the court below, must show it in the regular way, or the presumption in favor of its correctness must prevail." *Burks, J., in Harman v. Lynchburg*, 33 Grat. 43; *Dove v. Commonwealth*, 82 Va. 305; *Riely, J., in Shipman v. Fletcher*, 91 Va. 487, 22 S. E. 458.

In *Rocky Mt. Loan & Tr. Co. v. Price*, 103 Va. —, 49 S. E. 73, it appears that "one of the grounds for setting the verdict aside was misdirection of the jury, and the instructions

given are not in the record. This court [said Judge Harrison] cannot, in the absence of the instructions, assume that they were free from objection, or pass at all upon that ground for setting the verdict aside."

We are bound down, therefore, to the conclusion that the circuit court committed no error in setting aside the verdict of the jury.

Upon the second trial no evidence was introduced by the plaintiff, and the verdict of the jury was for the defendant. In this, of course, there was no error.

Upon the whole case, the judgment is affirmed.

(108 Va. 586)

INTERSTATE COAL & IRON CO. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

TAXATION—MINERAL LANDS—ASSESSMENT AS UNDER IMPROVEMENT.

Under Laws 1902-04, p. 820, c. 217, providing for the assessment every two years of mineral lands at their fair cash value: First, of such portion of each tract which is improved and under development; second, of the improvements, fixtures, and machinery on each tract; and, third, the area and fair cash value of such portion of each tract as shall not be under development—the portion of a tract underlaid with coal is to be assessed as under improvement, where coal mines have been opened on it, and not such portion merely as will be deprived of coal within the next two years.

Error to Circuit Court, Wise County.

Proceeding by the Interstate Coal & Iron Company against the commonwealth to correct an assessment. There was an adverse judgment, and the company brings error. Affirmed.

Bullitt & Kelley, for plaintiff in error. The Attorney General and W. W. G. Dotson, for the Commonwealth.

KEITH, P. The Interstate Coal & Iron Company is the owner of a tract of coal land lying in Wise county, containing 1,470 acres. In the year 1903 the commissioner of the revenue assessed one-half of this land, 735 acres, as being under development, at the sum of \$200 per acre—a total valuation of \$147,000—and the remainder at \$20 per acre, amounting to \$14,714.80.

On the 9th of December, 1903, the coal and iron company, having given the commonwealth's attorney of Wise county proper notice, made motion before the circuit court to correct this assessment, and to assess only 65 acres thereof as under improvement.

The case came on to be heard, and it appeared from the evidence that only 421 acres of the tract was underlaid with coal, and that only about 65 acres thereof will be mined within the next two years; that \$200 per acre is a fair valuation of that portion of the land which should be considered as under improvement, that the coal company has upon the land 200 coke ovens, which

together with the buildings, machinery, and other structures, are assessed to the Virginia Iron, Coal & Coke Company, the lessee of the Interstate Coal & Iron Company; that the coal vein upon the land will produce about 8,000 tons of coal per acre, and that the Interstate Coal & Iron Company receives as royalty upon the coal 10 cents per ton, making about \$800 per acre which it will receive for every acre of coal which shall be mined; that about one-third of the coal mined from said property is shipped as coal; and that the balance is made into coke; and that various other companies which make about the same proportion of coke and coal have been assessed in Wise county as having about two acres of land under improvement for each coke oven owned by such company. And thereupon, "the court being of opinion that, in order to determine how much land is under improvement, it is right to consider the number of coke ovens being operated on the property, and the output of coal therefrom, and that to consider two acres as under improvement for each coke oven, where two-thirds of the coal is made into coke, is a fair way to estimate the quantity of land under improvement, and being further of opinion that all such companies ought to be taxed ratably, upon the basis of the number of coke ovens operated by each, and the output made by them, respectively, it is therefore considered by the court that 421 acres of the said land—this being all thereof which carries the coal—should be considered as under improvement; and it is further considered by the court that the said assessment be corrected, and that 421 acres of the said land be assessed at \$200 per acre, and that the balance of the land, to wit, 1,049.74 acres, be assessed at \$20 per acre, and that the taxes be extended upon this corrected assessment."

Thereupon the Interstate Coal & Iron Company appealed to this court, and assigns as error the ruling of the court that 421 acres of its land should be considered as under improvement, instead of holding that only 65 acres should be considered as under improvement, and be assessed at \$200 per acre.

The assessment was made under an act entitled "An act to provide for the separate and special assessment of taxes on mineral lands and on the improvements, fixtures and machinery thereon," approved May 13, 1903 (Laws 1902-4, p. 320, c. 217), which is as follows:

"Section 1. Be it enacted by the General Assembly of Virginia, as follows: The several commissioners of the revenue in this state shall on or before the first day of August nineteen hundred and three, and every second year thereafter on or before the fifteenth day of May, specially and separately, assess at the fair cash value all mineral lands, and the improvements, fixtures and machinery thereon, within their respective

districts separately from other lands charged thereon, and shall extend the taxes upon said lands, improvements, fixtures and machinery, assessed as aforesaid, at the rate fixed by law upon tangible property.

"Sec. 2. The commissioner, in assessing mineral lands, shall set forth upon the land book, first, the area and the fair cash value thereof, first of such portion of each tract which is improved and under development; second, the fair cash value of the improvements, fixtures and machinery upon each tract; and, third, the area and the fair cash value of such portion of each tract as shall not be under development. If the surface of the land is held by one person, and the coal, iron, minerals, mineral water, gas or oils under the surface be held by another person, the estate therein of each, and the relative fair cash value of their respective interests shall be ascertained by the commissioner. If the surface of the land and the coal, iron, minerals, mineral waters, gas or oils under the surface be owned by the same person, the commissioner shall ascertain the fair cash value of the land, inclusive of the coal, iron, minerals, mineral waters, gas or oils, and assess the same at such ascertained value."

It appears from the act that the commissioners of revenue are required on the 1st day of August, 1903, and every second year thereafter, on or before the 15th day of May, to assess all mineral lands at their fair cash value: First, of such portion of each tract which is "improved and under development"; and, secondly, of the improvements, fixtures, and machinery upon each tract; and, third, the area and fair cash value of such portion of each tract as shall not be under development.

What is the meaning of the words "improved and under development," as used in the statute? It is evidently something different from "improvements, fixtures and machinery." According to the appellant, only so much of the land as will be deprived of its coal within the next two years after the assessment can be considered as under improvement, while the court was of opinion that, by opening the mines upon the lands, the cash value of the entire body of land underlain with coal was enhanced, and took as an index by which the extent of the improvement was to be measured the number of coke ovens in operation. At the end of two years, if the coal under 65 acres shall have been exhausted, that area ought to be deducted from the aggregate of the mineral lands under improvement, the result of which will be that the owners of mineral lands will pay taxes upon the fair cash value of the land, inclusive of the coal, iron, and minerals, as the statute directs, and will at the end of each period of two years be relieved from taxation upon that land from which the coal has been taken.

The statute fixes no other standard than

that the commissioner shall ascertain its fair cash value, and there is no evidence to show that the mode adopted by the commissioner and by the court is not in itself proper, or which suggests to this court a more fair and just method of reaching the object at which the statute aims.

The judgment of the circuit court is affirmed.

(103 Va. 634)

CHADDUCK v. BURKE.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

PUBLIC OFFICERS—APPOINTMENT—POWER OF COURTS—STATUTORY PROVISIONS—VACANCIES—HOLDING OVER AFTER EXPIRATION OF TERM.

1. A court has no inherent power to appoint to office, and a statute conferring the power must be strictly pursued.

2. Under Acts 1902-04, p. 742, c. 482, § 95 [Va. Code 1904, p. 59], which provides that each county judge shall, on the recommendation of the board of supervisors, appoint a superintendent of the poor, and which declares that the judge may reject the recommendation, and, unless the board recommends another person within 30 days, he shall fill the office by his own appointment, an appointment by a judge, made in the same order which rejects a recommendation of the board, is void.

3. Acts 1902-04, p. 745, c. 482, § 106 [Va. Code 1904, p. 62], which provides that when a vacancy occurs in any county office the same shall be filled by the court or judge thereof, has reference alone to vacancies occurring during the term of an office by death, resignation, removal, and the like, and does not contemplate the filling of an office for the ensuing term on the expiration of the preceding term, where the incumbent holds the office for a fixed term and until his successor has qualified.

4. A circuit court has no authority, under Act December 18, 1903, as amended by Act March 15, 1904 [Va. Code 1904, p. 59, § 95], which provides that each circuit court, on a recommendation of the board of supervisors, shall in November, 1907, and every fourth year thereafter, or at any time before or after November, 1907, in case a vacancy exists, appoint a superintendent of the poor, to appoint before November, 1907, a superintendent of the poor to succeed the incumbent holding over after the expiration of his term ending January 1, 1904.

Error to Circuit Court, Culpeper County.

Petition for mandamus by Roy O. Burke to require John M. Chadduck to surrender an office. There was a judgment awarding a peremptory writ, and defendant brings error. Reversed.

Grimsley & Miller and Jeffries & Lawless, for plaintiff in error. Barbour & Rixey, for defendant in error.

HARRISON, J. This writ of error brings before us a controversy over the office of superintendent of the poor of Culpeper county. By the judgment of the lower court a peremptory writ of mandamus was awarded, requiring the plaintiff in error to surrender the office in question, together with all of the property held in connection therewith, to the defendant in error. The correctness

of this conclusion is the subject for our consideration.

It appears that John M. Chadduck, the plaintiff in error, had held the office in controversy for several terms immediately preceding this litigation. Under the law as it was prior to the adoption of the present Constitution, the term of office of superintendent of the poor began on the 1st day of July and expired with the 30th day of June four years thereafter. The last term for which Chadduck had been appointed would have expired with the 30th day of June, 1903, but under the new Constitution the term of this office, like others, was made to begin on the 1st day of January, 1904, and, in order to meet the change, section 11 of the schedule [Va. Code 1904, p. cclxxvi] provided that all county officers, and their successors who were in office when the Constitution went into effect should hold their respective offices, and discharge their respective duties, and exercise the respective powers thereof until January 1, 1904. Section 17 of the schedule provided [Va. Code 1904, p. cclxxviii] that all officers whose terms of office are extended by this schedule, who are required by law to give bond, shall, prior to the expiration of the terms for which they were originally chosen, enter into a new bond, with like conditions, for the faithful performance of their duties for the extended term, and until their successors shall have been duly chosen. Section 33 of the Constitution [Va. Code 1904, p. ccxv] provides that all officers elected or appointed shall continue to discharge the duties of their offices, after the terms to same have expired, until their successors have qualified.

The plaintiff in error executed the new bond as required, and hence, under the provisions mentioned, his regular term, which would have expired with June 30, 1903, was extended to the 1st day of January, 1904; and he was authorized to discharge the duties of his office until his successor had been duly chosen and had qualified.

The provision for filling this office when it should expire on the 1st day of January, 1904, is found in section 95 of an act passed by the General Assembly on the 18th day of December, 1903. Acts 1902-04, p. 742, c. 482 [Va. Code 1904, p. 59]. It is there provided that each county judge, upon the recommendation of the board of supervisors of each county in which he holds court, shall, between the passage of the act and the 1st day of January, 1904, appoint for each county in which he holds his court one superintendent of the poor. It is further provided that the judge may, if he thinks proper, reject the recommendation; and, unless the board recommends another person suitable, in his opinion, for the office, within 30 days after the recommendation has been rejected, he shall fill the office by his own appointment in term or in vacation.

On the 31st day of December, 1903, the

board of supervisors recommended for appointment as superintendent of the poor Roy C. Burke, the defendant in error, for the term of four years commencing January 1, 1904. On the 11th day of January the judge rejected this recommendation, spreading, as required, his reasons therefor upon the order book of his court, and proceeded by the same order, without any further recommendation by the board, to appoint the plaintiff in error for the four-year term beginning January 1, 1904. A court has no original or inherent power to appoint to office. Its sole power to perform the act is derived from the Legislature. The statute conferring the power must therefore be strictly pursued when the power is exercised. It is manifest that the appointment made by the county judge was void, and of no effect, because of the failure to observe the requirement of the statute, which was mandatory, providing that he should make the appointment on the recommendation of the board of supervisors, unless the board should fail to recommend a person, in his judgment suitable, for 30 days after his rejection of the preceding recommendation, in which latter case alone had he the power to fill the office by his own appointment.

But it is further contended that after the 1st day of January, 1904, the period to which the term of this office was extended by the Constitution, no appointment having been made by the county judge for the next ensuing term, there existed a vacancy in the office, which the judge was authorized to fill under section 106 of the act of December 18, 1903 (Acts 1902-04, p. 745, c. 482 [Va. Code 1904, p. 62]), which, so far as needful here, provides that, when a vacancy occurs in any county office, the same shall be filled by the court of the county in which it occurs, or the judge thereof in vacation. The term of office of any person appointed under this section shall commence as soon as he shall qualify, and continue for the unexpired term of such office.

It is said that the word "vacancy," as applied to an office, has no technical meaning; that an office is vacant or not, according to whether it is occupied by one who has a legal right to hold it, and to exercise the powers and perform the duties pertaining thereto. A vacant office is one without an incumbent. Vacancy in office is one thing and term is another. An office may be vacant and filled many times during a term of four years, but it cannot become vacant at the end of a term where the incumbent is authorized to hold over, for the instant the successor is duly appointed and has qualified he becomes entitled to the office, and there has been no hiatus at all. So long, therefore, as an office is supplied with an incumbent in the manner provided by the Constitution or law, who is legally qualified to exercise the powers and perform the duties which appertain to it, the office is not va-

cant. Section 106 of the act under consideration contemplates and has reference alone to vacancies occurring during the term of an office by death, resignation, removal, and the like. It does not refer to or contemplate the filling of an office for the ensuing term upon the expiration of the preceding term. That was fully provided for by section 95 of the same act, which has already been adverted to.

The regular term of the plaintiff in error expired, under the law, on the 1st day of January, 1904, but he was just as fully authorized by law to hold the office and exercise the powers and perform the duties appertaining to it after that time, until his successor had been duly appointed and qualified, as he was before the expiration of his regular term. Indeed, the period between the expiration of his term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed statutory period, when the law provides that he shall hold until his successor qualifies.

As said in a California case, the plaintiff in error has, under the law, "a fixed term and a contingent term." He holds absolutely for the full period of his regular term, and contingently after that until his successor is appointed and qualified. It is said that the law abhors vacancies in public offices, and that great precautions are taken to guard against their occurrence. Hence it is, no doubt, that we find so generally adopted the provision that an incumbent shall, at the end of his term, continue to hold the office and exercise its powers and perform its duties until his successor has been duly appointed and qualified. And also the statutory provisions for filling vacancies occurring during a term, which are emergencies often requiring prompt action. Such provisions are founded upon necessity, to prevent vexatious embarrassments in the public service. As far as our investigation has gone, the great weight of authority upholds the view that, wherever the law provides for an incumbent holding over until his successor has been appointed and qualified, there is no vacancy in the office at the expiration of the fixed term. *Ex parte Lawhorne*, 18 Grat. 85; *Ex parte Meredith*, 33 Grat. 119, 122, 36 Am. Rep. 771; *Mechem on Pub. Officers*, § 126 et seq.; *Throop on Pub. Officers*, § 308 et seq.; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *People v. Van Horne*, 18 Wend. (N. Y.) 515; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; *People v. Ward*, 107 Cal. 236, 40 Pac. 538; *Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *Baxter v. Latimer*, 116 Mich. 356, 74 N. W. 726; *Kimberlin v. State* (Ind. Sup.) 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 858; *People v. Henderson* (Wyo.) 35 Pac. 517, 22 L. R. A. 754.

The case of *Johnson v. Mahn*, 77 Va. 265, is cited for the proposition that a vacancy exists, which can be supplied by the appoint-

ing power for filling vacancies, when the incumbent of an office is holding over, by authority of law, until his successor qualifies. In that case Judge Richardson does employ language justifying this contention; but its use does not appear to have been necessary to the decision of the question there involved, and the dictum is not sound, is contrary to the current of authority, and cannot be followed as a precedent.

Upon reason and authority we hold that there was no vacancy in the office of superintendent of the poor of Culpeper county on the 11th day of January, 1904; that the judge of that county was authorized to fill under section 106 of the act of December 18, 1903; that his action in attempting to fill the office was void; and that the plaintiff in error continued, as the incumbent under the law, in the rightful possession of the office, awaiting the lawful appointment and qualification of his successor.

On the 19th day of April, 1904, the circuit judge of Culpeper county, upon the recommendation of the board of supervisors, entered an order appointing the defendant in error, Roy C. Burke, to fill the office in controversy.

Under the provisions of the schedule of the present Constitution, and of section 3058b, p. 1628, of Va. Code 1904, the circuit courts, created by the Constitution, succeeded to all the power that the county courts had under section 95 of the act of December 18, 1903. This was the only source from which the circuit court derived authority to make an appointment to this office. Section 95 of the act mentioned was amended and reenacted on the 15th of March, 1904, and is now found as section 95, p. 59, in Va. Code 1904. As already seen, the law conferring the power of appointment upon a court or the judge thereof measures and limits the extent of that power. We must therefore look to section 95, as amended on the 15th of March, 1904, for the authority of the circuit court of Culpeper county to fill the office in question on the 19th day of April, 1904.

It seems to be plain from section 95, as amended, that the only power conferred upon the circuit court, or the judge thereof, with respect to the office of superintendent of the poor, is that in November, 1907, he shall, upon the recommendation of the board of supervisors, appoint a suitable person to fill the office for the ensuing term beginning January 1, 1908; and that every fourth year thereafter he shall, upon such recommendation, again appoint for the next ensuing term. The act further provides that at any time before or after November, 1907, the court, or judge thereof, shall fill vacancies that may occur in the office. So that the only power the circuit court or the judge thereof had until November, 1907, touching the office in question, was to fill any vacancy that might occur therein. And, inasmuch as no vacancy existed in the office on the 19th day of April,

1904, the order appointing Roy C. Burke was invalid, and of no effect.

Upon the whole case our conclusion is that John M. Chaddock, the plaintiff in error, is the rightful incumbent of the office of superintendent of the poor of Culpeper county, holding the same by authority of law, and that his term cannot be disturbed until a successor has been duly appointed and qualified. In view of the high testimony borne by the record to his experience, fidelity, and efficiency, the result reached cannot be regretted, so far as the welfare of the public service is concerned.

For these reasons the judgment complained of must be reversed, and, this court proceeding to enter such judgment as the lower court ought to have entered, it will be ordered that the writ of mandamus prayed for by the defendant in error be denied, and his petition dismissed.

CARDWELL and WHITTLE, JJ., absent.

(108 Va. 624)

LEWIS v. APPERSON.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

DOWER—RELINQUISHMENT—DEED—ESTOPPEL.

Code 1887, § 2502 [Va. Code 1904, p. 1272], provides that, when a husband and wife have signed a writing purporting to convey real estate, it may be recorded, and shall then operate to convey the wife's right of dower. In a suit to subject an owner's land to liens, none of which were superior to his wife's dower right, a decree for the sale of the land was made. The wife joined the commissioner in executing a deed to the purchaser, reciting that the wife relinquished to the purchaser her rights in the premises. The deed was acknowledged and admitted to record. The wife was not guilty of any fraud whereby the purchaser was misled. The evidence did not show that she induced the purchaser to purchase the premises. *Held*, that the wife was not barred from claiming her dower right by her deed under the statute, inasmuch as her husband did not join therein, or by estoppel.

Appeal from Circuit Court, Prince William County.

Suit by Mrs. P. M. Apperson against H. T. Lewis. From a decree for plaintiff, defendant appeals. Affirmed.

Jeffries & Hill and Grimsley & Miller, for appellant. Barbour & Rixey, for appellee.

KEITH, P. The suit of Partlow v. John H. Apperson was instituted in the circuit court of Culpeper county to subject the lands of the defendant to the payment of liens, amounting to the sum of \$1,872, none of which were superior to the widow's right of dower. Under decrees entered in this cause, the land was offered for sale, and purchased by H. W. Lewis at \$12 per acre, amounting in the aggregate to \$2,232. On the 14th of September, 1886, the commissioners reported this sale, which was duly confirmed, and by a subsequent decree a reference was made to one

of the master commissioners "to take, state, and report to the court an account of the present value of the contingent right of dower of Mrs. P. M. Apperson, wife of John H. Apperson, in the land sold in this cause, and in taking said account said John H. Apperson and wife shall have notice."

Mrs. Apperson, the wife of John H. Apperson, had been at that time married about 45 years. She was older than her husband; she was not a party to the original bill of Partlow v. Apperson; the preponderance of the evidence does not show that she knew of the sale of her husband's land until after it had been made, nor does it show that she had any notice of proceedings under the rule to commute her contingent right of dower. A highly respectable witness states that the subpoena was issued to her, that it was given to her husband to execute, and that he had seen it in the papers, with service acknowledged in the handwriting of Mrs. Apperson. The paper itself has disappeared, and Mrs. Apperson, on the other hand, testifies that she never acknowledged service of the commissioner's notice, and that she never was asked to do so. It does not appear by the preponderance of the evidence that there was an effort to sell the land free from the claim of dower. There is the testimony of witnesses to that effect, but other witnesses are positive that the auctioneer proclaimed more than once that the land was sold subject to dower. The purchaser swears that he bought understanding that he was to get a complete title, and that he paid \$12 per acre for land for which he would not have paid more than \$6 an acre subject to dower rights. He admits, however, that he knew that Mrs. Apperson was living and had a contingent right of dower in this land.

It appears that the land sold for more than enough to pay all the liens reported against it, together with the sum of \$171.87, which the commissioner ascertained to be the value of the contingent right of dower. The commissioner's report, showing the disbursement of the fund in his hands, contains this item: "By cash paid Mrs. P. M. Apperson, present value of her contingent right of dower, she having united in deed to purchaser, \$171.87;" and at the foot of the report the commissioner of sale makes this statement: "In paying the present value of the contingent right of dower of P. M. Apperson [the widow], your commissioner only paid her the principal sum ascertained by Commissioner Stallard's report (\$171.87). As her husband is still living, he is entitled to the interest, and it was therefore included in the amount of balance paid him, as will be seen above." The commissioner of sale states in his deposition that "I paid her the money, and took hers and her husband's joint receipt for the two amounts paid them. I drew the receipt, and both of them signed it in my presence." Mrs. Apperson, however,

says that, "as a matter of fact, Mr. Apperson received all of the money, and I did not have the use of any of it"; and, referring to the commissioner's deed in which she united, and which we will more particularly hereafter advert to, says: "If I had understood it, I would not have signed it. I never employed any lawyer about this matter in my husband's lifetime, and never authorized my husband to do so, and never consulted any lawyer on the subject."

On the 30th of May, 1893, when her husband was still living, the commissioner of sale in the chancery cause of Partlow v. Apperson executed a deed to the purchaser, in which Mrs. Apperson united, conveying this tract of land, and in it there appears this recital: "And whereas the said commissioner was directed to pay to P. M. Apperson, wife of J. H. Apperson, the commuted part of her contingent right of dower: Now this deed witnesseth, that for and in consideration of the premises and of the payment in full of the purchase money aforesaid by the said parties of the second part, the said commissioner as aforesaid doth give, grant, sell and convey with special warranty of title unto the said parties of the second part the aforementioned tract or parcel of land, and the said P. M. Apperson doth hereby relinquish and convey unto the said parties of the second part all right, title and interest she may have in said land in consideration of the commuted value thereof paid her by said commissioner"—signed by the commissioner and P. M. Apperson, duly acknowledged before a commissioner in chancery on the 18th of September, 1893, and admitted to record on October 24th of the same year.

On the 16th of December, 1898, John H. Apperson died, and in June, 1901, Mrs. Apperson filed her bill, claiming dower. The purchaser answered, denying her right, and from the record in the former suit of Partlow v. Apperson, which was exhibited with the bill, and the testimony of the witnesses, the facts appear that have already been related. The circuit court held that Mrs. Apperson was entitled to the relief asked for, and from that decree an appeal was allowed.

By section 2502 of the Code of 1887 [Va. Code 1904, p. 1272], in force at the date of this deed, it is provided that "when a husband and his wife have signed a writing, purporting or contracting to convey any estate, real or personal, or any writing authorizing another to convey, or contract to convey any such estate, such writing may be admitted to record as to each of them according to the provisions of section twenty-five hundred or twenty-five hundred and one, and when it shall have been so admitted to record as to the husband as well as the wife, or if it be a writing executed under a power of attorney, when such writing as well as such power of attorney shall have been admitted to record it shall operate to convey

from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any estate conveyed or embraced therein, as effectually as if she were, at the date, an unmarried woman. Such writing shall not operate any further upon the wife or her representatives by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which, if it relate to her said right of dower or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit."

It is plain that the deed of the 30th of May, 1893, though signed, acknowledged, and admitted to record as to Mrs. Apperson, was not of itself effectual to bar her right of dower, her husband not being a party to it. It is claimed, however, that this deed, together with the conduct of Mrs. Apperson in connection with the transaction under investigation, were such as to bar her claim.

In volume 14 of Cyc. of Law and Procedure, p. 931, it is said that, "As a general rule, acts of the wife during coverture, to operate as a bar of dower by way of estoppel, must in effect amount to one of the modes pointed out by the common law or recognized by statute as constituting a bar. It has been held, however, that acts and conduct sufficient to constitute an equitable estoppel will bar the right."

In *Martin v. Martin*, 22 Ala. at page 105, it is said: "Where the subject-matter of litigation arises out of a contract, either express or implied, it may be granted that a married woman may be estopped, like other parties, by acts or declarations upon which others have been induced to act, and against the truth of which it would work fraud and injustice for her to aver; but this doctrine can have no application to dower, which does not arise out of nor is dependent upon any contract. On the contrary, 'it is an estate which arises solely by operation of law, and not by force of any contract, express or implied, between the parties. It is the silent effect of the relation entered into by them; not as in itself incidental to the marriage relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law.' Park on Dower, 5. It has for its object the sustenance of the widow and the nurture and education of her children, if she have any, and is favored in law. Indeed, such was the favor with which it was regarded by the ancient common law that it grew into a maxim 'that the law favoreth three things—life, liberty, and dower.' Dower, being an institution of positive law, can only be defeated or barred by some of the modes pointed out by the law." In

support of the law as thus stated, there are cited Cro. Jac. 111; 9 Co. 170.

In *Rannells v. Gerner*, 80 Mo. 474, it is said that "the Legislature has provided but one mode whereby a married woman may relinquish her dower in the real estate of her husband, and that is by their joint deed, acknowledged and certified"; and, with reference to the doctrine of estoppel as applied to such cases, the court says: "Respecting the equitable subject-matter of defendant's answer, it is the established law of this state that estoppels in pais are not applicable to *femes covert*, except where regarded as *femes sole*, in consequence of possessing separate estates." In support of this a large number of authorities are cited, and the court then observes that "isolated cases may perhaps be found supporting the views advanced by defendant's counsel, but they are opposed by the authorities heretofore cited, and, indeed, by the great current of authority."

In *Grim's Appeal*, 105 Pa. 375, the court said, speaking upon this subject: "If the heirs had been *sui juris*, they would, under these circumstances, certainly be precluded now from asserting a right inconsistent with the course which by their encouragement they induced the executor to pursue. It is objected, however, that certain of the heirs are married women, and, as it does not appear that they were joined by their husbands in these acts of approval and encouragement, they are protected by their coverture. It is certainly true, as shown in a long line of cases, that a contract, void under the disability of coverture, cannot be made good by estoppel; neither a fraudulent denial of coverture, payment of purchase money, nor silent acquiescence in the making of improvements, nor all of these together, can, by way of estoppel, give validity to a contract void upon this ground."

In *Herman on Estoppel*, at section 581, the law is thus stated: "In order to give rise to an estoppel by deed, the parties must ordinarily be *sui juris*, competent to make it effectual as a contract, and the instrument so executed as to be binding in law. The deed of a married woman will not operate as an estoppel where it fails as a grant, or estop her from setting up an estate, obtained subsequently or by purchase, against the grantee. This, like the grant, is limited to the estate the wife has at the time, and does not extend to an interest acquired after the execution of the deed, for she cannot bind herself subsequently by any covenant. Where the deed of a married woman fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground of recovery in a subsequent controversy. By common law the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or estoppel,

because she was incapable of binding herself by covenants of warranty or by agreement to convey her real estate."

In some of the states, as appears from the author just cited, these restrictions are substantially abolished by statute; so that a mortgage deed given by a married woman with her husband's consent, with covenants of warranty, will inure, by way of estoppel, against her in cases of title subsequently acquired. But with us there is no such statute. On the contrary, it is expressly provided that, even where the husband is a party to the deed in which the wife unites, it shall not operate any further upon her or her representatives "by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which, if it relate to her said right of dower, or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit." And here it may be well to remark that the contingent dower interest of the wife was not, at the time Mrs. Apperson united in the deed with the commissioner, a part of the separate estate of a married woman.

In *Lowell v. Daniels*, 2 Gray, 161, 61 Am. Dec. 448, the court, speaking upon this subject, says: "The material question at issue between the parties is whether a married woman and her heirs may be barred of her estate by an estoppel in pais. She can make no valid contract in relation to her estate; her separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate, or that of the husband and children. * * * We think a married woman cannot do indirectly what she cannot do directly; cannot do by acts in pais what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate. This doctrine of estoppel in pais would seem to be stated broadly enough when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates."

In *Drury v. Foster*, 2 Wall. 24, 17 L. Ed. 780, Mr. Justice Nelson said: "It is conceded in this case that the instrument of Mrs.

Foster, signed and acknowledged, was not a deed or mortgage; that, on the contrary, it was a blank paper; and that, in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree, if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, that its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient. But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed, within the requisitions of the statute, until the blanks were filled and the instrument complete. Till then, there was no deed to be acknowledged. The acts of the feme covert and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing. It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *femes covert*. Instead of the transaction being a real one in conformity with established law, conveyances by signing and acknowledging blank sheets of paper would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated."

There are authorities which, conceding that a married woman cannot be estopped by her contract, hold that she may be estopped by a fraudulent act. It is needless to discuss this distinction. It will be time enough to undertake to define its extent when a case arises which renders it necessary. Mrs. Apperson was in this case guilty of no fraud, in relying upon which the appellant could have been misled to his prejudice. She has established a *prima facie* right to the relief sought by her, and the burden was upon those who sought to defeat it to establish all the elements of an estoppel, assuming that such a defense would have been effectual. The preponderance of the evidence does not show that Mrs. Apperson, by word or deed, induced or encouraged Lewis in the purchase of this property. It does not show that she

even had knowledge of his being the purchaser until after the sale was made to him. It is not shown by a preponderance of the evidence that she received the money in lieu of her contingent right of dower, or, if she did, that she was advised with respect to her rights.

We are of opinion that the deed of the commissioner, in which Mrs. Apperson united, did not convey her dower; that she is not estopped by her conduct from asserting her right; that under the circumstances disclosed in this record we cannot burden that right with the money which she is alleged to have received, during her coverture, in lieu of her contingent right of dower; and that, upon the whole case, the decree of the circuit court should be affirmed.

(103 Va. 579)

ADAMS v. JENNINGS.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

JUSTICES OF THE PEACE—JURISDICTION—SPLITTING UP DEMAND—JUDGMENTS—COLLATERAL ATTACK.

A claim due under a contract exceeding the jurisdiction of a justice of the peace was split up into several amounts, each of which was within his jurisdiction. Suits were brought before a justice, and judgments recovered for the amounts claimed. The debtor had notice of the proceedings, but made no objections thereto. Held that, in proceedings after judicial sale of the debtor's land for distribution of the proceeds, the judgments were not subject to collateral attack by a subsequent judgment creditor of the same debtor, though the debtor might have obtained a writ of prohibition to prevent the justice from proceeding for want of jurisdiction.

Appeal from Circuit Court, Campbell County.

Proceedings by one Jennings for a rule against one Adams to show cause why he should not be debarred from participating in the purchase money on the sale of land under an execution. From a decree debarring Adams from participating in the purchase money on the ground that his judgments were invalid, Adams appeals. Reversed.

Caskle & Coleman, Jas. H. Guthrie, and A. S. Hester, for appellant. Frank Nelson and Wilson & Manson, for appellee.

KEITH, P. The question for decision in this case arises upon a decree entered in the chancery suit of *Canada v. Ward*, pending in the circuit court for Campbell county, rejecting certain judgments obtained by Adams against Vandegrift before a justice of the peace, three of which were for the sum of \$100 each, and the other for \$80.30, with interest and costs. These judgments stood upon the office judgment docket of Campbell county, and the commissioner refused to report them, upon the ground that the justice before whom they were recovered had no right to split up the claim of R. E. Adams in order to bring it within his jurisdiction.

The land in this suit was sold to Burruss, who, being advised of the existence of these judgments, and that Adams had not been made a party to the cause, excepted to the confirmation of the report of sale; and the court awarded a rule against Adams, requiring him "to appear and show cause why he should not be debarred from participating in the purchase money."

In answer to the rule, Adams appeared, and stated that the judgments in controversy were recovered by him at the date mentioned, and were for the several amounts stated in the report; that they were in all respects valid, and had never been called in question by Vandegrift, the defendant in the judgments. Adams insisted that these judgments could not be collaterally inquired into, and that no testimony with respect to them was admissible; but it was agreed that, if the law upon that point should be otherwise, the facts with reference to the judgments were as follows:

"Beauregard Vandegrift was indebted to R. E. Adams in the sum of \$380.30 under a contract for the purchase of timber, which debt arose out of one contract, and was all due at one time. After said debt was due, the claim was sent by the creditor, Adams, to G. R. Nicholls, a constable of Campbell county, for collection. Nicholls, without the knowledge of Adams, cut up the original debt into four notes, three for \$100 each, and the fourth for \$80.30, all falling due on February 20, 1897, and on the 20th of March, 1897, obtained four judgments on the said notes, three of which were for the sum of \$100 each, and the fourth for \$80.30, before J. W. Lindsay, a justice of the peace of Campbell county, abstracts of which are filed in the record."

When the case came on to be heard, the judge of the circuit court was of opinion that those judgments were invalid, and from that decree this appeal was taken.

In addition to the facts already stated, it is pertinent to observe that the judgments are in all respects regular—that is, there is no question that the amount represented by them was due; that Beauregard Vandegrift was fully cognizant of all that was done with respect to the debt, and had notice of the proceeding before the justice, and made no objection thereto, and, so far as this record discloses, is not now objecting to the claim of appellant, Adams.

One of the cases relied upon in support of the decree of the circuit court is *Hutson v. Lowry et al.*, reported in 2 Va. Cas. 42. In that case it appears that A. owed B. \$80, and gave four several single bills, for \$20 each, payable at one day, and at one, two, and three months, after date, respectively, and that, after the last note fell due, B. obtained warrants from a justice to recover these several sums. "Held, that A. may obtain from the superior court a writ of prohibition to prevent the justice from proceeding, because

the justice has not jurisdiction in the cases, all the notes constituting only one debt; that, if the money is in the hands of the constable, the prohibition will still go, the defendant having given notice to the constable not to pay over the money to the plaintiff."

The grounds upon which that case went were "(1) that the creditor, by choosing to sever the debt into parts, deprives the debtor of the benefit of counsel, who are not admitted, nor themselves or their fees noticed, before a single justice; (2) the creditor thereby chooses whether he will oust the defendant of the benefit of jury trial; and (3) the creditor thereby eventually might choose whether his debtor should have a writ of error in the supreme tribunal of Virginia, although the amount in controversy is of sufficient magnitude to admit of an appeal or writ of error." The court held that the justice had not jurisdiction to render the several judgments mentioned, and awarded the writ of prohibition.

In *James v. Stokes* and *James v. Harris*, 77 Va. 225, the case of *Hutson v. Lowry* was followed; the syllabus stating that "the law limiting the jurisdiction of justices is founded on public policy, and no manipulation of a debt can affect such jurisdiction; that the limitation by law cannot be changed by one or by both of the parties, and such efforts have been held to be in fraudem legis; and that the views in the case of *Hutson v. Lowry* are founded upon the soundest principles of public policy, and are within the plainest terms of the law." In that case, also, the writ of prohibition was awarded.

In all the cases to which our attention has been called, the remedy resorted to has been the writ of prohibition, sued out by the debtor. In the case before us the question is raised by an exception to a commissioner's report, interposed by a subsequent judgment creditor, and not by the debtor; and the appellant, Adams, was brought before the court by a rule to show cause, entered at the instance of a purchaser of real estate, who desired to protect his title.

Mr. Minor (part 1, vol. 4, p. 219), in treating of the subject, says that where an entire claim exceeds \$20, and has been divided into several parts, each not exceeding \$20, and separate securities are taken therefor, and all are due, it seems the better opinion that courts of record cannot thus be deprived of their jurisdiction, nor the defendant of his right to trial by jury, and that a writ of prohibition will be awarded by the circuit court in order to prevent the usurpation. So, also, it may be remarked, a prohibition will be awarded if a justice of the peace in any case usurp an illegal jurisdiction, as by taking cognizance of a controversy involving the title to a freehold, etc., or by transcending otherwise his lawful cognizance.

But in every case cited, and in all the text-writers consulted, it appears that the attack upon the judgment must be made by

means of a writ of prohibition, and by the party who has been aggrieved. Where the proper remedy by prohibition has been resorted to, the relief is granted upon the ground that the jurisdiction usurped by the justice is a fraud upon the jurisdiction of courts of record, by which a defendant may be deprived of his right to a trial by jury, and of his right to an appeal or writ of error.

Suppose the same thing had been done in a court of record, and that, instead of instituting one suit upon this debt of \$380.30, it had been divided, with the assent of the debtor, into four parts, and separate suits brought upon each at the same time in the circuit court. It would have been a manifest wrong to the defendant to vex him with costs in four suits instead of one, but it would not have constituted a ground for a plea in abatement or in bar, and the debtor's remedy would have been to ask the court to consolidate the actions. If, however, this were not done, and the court proceeded to judgment in each case, it cannot be doubted that the judgments would be valid.

It savors of refinement to say that there has been in this case a fraud upon the jurisdiction of the court, for which the party proceeding before the justice should be condemned to lose his debt. If there has been a fraud committed, who has been defrauded? The defendant, if any one, and he is not complaining. The whole proceeding was taken with his knowledge and consent. It deprived him of no right. It imposed upon him no penalty. He was content, and perhaps preferred to be sued before a justice, rather than to incur the greater cost attending litigation in courts of record.

Suppose that he were at this day to ask for a writ of prohibition; should it be awarded? Would not the courts say to him: "You have slept upon your rights. The act of which you complain was committed in 1897. You have stood by without objection and seen rights accrue which would render it an act of injustice at this late day to disturb those judgments. Had you been vigilant, you would have been awarded the writ; but you have slept upon your rights, and justice to others now requires that it should be denied." Can it be doubted that such would be the decision if Vandegrift had at the date of this decree applied for a writ of prohibition against Adams with respect to these judgments? We think not. And that consideration alone should be conclusive of the controversy.

This result will not in any degree impinge upon the maxim that consent cannot give jurisdiction. The justice had jurisdiction over the amount represented in each of these judgments. Had he undertaken to give a judgment in excess of his jurisdiction, that judgment would have been void. The question here is whether those not parties to the judgment may, after a lapse of years,

introduce evidence of collateral facts, the effect of which, if properly pleaded in due time, would have prevented the judgment from being rendered, or would have avoided it after it was rendered, if presented in a petition for a writ of prohibition. The real point is not that the justice did not have jurisdiction of the matter of which he took cognizance, but that he acquired that jurisdiction by what is denominated a fraud upon the law. That view of the question we have already treated.

Upon the whole case, we are of opinion that so much of the decree of the circuit court as denies to Adams the right to participate in the distribution of the purchase money of the property sold to Burruss is erroneous, and should be reversed.

(108 Va. 661)

VIRGINIA IRON, COAL & COKE CO. v. ROBERTS et al.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

JUDGMENTS—PERSONS CONCLUDED—PURCHASERS PENDENTE LITE—SCOPE OF ADJUDICATION—ESTOPPEL—CONCEALMENT OF TITLE—PARTITION—FINALITY OF DECREE—LIEN FOR COSTS—ENFORCEMENT.

1. A defect in a bill, in failing to sufficiently allege the facts relied on as fraudulent, does not justify sustaining a demurrer to the bill, where other allegations thereof sufficiently set forth an estoppel against defendants.

2. Acts of defendants in inducing others to purchase land which had previously been conveyed to defendants themselves estop them to claim any rights under their deed to the prejudice of those whom they induced to purchase, or those claiming under them, where the purchasers acted in good faith, relying on defendants' acts, without notice or knowledge of the conveyance to defendants.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 232.]

3. Where a bill was demurred to on specific grounds, its failure to expressly allege the majority of defendants against whom an estoppel was sought to be raised, which was not stated as one of the grounds of demurrer, was not available to sustain the demurrer on appeal.

4. In 1879 A. and others instituted suit for the specific performance of a contract for the sale of land to them, and for the confirmation of a partition between themselves. The relief sought was obtained, but, before the report of partition was confirmed, A. died, and the suit was revived in the names of his children as his heirs. A. had conveyed a portion of the land to his children in 1882, and in 1887 had executed a deed purporting to convey mineral rights in the same portion to B. B. was not made a party to the suit. The report of partition was confirmed in 1895, and the portion of the property claimed by them was conveyed by commissioner's deed to A.'s children. Held that, while B. was a purchaser pendente lite, his right to attack the deed under which A.'s children claimed was not affected by the proceedings and decree, as A.'s children succeeded to the suit as heirs, and not as purchasers, and their rights under the deed were not involved therein.

5. The fact that children, to whom land has been conveyed by their father, revive a suit brought by their father, involving the land, in their names as heirs, and not as purchasers, does not estop them to claim under the deed.

6. A decree in partition, entered after everything has been done in the cause except the settling of costs, ascertaining and apportioning the costs, is a final decree; and subsequent proceedings by which a part of the land is sold to pay the costs assessed against it are not binding on a purchaser pendente lite who has no notice of such proceedings.

7. In a suit for partition, where no sale is necessary and none is made for the purpose of partition, the court has no jurisdiction to sell the land assigned to one of the parties to satisfy his share of the costs, but such costs are a lien upon the land assigned to him, which must be enforced, like other judgment liens, by bill in equity, as provided by Code 1887, § 3571 [Va. Code 1904, p. 1907].

Appeal from Circuit Court, Wise County.

Suit by the Virginia Iron, Coal & Coke Company against Wade H. Roberts and others. From decrees rendered, plaintiff appeals. Reversed, except as to a certain decree, appeal from which is dismissed.

D. D. Hull, Jr., G. C. Perry, and Bond & Bruce, for appellant. E. M. Fulton, O. M. Vicars, and Bullitt & Kelley, for appellees.

BUCHANAN, J. This is an appeal from a decree of the circuit court for Wise county sustaining a demurrer to a bill, as amended, filed by the appellant against the appellees, and dismissing the same; to a decree dismissing a bill of review filed by the appellant to review that decree; and to a decree striking from the docket the cause of Hunsucker, etc., v. Spear, etc., in which the appellant's bill, as amended, was asked to be treated as a petition to rehear. The object of appellant's bill was to remove a cloud upon its title to certain coal and mineral rights claimed by it.

It is insisted by the appellees that the demurrer to the bill of the appellant, as amended, was properly sustained, upon several grounds: First, because the deed of W. L. Roberts to his children, dated April 26, 1882, passed to his said children all his right, title, and interest in the land in controversy, and therefore the deeds made by him to Greenway & Warner and to Barrett & Trigg in the year 1887 passed no interest whatever in the lands.

The appellant, in its amended bill, attacks the deed of April 26, 1882, upon two grounds: First, that it was voluntary and fraudulent; and, second, that the grantees in it are stopped from setting it up as against the appellant.

The appellees insist that the charge in the bill (and when we speak of the bill we mean the bill as amended) that the deed was voluntary and fraudulent is not sufficiently definite and specific, and that the facts relied on to show that the deed was fraudulent as against the appellant, or those under whom it claims, should have been set forth.

This objection to the bill is well taken, but that defect was not sufficient to justify the court in sustaining the demurrer to the bill if the allegations of the bill are sufficient

to estop the grantees in the deed of April 26, 1882, or those who claim under them, from asserting rights under it to the prejudice of the appellant, or those under whom it claims.

The estoppel set up in the bill is of two kinds—estoppel by the record and estoppel in pais. As the question of estoppel by the record belongs more properly to another ground of demurrer, it will not now be considered.

As to the estoppel in pais: The bill alleges, in substance, that Wade H. Roberts, one of the grantees in the deed of April 26th, actively participated in the negotiations that led up to the sales by W. L. Roberts to Greenway & Warner and to Barrett & Trigg, and induced them to purchase; that said sales were made by W. L. Roberts with the knowledge, acquiescence, and consent of the grantees in the deed of April 26th; and that Greenway & Warner and Barrett & Trigg, and the parties through whom the appellant claims, each and all of them, at the time of their respective purchases, had no knowledge or notice of the alleged deed of April 26th, but that they and each of them purchased in good faith, relying upon the assurances, representations, and conduct of the said Wade H. Roberts and the other grantees in that deed.

If these allegations are true—and upon demurrer they must be so treated—they are sufficient to estop the grantees in the deed of April 26th from claiming any rights under it to the prejudice of the appellant (*C. & O. Ry. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 614, and authorities cited), unless, as is urged, the bill was defective in not specifically alleging that the grantees therein had reached their majority when their father and grantor made his sales to Greenway & Warner and Barrett & Trigg.

The deed of April 26th provides that the grantees therein and neither of them have the right to sell or dispose of the real and personal property embraced in the deed, nor any part thereof, until they arrive at the age of 21 years. The bill does not specifically allege that the grantees had reached their maturity at the time the sales to Greenway & Warner and to Barrett & Trigg were made, but it does charge that they were made with their consent, which could not be true ordinarily unless they had reached the age of 21 years. The appellant, as appears from its reply brief, construes the language as averring that the grantees had reached their majority. Whether or not this averment would have been sufficient in setting up the estoppel, if that question had been raised at the proper time, it is not necessary to determine. The grounds of demurrer relied on in the circuit court were specifically stated. The objection now under consideration was not one of them. If the objection had been made in the trial court, the defect, if it be one, might have been remedied without costs or delay.

It is purely technical, and will not in the slightest degree affect the rights of the parties on the merits, as the same proof will be required to sustain the allegation as made as would be necessary if the bill had specifically charged that the grantees had reached their majority.

The next ground relied on here by the appellees to show that the demurrer to the bill was properly sustained is that the appellant and those under whom it claims purchased during the pendency of the suit of Hunsucker and others v. Spear and others, and are conclusively bound by the proceedings in that cause, by which certain of the children of W. L. Roberts, grantees in the deed of April 26, 1882, who were also pendente lite purchasers, acquired absolute title to the land in controversy.

In the year 1879 John Hunsucker, James Hunsucker, and W. L. Roberts instituted a suit in the circuit court for Wise county against the heirs of Thomas Rogers and others for the purpose of having a contract for the sale of a tract of land (which includes the land in controversy) entered into by the complainants in that suit with the heirs of Thomas Rogers specifically executed, and also to have a partition of the land made by the complainants between themselves confirmed. By a decree entered in that cause the contract of sale was specifically executed as to a part of the land, and partition made between the parties to the suit. Before the report of partition was confirmed, W. L. Roberts departed this life, and on motion of his children the suit was revived in their names, as his heirs. At that term of the court (September, 1895) the report of partition was confirmed, and O. M. Vicars was appointed a commissioner to convey to the heirs of W. L. Roberts the land assigned him in the partition, except a certain tract of 47 acres. Pursuant to that decree the commissioner executed a deed to the said heirs of W. L. Roberts. During the same term the court set aside that conveyance by decree, in which it is recited that "it appearing to the court that the land assigned to Wm. L. Roberts should not be conveyed to his heirs in equal proportions," and directed that the commissioner should convey to James A. Roberts, W. F. Roberts, and W. H. Roberts, each $\frac{1}{25}$; to Louisa Roberts and Alice Hubbard, each, $\frac{1}{25}$; and to W. H. Roberts, as trustee, etc., of Isaac Roberts, deceased, $\frac{5}{25}$ —of the land. The land was conveyed to these parties in accordance with that decree by the commissioner, report made to the court, and his report confirmed.

The proceedings in the case of Hunsucker and others v. Spear and others, which resulted in the conveyance last mentioned, it is insisted by the appellees, was an adjudication that the grantees in the deed of April 26, 1882, were entitled to the land in con-

troversy, and conclusively binds the appellant and those under whom it claims, all of them being pendente lite purchasers.

The general rule is that a person who acquires an interest in land involved in a pending suit, and from a party litigant, takes subject to the rights of the other parties to the suit, as finally adjudicated, and is concluded by the judgment or decree, whether he becomes a party to the suit, and has a day in court, or not. This rule is necessary to give effect to the proceedings of courts of justice. Without it the administration of justice might in all cases be frustrated by successive alienations of the property which was the subject of litigation, pending the suit, so that every judgment or decree would be rendered abortive where the recovery of specific property was the object. "But while there is no principle in the law," as was said by Judge Tucker in *French v. Loyal Co.*, etc., 5 Leigh, at page 681, "more essential to the administration of justice than the doctrine of *lis pendens*, when properly understood, there is none which is attended with greater occasional hardship; nor would any be more pernicious, if extended beyond its proper limits." It is therefore "confined," as was said by Judge Green in *Newman v. Chapman*, 2 Rand. 93, 102, 103, 14 Am. Dec. 766 (the leading case in this state on the subject), "in its operation, to the extent of the policy on which it was founded; that is, to give effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase." See *French v. Loyal Co.*, 5 Leigh, 681, 683.

Applying these well-settled principles to the facts of the case of *Hunsucker and others v. Spear and others*, do the proceedings in that cause which resulted in a conveyance of the land in controversy to the grantees in the deed of April 26, 1882, conclude the appellant from setting up claim to the coal and mining rights in the land, as against the grantees in that deed? Neither the grantees in the deed of April 26, 1882, as such, nor the appellant, nor those under whom it claims, were ever parties to that suit. W. L. Roberts, the vendor of both sets of claimants, was a party until his death. Then the suit was revived upon the motion of his heirs, and afterward prosecuted in their names as heirs, not as purchasers. The question whether the grantees in the deed of April 26, 1882, or the appellant, had the better right to the coal and mining rights involved in this case, was not in issue in that case. A decision of that question was wholly unnecessary in determining the questions which were in issue. There was nothing in the record of that suit at the time of the purchases of *Greenway & Warner* and of *Bartlett & Trigg* which could have given them notice, actual or constructive, that the question of the rights of the grantees in the deed of April 26, 1882, was involved in that case. It could not have been involved in it at that

time, for the vendees in that deed were not then parties to that suit in any capacity whatever.

A purchaser having actual or constructive notice of a pending suit can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. He cannot be charged with knowledge of facts afterwards brought into the case. *Davis v. Christian*, etc., 15 Grat. 11; *Stout v. Philippi Mfg. Co.* (W. Va.) 23 S. E. 571, 56 Am. St. Rep. 843.

But even if it did appear in the record of that court, as appellees insist, that the grantees in the deed of April 26, 1882, had some interest in or claim to the land which W. L. Roberts was seeking to have assigned him, it only appeared incidentally, and did not in any manner affect the litigation between the complainants and defendants in that suit; and a decision as to the validity of such claim was not essential to giving complete relief under the pleadings in the case. In such a case, even where the person whose interest only incidentally appears is a party to the suit, an adjudication of such a claim does not bind a pendente lite purchaser who has no notice of such claim; and for a much stronger reason it would not bind where such person was not a party to the suit.

In the case of *Bellamy v. Sabine*, 1 De G. & Jo. 560, the question was raised, how far a purchaser from a pendente lite defendant is affected by the right of another defendant in that same suit. It was there said that it seems where a person, without notice of a suit, purchases from one of the defendants property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by the equitable title of another defendant, which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any purposes of the suit to give effect. *White & Tudor's Lead. Cas.* in Eq. vol. 2, pt. 1, p. 142.

In *Freeman on Judgments* (4th Ed.) § 200, it is said, in discussing the doctrine of *lis pendens*, that "if, in an action by one plaintiff against two or more defendants, it appears from the pleadings that one of the defendants has certain equities against others, but those equities do not in any way affect the present litigation between the plaintiff and defendants, and the rights of the defendants between each other are not sought to be determined, no *lis pendens* can be created beyond the purposes of the suit, and an alienee of one of the defendants is not charged with implied notice of the equities between the codefendants. It would seem to be perfectly clear, in the absence of authority on the subject, that there could be no *lis pendens* between coplaintiffs and codefendants in any action not designed to settle the rights of such plaintiffs or defendants between each other, no matter how many facts not material to the present controversy hap-

pened to find their way into the record. If, however, upon proper pleadings, one of the defendants is shown to have certain rights, as against the others, affecting specific property, and entitling him to relief with respect to such property in the present action, a purchaser, after such pleadings have been filed, and notice of the defendant's claim for relief registered (where registry is required), is bound as a purchaser pendente lite."

We are of opinion, therefore, that the decree of the September term, 1895, and the conveyance made pursuant thereto of the land in controversy on the 17th of that month, by Vicars, commissioner, invested the grantees in that deed with such title as W. L. Roberts was entitled to at the time of his death; that they took as heirs, and not as purchasers from said Roberts; and that said decrees and deed in no way affected the rights of the appellant, or those under whom it claims. Neither does the fact that the grantees in the deed of April 26, 1882, had the suit of Hunsucker, etc., v. Spear, etc., revived in their names as heirs, merely, and not as purchasers, estop them, as the appellant insists, from asserting in this case their rights under the deed of April 26, 1882.

The appellees further insist that "the decrees entered by R. T. Irvine, special judge, in September, 1901, directing sale of the land in controversy for costs, the sale made pursuant thereto, and the decree confirming the sale, and the deed made by Commissioner Vicars, and decree confirming this deed, dated April 8, 1902, are all valid and binding, and cannot be set aside," and that the bill, as an original bill, was demurrable.

The purposes of the suit of Hunsucker, etc., v. Spears, etc., had been accomplished by the proceedings had therein prior to the decree of April 12, 1899. Nothing further remained to be done in the cause, except to settle the question of costs. By that decree the amount of costs was ascertained and apportioned among those liable to pay. Of that sum, as costs for partitioning the land, W. L. Roberts, though dead, was directed to pay \$40; and it was decreed to be a lien on the land assigned him, and theretofore conveyed to his heirs by a commissioner of the court. By the same decree a receiver was appointed to collect and disburse the costs, and, if the parties against whom costs were decreed did not pay within 30 days, executions were directed to be issued in favor of the receiver against them. On the 10th of September, 1901, more than two years thereafter, a decree, in which it is recited that the receiver having reported that the costs adjudged to be a lien upon the Roberts land had not been paid, was entered, directing O. M. Vicars, who was appointed a special commissioner for the purpose, to sell the land, or so much thereof as might be necessary, to satisfy the said costs. Pursuant to that decree the whole tract of 230 acres of land, alleged to be then worth \$4,000, was sold, and pur-

chased by W. H. Roberts, one of the heirs of W. L. Roberts, at the price of \$42. The sale was reported to the court, and confirmed by decree of April 8, 1902.

If the decree of April 12, 1899, was a final decree, as insisted by appellees, and as, under our decision, we think it was (*Cocke's Adm'r v. Gilpin*, 1 Rob. 20; *Ryan v. McLeod*, 32 Grat. 367; *Rawlings v. Rawlings*, 75 Va. 76; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772), the subsequent proceedings by which the land assigned W. L. Roberts was sold would seem to be without authority of law, at least as to the appellant, who had no notice thereof.

In *Johnson v. Anderson*, 76 Va. 766, 771, where the court had given all the relief contemplated in the cause, Judge Burks, speaking for the court, said: "The cause was ended, and the court could proceed no further. It had no further jurisdiction in that proceeding either of the subject-matter or of the parties. * * * The original cause being ended, the proceeding was a new one against the defendant; and, being without notice, the personal decree against him is a nullity, and would be so treated, we presume, everywhere." See *Battaille, etc. v. Maryland Hospital, etc.*, 76 Va. 63; *Smith v. Powell*, 98 Va. 431, 36 S. E. 522.

If it had been necessary in the suit of Hunsucker, etc., v. Spear, etc., to have sold the land, the subject-matter of the suit, for the purpose of partition, of course the costs adjudged against each party would have been a charge upon, and should have been paid out of, his share of the proceeds of the sale. But in that case there was no necessity for sale for the purpose of partition, and none was made or could have been made therein without the consent of parties. *Howery v. Helms*, 20 Grat. 1. It would therefore seem clear that in a suit for partition, where there was no sale necessary or made for the purpose of partition, the court would not have jurisdiction to sell the land assigned one of the parties to satisfy his share of the costs of partition. The costs adjudged against such party would be a lien upon the land assigned him, and perhaps a preferred lien, as they were necessary to perfect his title in severalty to it; but it would have to be enforced, like other judgment liens upon the land, by a bill in equity, as provided by section 3571 of the Code of 1887 [Va. Code 1904, p. 1907].

But if it be held that the proceedings in question which resulted in the sale of the land are binding upon the heirs of W. L. Roberts, since they, being parties to the suit, are presumed to have had notice thereof and made no objection, still they are not binding upon the appellant, who had no notice of them. As before stated in this opinion, a purchaser having actual or constructive notice of a pending suit can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed

at the time of his purchase, would have informed him, and he cannot be charged with knowledge of facts afterward brought into the case (*Davis v. Christian*, supra), or be bound by proceedings had therein affecting the land after a final decree, and beyond the jurisdiction of the court.

Having reached the conclusion that under the allegations of the bill the grantees in the deed of April 26, 1882, are estopped by their conduct from asserting a claim under it to the prejudice of the appellant; that the proceedings in the cause by which the land assigned to W. L. Roberts was directed to be conveyed, and was conveyed, to his heirs, did not adjudicate any question between them and the appellant as to which had the better title to the coal and mining rights in controversy; and that the proceedings in the case after the final decree of April 8, 1899, are not binding on the appellant—we are of opinion that the appellant was entitled to maintain its bill as an original bill to remove a cloud from its title, and that the circuit court erred in sustaining a demurrer to the bill and dismissing it.

Having reached this conclusion, it will be unnecessary to consider the other grounds of objection to the validity of the proceedings in the cause of *Hunsucker, etc., v. Spear, etc.*, set up in the bill, as a decision of the questions raised by them, however decided, could not render the bill demurrable, or affect the conclusion we have reached.

The decree of the circuit court of April 11, 1903, dismissing the appellant's bill, and its decree of April 7, 1904, dismissing the appellant's bill of review, must be reversed and annulled; and this court will enter such decree as the circuit court ought to have entered, overruling the demurrer to the bill, and remand the cause to the circuit court for further proceedings to be had, not in conflict with the views expressed in this opinion. And the appeal from the decree of April 10, 1903, in the case of *Hunsucker, etc., v. Spear, etc.*, must be dismissed as improvidently awarded, as there was a final decree rendered in that cause more than one year before the bill in the case of *Virginia Iron, Coal & Coke Co. v. Roberts* was asked to be treated as a petition to rehear in that cause.

(103 Va. 719)

**WORRELL & WILLIAMS v. KINNEAR
MFG. CO.**

(Supreme Court of Appeals of Virginia. March 9, 1905.)

**SALES—MANUFACTURED ARTICLES—BREACH OF
CONTRACT—DAMAGES—ASCERTAINMENT OF
FIXED CHARGES—WITNESSES—CROSS-EXAM-
INATION—APPEAL—HARMLESS ERROR—FOR-
EIGN CORPORATIONS—PLEADING.**

1. The measure of damages for an unqualified annulment without reasonable cause by the vendee in an executory contract for the sale of an article not manufactured at the time of

the breach is the difference between the cost of manufacturing and delivering the article and the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1108.]

2. The latitude permissible in cross-examining a witness must be left largely to the sound discretion of the trial court, which will not be interfered with unless plainly abused to the prejudice of the party excepting.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3854.]

3. In an action for the breach by the vendee of an executory contract for the sale of articles to be manufactured it was charged by plaintiff that a rival concern was back of the suit, and the vice president of that concern was actually in court as the chief witness for defendant. Plaintiff's president was asked on cross-examination, under the guise of showing the "fixed charges" of manufacturing the articles in question, what amount of business plaintiff did, what it spent for advertising, what it spent for salesmen, what were the salaries of its officers, and what was spent for freight. Held, that the questions were properly excluded.

4. Plaintiff's president, having testified that the cost of steel under continuing contracts was three cents a pound, was further asked on cross-examination with whom his company had continuing contracts. Defendant's counsel stated that his purpose was to test the credibility of the witness, and that he intended to show that steel could not be bought at that price. In response to a question of the court, he further stated, however, that he could not say that he would attempt to show that the witness did not have any of the contracts testified to. Held that, as the only legitimate object of the question would have been to lay a foundation for impeachment, and as counsel disclaimed that purpose, the exclusion of the question was proper.

5. The vendor of material to be used in the manufacture of an article is not a subcontractor within the meaning of the rule excluding supposed advantages of a subcontractor in computing profits in the sale of a manufactured article.

6. Representations that plaintiff's bid for the work was as low as it could be done, and that there was no profit in it at the price bid, are mere expressions of opinion, and, although false, do not invalidate a contract made in pursuance thereof.

7. Rejecting a special defense is not prejudicial to defendant where the evidence in support of such special defense is admitted under the general issue.

8. A specification of a defense in that plaintiff corporation had not complied with the provisions of Code 1904, § 1104, prescribing the conditions upon which foreign corporations may do business within the state, was defective where it did not specify the particular in which plaintiff had failed to comply with the statutory requirements.

9. In an action for the breach by the vendee of an executory contract for the sale of articles to be manufactured defendant could not complain of the ascertainment of plaintiff's "fixed charges" of manufacturing the articles by testimony as to the customary percentage to be deducted for such charges, where he introduced such testimony himself, and the jury returned a verdict for less than the amount of plaintiff's claim as computed by deducting the highest estimate made by defendant's witnesses for fixed charges.

10. A new trial will not be granted for refusal to permit evidence to be introduced, where substantially the same evidence is received without objection at a later stage of the trial.

Error to Law and Chancery Court of City of Norfolk.

Action by the Kinnear Manufacturing Company against Worrell & Williams. There was a judgment for plaintiff, and defendant brings error. Reversed.

John B. Jenkins and Green, Withers & Green, for plaintiff in error. Jeffries & Lawless, for defendant in error.

WHITTLE, J. On June 8, 1903, the defendant in error, by a written contract, obligated itself to manufacture and erect for the plaintiff in error 73 galvanized steel shutter doors, to be used in the union warehouses and slip of the Southern Railway Company and the Atlantic Coast Line Railway, at that time in process of erection in the city of Norfolk, at the price of \$5,553.90.

On the following day the plaintiff in error despatched a telegram to the defendant in error, withdrawing its acceptance of the offer by which the contract in question had been consummated; and immediately awarded the contract to the Wilson Manufacturing Company for fifty-odd dollars less than the price stipulated for in the original agreement. The sole reason assigned by the plaintiff in error for the violation of its contract was that it was to its interest to cancel it.

Thereupon this action was instituted in the court of law and chancery for the city of Norfolk to recover damages for the breach of contract, and resulted in a verdict and judgment for the plaintiff for \$1,647.14. To review that judgment the defendant brings this writ of error here.

A bill of particulars was filed with the declaration in the case, furnishing plaintiff's estimate of the material necessary to have completed the contract, with the cost of such material, and also the cost of labor for preparing material and manufacturing and erecting the doors pursuant to contract, to which was added the freight charges and drayage for their transportation from the factory at Columbus to Norfolk. These several items amounted in the aggregate to \$3,326.22.

It is settled law that the measure of damages for an unqualified annulment, without reasonable cause, by the vendee in an executory contract for the sale of an article not manufactured at the time of the breach, is the difference between the cost of manufacturing and delivering the article and the contract price. *Masterton v. Mayor of City of Brooklyn* (N. Y.) 42 Am. Dec. 38; *Morrison v. Lovejoy*, 6 Minn. 319 (Gil. 224); *Kelso v. Marshall*, 24 App. Div. 128, 48 N. Y. Supp. 728; *Dryfoos v. Uhl*, 69 App. Div. 118, 74 N. Y. Supp. 532; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Indiana Canning Co. v. Priest*, 16 Ind. App. 445, 45 N. E. 618; *Beardsley v. Smith*, 61 Ill. App. 340; *Kingman v. Hanna Wagon Co.*, 74 Ill. App. 22; *Rice Co. v. Penn Plate Co.*, 88 Ill. App. 407; *Kimball v. Deere, Wells & Co.*, 108 Iowa, 676, 77 N. W. 1041; *Hauser & Co. v. Tate*, 105 Ky. 701, 49 S. W. 475; *Berthold*

v. St. Louis El. C. Co., 165 Mo. 280, 63 S. W. 784.

The fact that there has been an entire breach of contract in this instance is not denied; and the general doctrine stated above, as to the measure of damages in this class of cases, is also conceded. But the defendant maintains that the plaintiff has altogether omitted the constituent element of "fixed charges" from its computation of the cost of the manufactured product, by which omission, it is insisted, the net profit demanded is materially enhanced.

By the term "fixed charges" is meant the general running expenses which attach to every business, and it is true, as contended, that such "fixed charges" do compose an essential element in the cost of a manufactured article.

The ruling of the trial court refusing to allow certain questions to be propounded to the president of the plaintiff company for the alleged purpose of ascertaining the proportion of the "fixed charges" of the business, proper to be taken into account in determining the plaintiff's profit, constitutes the first assignment of error.

As the rulings of the court with respect to the second and fourth assignments of error are germane to the first assignment, they may be conveniently treated together.

In order to reach an intelligent conclusion in regard to the refusal of the court to permit the defendant's counsel to pursue the line of investigation indicated, it is material to know the circumstances under which the proposed examination arose.

It appears that the Wilson Manufacturing Company, to which company, as remarked, the second contract for the manufacture of the doors in question was awarded after the original contract had been breached, was an active, and, indeed, the sole, competitor in the United States of the plaintiff in the manufacture of that class of doors, and that a suit was then pending between these rival companies for an alleged infringement of a patent upon these doors; that the vice president and factory manager of the Wilson Manufacturing Company was present during the trial as chief witness for the defendant; and it was openly charged by the president of the plaintiff company while on the witness stand that his business rival "is at the back of this suit," and "is here to get all the information he can as to the methods of our manufacture, and I do not propose to give it." This statement, thus directly made, was not denied by the party referred to, and the circumstances strongly tended to sustain the charge.

Under these conditions the trial court declined to permit the witness to be subjected to an examination, the general character of which may be gathered from the following interrogatories:

"What amount of business was done by your house last year?"

"What is the average of your business per annum?"

"What was spent for advertising by your concern last year?"

"What is the average expense for advertising your business?"

"What did you spend for salesmen last year?"

"What were the salaries of your officers last year?"

"What was spent for freight?"

"How many officers are in your company and what salaries do they receive?"

From the necessity of the case, the latitude permissible in cross-examining a witness must be left largely to the sound discretion of the trial court; and the rule is well established that an appellate court will not interfere, unless that discretion has been plainly abused. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Savage v. Bowen* (decided at the January term) 49 S. E. 668. See, also, authorities cited in 8 Enc. Pl. & Pr. 110, note 1.

In order to warrant a reversal on that ground, it must plainly appear that the ruling has resulted to the prejudice of the exceptor. *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850.

That the trial court properly exercised its discretion in refusing to allow the witness to be subjected to the inquisitorial examination proposed, in the light of the surrounding circumstances, cannot be doubted. Plaintiff was the owner of an extensive manufacturing establishment, engaged in various kinds of work, and manufacturing a variety of articles on a large scale, with the buildings, machinery, capital, officers, and employes incident to a business of that magnitude. The entire "fixed charges" of such a business would necessarily have afforded unsatisfactory data to a jury from which to estimate the proportional part of such "fixed charges" proper to be borne in the manufacture of an isolated article. Besides, it is contrary to the policy of the law to permit a person, who, without cause, has violated his contract and been sued for the breach, under the guise of determining "fixed charges" to unduly pry into and expose the private business methods of the injured party to the scrutiny of a vigilant competitor.

"Fixed charges," as remarked, constitute an element of the cost of manufacture, and were the subject of proper inquiry in this case; but, as shall be seen presently, they were susceptible of approximate ascertainment without unnecessary exposure of the plaintiff's trade secrets. To entertain a suit or only on the terms of such business disclosures would tend to deter one who had suffered wrong from resorting to the courts for redress.

In this connection the witness, who, in response to a question had stated that the cost of steel to his company, under continuing contracts, was three cents per pound,

was also asked on cross-examination with whom his company had said continuing contracts, to which question he made the following reply: "I decline to answer. I will make oath that the costs embodied in the bill of particulars are absolutely true, * * * but for the protection of those from whom we have bought I decline to answer." Thereupon counsel for the plaintiff objected to the question, and counsel for the defendant insisted upon the question being answered, stating that his purpose was to test the credibility of the witness, and he intended to show that steel could not be bought at that price. In response to the court's inquiry, if he intended to impeach the witness by showing that his company did not have the continuing contracts claimed, counsel stated "that he could not say that he would attempt to show that the witness did not have any such contracts." The court then sustained the objection to the question, and declined to require the witness to answer it.

The only legitimate object of such a question would have been to lay the foundation for impeaching the witness, and, counsel having disclaimed that purpose, the action of the court in ruling out the question was obviously proper.

It is further suggested in the fourth assignment of error that the plaintiff's estimate of the actual cost of material is based upon subcontracts for material, which, it is said, is not a correct criterion in calculating profits. But the doctrine invoked has no application to the purchase of material out of which an article contracted for is to be manufactured. The reason of the rule for excluding the supposed advantages of a subcontract in computing profits is that it introduces a collateral undertaking, uncertain and contingent in its character, to which the person sought to be affected was not a party, and which was not in contemplation of the parties when the original contract was entered into. *Devlin v. Mayor, etc.*, 63 N. Y. 8. But the vendor of material to be used in the manufacture of an article is not a subcontractor within the meaning of the rule.

In support of the assignment of error No. 3 two averments are made:

(1) That the defendant was induced to enter into the contract by reason of the false and fraudulent representations of the agent of the plaintiff that its bid for the work was as low as the work could be done, and that there was no profit in it at that price; and

(2) That the plaintiff had not complied with the provisions of section 1104, p. 521, of the Code of 1904, prescribing the conditions upon which corporations of other states or countries may conduct operations in this state.

There was an agreement between counsel that the defendant should be permitted to show under the general issue anything which it might be lawful to set up and prove under special pleas, provided such matters were

embraced in its specification of defenses, and contained a statement of facts, which, if true, would amount to a valid defense to the action. The above grounds were embraced in the statement of defenses filed, but, on motion of the plaintiff, were rejected by the court.

With respect to the first ground of defense, the alleged false representations were mere expressions of opinion—"dealer's talk"—and were not such as, if proved, would have invalidated the contract. 1 Benj. on Sales, 561. Besides, it appears that, notwithstanding the rejection of that specification of defense, the court allowed evidence of the alleged false representations to be introduced under the general issue, and the question was in that way submitted to the jury; so that the defendant could not have been prejudiced by the court's ruling upon that issue. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Norfolk, etc., Ry. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462.

The second ground of defense—that the plaintiff was a foreign corporation, doing business in the state without having complied with section 1104 of the Code—was defective in not specifying the particular in which it had failed to comply with the requirements of the statute, and for that cause, if for none other, was properly rejected. *Nat. Bldg., etc., Ass'n v. Ashworth*, 91 Va. 708, 22 S. E. 521.

Finally, in regard to the contention that the court erred in excluding testimony tending to show the amount which ought to have been deducted for "fixed charges." The record shows that the court permitted the introduction of admissible evidence on the subject, and also that the jury made some allowance for such charges in arriving at their verdict.

While the vice president and factory manager of the Wilson Manufacturing Company testifies that from 35 to 40 per cent. of the aggregate cost of material and labor was the customary percentage to be deducted for fixed charges, an intelligent and disinterested witness declares 25 per cent. to be the usual allowance for such charges in determining profit.

As to the propriety of basing a recovery upon this character of evidence, in the leading case of *Masterton v. Mayor of City of Brooklyn*, supra, the court said: "The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates."

It appears, therefore, that the defendant has no ground to complain of the mode adopted for ascertaining "fixed charges" in this instance, and the rule in this state is that "a new trial will not be granted for refusal to permit certain evidence to be introduced when substantially the same evidence was received without objection at a later stage

of the trial." *Norfolk, etc., Ry. Co. v. Marpole*, supra; *Taylor v. Mallory*, supra.

The evidence on behalf of the plaintiff shows that the cost of necessary labor and material to have performed the contract on its part would have amounted to.. \$3,172 43
25% of that sum is..... 793 10

Freight charges \$3,965 53
153 79
\$4,119 32

Contract price of article delivered \$5,553 90
Cost of manufacture and delivery 4,119 32

Profit \$1,434 58
Amount of verdict..... \$1,647 14
Profit 1,434 58

Excess of verdict over profit... \$ 212 56

It thus appears that, while it was competent for the jury to have adopted 25 per cent. of the aggregate cost of labor and material for "fixed charges," they have, in assessing the damages, exceeded that estimate by the sum of \$212.56.

For that reason the judgment of the trial court must be reversed; but, inasmuch as that is the only error which the record discloses, the case will be remanded, with directions that, unless the plaintiff enter of record its election to release the sum of \$212.56, the verdict shall be set aside, and a new trial awarded. But if the plaintiff shall accept a recovery of \$1,434.58 as the true measure of its damages in the case, then the motion of the defendant for a new trial will be overruled, and judgment rendered for said sum of \$1,434.58, with interest and costs.

(103 Va. 708)

VIRGINIA & N. C. WHEEL CO. v. HARRIS.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

MASTER AND SERVANT—DEFECTIVE MACHINERY
—PROMISE TO REPAIR—CONTINUING SERVICE
—PLEADING—DEMURRER—INSTRUCTIONS.

1. A demurrer to an entire declaration, if one count is good, must be overruled.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 486, 487.]

2. Where a demurrer is to an entire declaration, the assignment of causes of demurrer applicable to both counts does not enlarge the scope of the demurrer.

3. A declaration, in an action for injuries, charging that it was defendant's duty to use ordinary care to furnish plaintiff with a reasonably safe saw, that defendant was informed of its defective condition and promised to fix it, but directed plaintiff to continue his work, and failed to fix it as promised, by reason of which plaintiff was injured, is sufficient as against a demurrer assigning as grounds that it is indefinite and does not set out the alleged cause of action with sufficient particularity.

4. Where the servant is induced to continue to operate defective machinery by the master's

order, coupled with a promise to repair the defect, the question whether a continuance in the service and use of the defective machinery is such negligence as to bar a recovery is for the jury.

5. An averment that a master promised to repair machinery, but failed and "refused" to do so, is not inconsistent with the theory that the promise induced the servant to incur a known danger.

6. Where defendant in an action for injuries by a saw, introduced testimony that it was the truck which caused the trouble, that it was fixed before the accident, and that another employé worked at the saw for six weeks after the accident, evidence showing the condition of the saw a week after the accident, and subsequent repairs, was admissible in rebuttal.

7. A instruction that if defendant promised to repair a saw, and failed to do so in a reasonable time, plaintiff would not be entitled to recover for that cause alone, but if afterwards plaintiff "failed to exercise the increased degree of care, in using the saw, demanded by the increased peril, the jury must find for defendant," is properly modified by substituting, for the clause quoted, "failed to exercise such reasonable care as a prudent man would exercise under the same circumstances."

8. A requested instruction not warranted by the evidence is properly refused.

9. An instruction that if plaintiff complained of the defective condition of machinery, and defendant promised to repair, but failed to do so in a reasonable time, in consequence of which plaintiff was injured, the jury should find for plaintiff, unless he failed to exercise reasonable care, considering his experience, or unless the danger was so palpable that no one but a reckless person would expose himself to it, is not improper on the ground that it does not make the presence of danger a necessary element to a recovery, and does not state that plaintiff relied on the promise to repair.

10. In an action for injuries by a saw, an instruction that if defendant refused to repair the saw, or by its conduct gave plaintiff to understand that it did not intend to repair, plaintiff assumed the risk, is properly refused, as the presumption is that when a servant complains of defective machinery, which the master refuses to repair and directs him to proceed, unless the defect is so palpable that only a reckless man would use it, the servant may presume that the master considers it reasonably safe.

11. An instruction that if plaintiff knew the machinery was out of order, and reported it to the foreman, and it was repaired in plaintiff's presence, and he made no further complaint, to find for defendant, is properly refused, as ignoring the principle that the master's duty to use ordinary care to furnish reasonably safe machinery is personal and nonassignable.

Error to Circuit Court, Henrico County.

Action by one Harris against the Virginia & North Carolina Wheel Company. From a judgment for plaintiff, defendant brings error. Affirmed.

J. Alston Cabell and L. O. Wendenburg, for plaintiff in error. H. A. Atkinson, Jno. A. Lamb, and Saml. A. Anderson, for defendant in error.

WHITTLE, J. The purpose of this writ of error is to review a judgment rendered in behalf of the defendant in error, Harris, against the plaintiff in error, the Virginia & North Carolina Wheel Company, in an action to recover damages for personal injuries.

There was a demurrer to the declaration, which contained two counts, and the action of the trial court in overruling the demurrer constitutes the first assignment of error.

Since the court is of opinion, for reasons to be stated presently, that the second count is sufficient to maintain the action, and as it appears that the evidence, both of the plaintiff and defendant, was addressed to the case made by the second count, it will be unnecessary to consider the alleged insufficiency of the first count.

It has long been the established rule of practice in this state that a demurrer to the entire declaration raises the question whether it sets out sufficient matter to sustain the action, and in such case, where there are several counts, one of which is good, the demurrer must be overruled. *Roe v. Crutchfield*, 1 H. & M. 361; *Hollingsworth v. Milton*, 8 Leigh, 50; *Henderson v. Stringer*, 6 Grat. 130; *Wright v. Michle*, 6 Grat. 354; *Smith v. Lloyd*, 16 Grat. 295; *Wright v. Smith*, 81 Va. 777; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225; *Grubb v. Burford*, 98 Va. 553, 27 S. E. 4.

The defendant seeks to escape the consequences of the above-mentioned rule by showing that the assignment of causes of demurrer applies to both counts of the declaration. But the office of the assignment is to indicate the grounds relied on, and not to enlarge the scope of the demurrer.

"Assigning special causes for demurrer does not make a demurrer special which is in its nature general." *Miller v. McLuer*, *Gilmer*, 338.

"A demurrer to a declaration, with a statement of special cause of demurrer that one of the counts, or breaches, or parts of the plaintiff's demand, of a distinct and divisible nature, is bad, does not alter the character of the demurrer, and, if there be matter enough in the declaration to maintain the action, the demurrer must be overruled." *Henderson v. Stringer*, supra.

The second count of the declaration, after stating the employment of the plaintiff by the defendant as a sawyer, alleges that it was the duty of the defendant to use ordinary, due, and proper care to furnish the plaintiff with a reasonably safe and proper saw with which to perform his work; and especially was it the duty of the defendant, when it found that the machinery was out of order, to have the same repaired, so that the plaintiff would not be injured while using it. The count then proceeds to charge that the defendant was informed that the saw in question was out of order and ought to be fixed, and promised the plaintiff to fix the same, but negligently, recklessly, and carelessly failed and refused to fix the same, and directed the plaintiff to continue to operate the saw. It further alleges that the defendant was a second time informed of the condition of the machine, and again promised the plaintiff to fix the same, and directed him

to continue to use the saw, assuring him that the same would be fixed in a reasonable and proper time, upon which promise the plaintiff relied, and continued to operate the saw. Yet, it is said, the defendant, unmindful and disregarding of its duties and promises, negligently, recklessly, and carelessly failed and refused to fix the saw, as promised, in a reasonable and proper time, by reason whereof, while the plaintiff was operating the saw, and without any fault on his part, but because of the defective, insecure, and unsafe condition of the saw, he received the injuries complained of.

Summarized, the causes of demurrer assigned by the defendant in the trial court (and to which he must be confined in this court—Va. Code 1904, p. 1721, § 3271) are: First, that the declaration is vague and indefinite, and does not set out the alleged cause of action with sufficient particularity; and, second, that it seeks to hold the defendant responsible for obvious and known risks incident to the employment and assumed by the plaintiff, and to impose upon the defendant a higher degree of care than is required by law.

The count is plainly not amenable to the first objection. To the contrary, the facts which constitute the alleged cause of action are stated with sufficient certainty to be understood by the defendant, who has to answer them; by the jury, who are to inquire into their truth; and by the court, which is to render judgment. *Wood v. Am. Nat. Bk.*, 100 Va. 306, 40 S. E. 931.

The rule laid down in yet more recent cases is that the declaration is sufficient if it informs the defendant of the nature of the demand made upon it, and states such facts as will enable the court to say that, if the facts are proved as alleged, they establish a good cause of action. *Hortenstein v. Va. Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Va. Portland Cement Co. v. Luck's Adm'r (Va.)* 49 S. E. 577.

The second ground of demurrer involves the right of a servant to recover damages against the master for injuries occasioned by defective machinery, of which he has notice. The general rule is that a servant who continues the service with such knowledge, without complaint and without the promise of the master to repair the defect, cannot recover damages of the master for an injury received under such circumstances. But the rule is subject to the qualification that where the servant is induced to continue to operate the defective machinery by the order of the master, coupled with a promise to repair the defect, the master is liable, unless the danger is so manifest that no prudent person would incur the risk. And, ordinarily, the question whether a continuance in the service and use of the defective machinery amounts to such negligence as to bar a recovery ought to be submitted to the jury upon proper instructions. *Hough v. Ry. Co.*, 100 U. S. 213, 25 L.

Ed. 612; *Kane v. Ry. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Virginia & Carolina Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *N. & W. Ry. Co. v. Wade*, 102 Va. 140, 45 S. E. 915.

An allegation of duty is only a conclusion of law, and where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause, the declaration ought to be sustained. Va. Code 1904, pp. 1708, 1722, §§ 3246, 3272.

Tested by these familiar principles applicable to the relation of master and servant, the declaration states a good cause of action.

But it is said the averment that the master promised the servant to repair the saw, but failed and refused to do so, is inconsistent with the theory that the promise to remedy the dangerous condition of the saw was the motive that induced the servant to incur a known danger. It is manifest, however, that the word "refused" is not used in the narrow sense attributed to it, in the connection in which it occurs. Employed as an intransitive verb, the definition in Webster's International Dictionary of "refuse" is, "Not to comply with;" and in *Taylor v. Mason*, 9 Wheat. 327, 6 L. Ed. 101, it is said: "The words 'refusing to comply' may in general have the same operation in law as the words 'failing to comply' would have."

"It is a rule of pleading that, when an expression is capable of different meanings that one will be adopted which will support the pleading, and not one which will defeat it." *Pender v. Dicken*, 27 Miss. 252; *Loehr v. Murphy*, 45 Mo. App. 523.

Ascribing to the word "refused" its broader signification, there is no merit in the last suggestion.

The second assignment of error is that the court permitted the plaintiff to introduce evidence showing the condition of the saw about one week after the accident happened, and also subsequent repairs.

The foreman, and principal witness for the defendant, had testified in chief that there was nothing the matter with the slide; that it was the track which caused the trouble; that he had fixed the track about 15 or 20 days, or possibly a month, before the accident, after which time there was no complaint on the part of the plaintiff. To strengthen his statement, he declared that another employé went to work on the saw the day after the accident, and worked it for six weeks. The questions and answers objected to were directly in rebuttal of the foreman's testimony, and were therefore clearly admissible.

In *Virginia & North Carolina Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976, it is said: "The defendant company, for the purpose of showing that the machine was in a reasonably safe condition when the accident occurred, introduced evidence tending to show that

some time afterwards it was in good condition, and that no repairs had been made upon it during that period. The plaintiff clearly had the right, in rebuttal, to show that it had been repaired during that time, otherwise the defendant would be permitted to prove facts to establish its defense which the plaintiff was denied the right of disproving. The evidence was brought out upon the cross-examination of a witness who had testified in chief that the machinery was in the same condition when exhibited to the jury that it was when the plaintiff was injured. The latter had the right not only to show that this was not true, but upon cross-examination had the right to ask any question which tended to test the witness' accuracy, veracity, or credibility, as the question complained of clearly did."

The third assignment of error is to the ruling of the court with respect to instructions.

It is insisted that the court erred in refusing to give defendant's instruction No. 2, and in giving the court's instruction No. 2 in place of it.

The rejected instruction told the jury that even though they should believe from the evidence that the defendant promised to repair the saw, and failed to do so within a reasonable time, the plaintiff would not be entitled to recover for that cause alone; but if afterwards the plaintiff "failed to exercise the increased degree of care, in using the saw, demanded by the increased peril, they must find for the defendant."

The competing instruction substituted, for the language quoted, "failed to exercise such reasonable care and caution as a prudent man would exercise under the same circumstances, they must find for the defendant."

The instruction given by the court correctly propounds the law. *N. & W. Ry. Co. v. Ampey*, supra; *Ry. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631; *T. & N. O. Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Hough v. Ry. Co.*, supra. But the court would have been warranted in refusing the instruction tendered by the defendant on the ground that there was no evidence to justify it. The uncontradicted testimony of the plaintiff is that he was careful about running the saw, and, after the master's promise to fix it, was even "more careful than ever before."

The objection to instruction No. 6, given by the court, is that it does not make the presence of danger a necessary element to a recovery, and does not state that the servant relied upon the master's promise to repair.

The instruction is as follows: "The court instructs the jury that if they believe, from the evidence, that the plaintiff complained of the defective condition of the machinery which he was operating, and that the defendant promised to have the defects in said machinery remedied, but failed so to do

within a reasonable time, and in consequence thereof the injuries complained of were inflicted upon the plaintiff, then the defendant is liable, and the jury should find for the plaintiff, unless the jury believe that the plaintiff failed to exercise reasonable care and caution in doing the work in which he was engaged, taking into consideration the plaintiff's experience, or unless the danger was so palpable, immediate, and constant that no one but a reckless person would expose himself to it, even after receiving such promise or assurance."

The circumstance that the plaintiff was injured while operating the saw in the exercise of reasonable care and caution, added by common knowledge, sufficiently indicates the presence of danger. Upon the second point, the fact that the plaintiff relied upon the master's promise to repair is plainly to be implied from a fair and reasonable interpretation of the instruction. But if it were otherwise, the defendant could not have been prejudiced by the omission, since the allegation of the declaration and the uncontradicted testimony of the plaintiff is that he did rely upon the master's promise to repair. *Richmond Ry. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839.

Instruction No. 7, which is objected to, was copied literally from an instruction approved in *N. & W. Ry. Co. v. Ampey*, supra.

Defendant's instruction No. 5 is covered by instruction No. 1, given by the court.

Instruction No. 6 tells the jury that "if the defendant refused to repair the saw, or by its conduct gave the plaintiff to understand that it did not intend to repair the saw, the plaintiff assumed the risk." This instruction was properly refused because there is no evidence to support it, and for the additional reason that it does not accurately propound the principle of law intended to be inculcated. The presumption is that the master's knowledge of machinery is superior to that of the servant, and that when a servant complains of defective machinery, which the master refuses to repair, and directs the servant to continue its use, unless the defect is so palpable, immediate, and constant that only a reckless man would use it, the servant has a right to presume that the master considers the machinery in a reasonably safe condition, and may continue to use it without necessarily assuming the risk. *Va. Portland Cement Co. v. Luck's Adm'r*, supra; *Shearman & Redfield on Neg.* § 168.

It is further contended that defendant's instruction No. 7 was improperly refused. This instruction is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff, Harris, knew the saw was out of order, and reported the same to the foreman, and that the saw was repaired in the pres-

ence of Harris, and that he made no further complaint before the accident, they must find for the defendant."

The instruction ignores the essential principle that the duty of a master to use ordinary care to furnish reasonably safe machinery for the use of the servant is a personal, nonassignable, continuing duty. In the form in which the instruction was offered, it is not a correct exposition of the law, and was properly refused. *N. & W. Ry. Co. v. Ampey*, supra; *Ry. Co. v. Daniels*, 152 U. S. 688, 14 Sup. Ct. 756, 38 L. Ed. 597; *N. & W. Ry. Co. v. Wade*, supra; *Settle v. St. Louis, etc., Ry. Co.*, 127 Mo. 342, 30 S. W. 125, 48 Am. St. Rep. 633.

An inspection of the instructions given by the court shows that the law of the case was fully and fairly submitted to the jury. This assignment of error is, therefore, also without merit.

The remaining assignment of error is to the action of the court in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the evidence.

Viewing the case from the standpoint of a demurrer to the evidence, the evidence is ample to sustain the verdict, and it cannot be disturbed.

Upon the whole case, the judgment complained of is without error, and must be affirmed.

CARDWELL, J., absent.

(103 Va. 644)

VIRGINIA PASSENGER & POWER CO. et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

STREET RAILROADS—FRANCHISE—TRANSFERS—INTERSECTING LINES—LINE PARTIALLY OWNED BY DIFFERENT COMPANY.

1. Where the ordinance granting a franchise to a street railroad company imposed certain conditions as to rates of fare and giving of transfers, and the company operated its lines in accordance with these regulations, it thereby assumed contractual obligations with respect to such regulations.

2. The ordinance granting a franchise to a street railroad company provided that it should sell half-fare tickets between certain hours, and give transfers at points where one line intersected with another. The company owned a line which extended from its point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which, however, ran its cars with the same operatives into the city and to the point of intersection. *Held*, that this line was an intersecting line, to which the provisions as to half-fare tickets and transfers applied.

Appeal from State Corporation Commission.

Petition by the Virginia Passenger & Power Company and the Richmond Passenger & Power Company against the commonwealth of Virginia to the State Corporation Commission. From an order denying the petition, petitioners appeal. Affirmed.

M. M. Martin and A. B. Guigon, for appellants. The Attorney General, F. M. Conner, and H. R. Pollard, for the Commonwealth.

KEITH, P. This case is before us upon an appeal from an order of the State Corporation Commission requiring the appellants to sell certain tickets, known as "labor tickets," at the rate of two for five cents, and to issue transfers between the Seven Pines line of the Virginia Passenger & Power Company and the intersecting line in the city of Richmond of the Richmond Passenger & Power Company.

With its order refusing the petition of the Virginia Passenger & Power Company and the Richmond Passenger & Power Company, the State Corporation Commission filed a paper setting forth its reasons, which are as follows:

"On the petition of the two defendant railroad companies for permission to alter and advance their rates and charges.

"The defendant railroad companies, the Virginia Passenger & Power Company and the Richmond Passenger & Power Company, having filed in this proceeding their joint petition praying that an order may be entered permitting the discontinuance of the sale of labor tickets on the Seven Pines line, operated by the Virginia Passenger & Power Company, and permitting the discontinuance of the issue and receipt of transfers between the said Seven Pines line and the Richmond Passenger & Power Company, and separate answers to said petition having been filed by William E. Oakley and the city of Richmond, and a full hearing having been had before the commission on the 24th day and 25th day of May, 1904, the commission has carefully considered all of the pleadings, the various exhibits filed with the pleadings and at the hearing, the testimony of witnesses, and the arguments of counsel, and, proceeding now to dispose of the questions at issue, the commission finds:

"(1) That the defendant the Richmond Passenger & Power Company acquired the right to operate as a street railway company in the city of Richmond under the grant and franchises contained in an ordinance passed by the council of the city of Richmond on the 23d day of December, 1899, and the amendments thereof, and subject to the terms, provisions, and restrictions contained in the said ordinance and amendments; that the said ordinance was accepted by the said Richmond Passenger & Power Company, and became operative in the month of August, 1900, and since that date the line of the Richmond Passenger & Power Company connecting with what is and was known as the 'Seven Pines Line,' at Twenty-Ninth and P streets, was operated under the terms and provisions of said ordinance.

"(2) That at the time the said Richmond Passenger & Power Company obtained from

the city of Richmond the said ordinance aforesaid, and acquired its rights thereunder, the said Seven Pines line was operated by the Seven Pines Railway Company, having its apparent terminus at the said Twenty-Ninth and P streets, in the city of Richmond. The defendant the Virginia Passenger & Power Company became by subsequent deeds the owner of the said Seven Pines line at the point from the limits of the city of Richmond to Seven Pines, in the county of Henrico, and is now operating the same, running its cars with the same conductors and motormen continuously through to said corner of said Twenty-Ninth and P streets; the portion of said line from the city limits to Twenty-Ninth and P streets having been conveyed to the Richmond Passenger & Power Company.

"(3) That by the provisions of the said ordinance of the city of Richmond of December 23, 1899, it was provided in subsection 5 of section 2, among other things, that the Richmond Passenger & Power Company should sell to all passengers, between the hours of 6 a. m. and 7 a. m., tickets at the rate of two for five cents, to be used only between the hours of 6 and 7 a. m. from Monday to Saturday, inclusive, said tickets being commonly known as 'labor tickets'; and it is further provided in said subsection of said section that each passenger, having paid his fare, may demand and receive from the conductor of the car upon which he first took passage a transfer ticket, without additional charge, which fare and transfer ticket should entitle such passenger to ride upon such car upon which he has taken passage to the point where the said line intersects with the line to which said passenger desires to be transferred, and after arriving at said point of intersection such passenger may take passage on the line indicated on said transfer ticket, and, on the surrender thereof to the conductor of such car, shall be permitted to ride to the end of the last-mentioned line. And it seems to the commission that these provisions of the said ordinance constitute a contract binding upon the said company, and with which it is obliged to comply.

"(4) That soon after said ordinance of December 23, 1899, became operative, the Richmond Passenger & Power Company and the then owners and operators of the said Seven Pines line put into effect and continued a system of transfers whereby passengers on either line, going in the direction of and wishing to be transferred to the other line, were given transfers for that purpose, which were received by the conductors of the respective lines, and passengers were so carried on a single fare to the end of each of these lines, and that on or about the same time the said labor tickets were put into effect on each of the said lines, and mutual transfers on said labor tickets allowed by and between the said lines, the point of transfer between the said two lines being at

Twenty-Ninth and P streets, and that this arrangement for mutual transfers at the said point, and the sale of labor tickets, with the right of transfer on them, continued without interruption until the controversy now before the commission was brought about.

"Under the foregoing facts now found by the commission, and with all the testimony before it bearing upon these facts, the commission is of opinion that the council of the city of Richmond, in using the word 'line' in the section of the ordinance above mentioned, employed that word in its popular signification, and with reference to the circumstances out of which the granting of the said ordinance grew, and with reference to the urban and suburban street railroad conditions in and around the city of Richmond at that time, and that the line then known and since known as the 'Seven Pines Line' was an intersecting line. And considering the question before the commission in all its aspects, the commission is of opinion that it should not permit the two defendant companies to change the system of transfers and labor tickets which have been in effect for several years, and with reference to which the patronage of the defendant lines in the city of Richmond and in the growing section of Henrico county, adjacent to the city, along which the Seven Pines line runs, has been acquired.

"It is therefore ordered by the commission that in the matter of the said labor tickets, and the said transfers between the Seven Pines line of the Virginia Passenger & Power Company and the intersecting line in the city of Richmond of the Richmond Passenger & Power Company, the present system of the sale of said labor tickets and the interchange of transfers be continued, and that the advance in rates of fares which would follow from granting the petition of the two said companies in this proceeding be refused.

"It is therefore ordered that the application made in this proceeding by the Virginia Passenger & Power Company and the Richmond Passenger & Power Company be denied."

It thus appears that, in the view of the Corporation Commission, the railroad companies had assumed contractual obligations with respect to the sale of labor tickets and the giving of transfers in controversy. We think that the construction placed by the Corporation Commission upon the ordinances of the city is a reasonable and proper one, and this conclusion is greatly strengthened by the fact that it is the construction acted upon by the appellants, commencing a short time after the passage of the ordinances by the city, and continuing for about four years, when the railroad companies discontinued the sale of labor tickets and the giving of transfers, which led to the institution of the proceedings before the Corporation Commission. We have given the views of the Corporation Commission in full, because they are

so clear and convincing that we are content to adopt them as the opinion of this court.

Upon the whole case, we are of opinion that there is no error in the order complained of, which is affirmed.

BUCHANAN, J., absent.

(103 Va. 635)

CHESAPEAKE & O. RY. CO. v. HARRIS.
(Supreme Court of Appeals of Virginia. March 9, 1905.)

CARRIERS — INJURIES TO PASSENGERS — APPROACHES TO STATIONS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

1. In an action for injuries to a passenger by his falling into a ditch in going from a train to the platform on a dark night after he had alighted on direction of the trainmen, the evidence held to show that the company had failed to exercise that degree of care which the law required.

2. Where passengers were alighting on a dark night from a train indiscriminately on both sides, with the knowledge and assistance of the trainmen, and plaintiff, without knowledge as to the existence of the platform, fell into a ditch after alighting, he was not guilty of contributory negligence because, the company having provided a suitable platform for the purpose, it was his duty to use it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1362.]

3. Where plaintiff, who was ignorant of the surroundings, was directed to get off a train and go to the depot, and people were getting off on both sides of the train, evidence that he stated he did not get off on the other side of the train because there was such a rush, and he never followed a crowd in a rush, does not show a want of due care.

4. Where plaintiff, after alighting from a train and making his way to the platform, did not know, when walking on the end of the ties and holding to a car, that he was on a trestle or that he was in a dangerous position, he was not negligent, as he had the right to assume that the company had discharged its duty in making the approaches from its passenger cars to the station reasonably safe.

5. Where, on the whole case, no verdict other than that rendered against defendant could have been rightfully found, it is unnecessary to consider objections to instructions.

Error to Circuit Court, Fluvanna County.

Action by Julian O. Harris against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Leake & Leake, for plaintiff in error. Daniel Harmon and T. S. Martin, for defendant in error.

BUCHANAN, J. About 8:30 o'clock on the evening of April 13, 1903, Julian O. Harris was injured by falling into a culvert or ditch while making his way from a passenger train of the Chesapeake & Ohio Railway Company to its station at Bremono, in the county of Fluvanna, and this action was brought to recover damages therefor on the ground that his injuries were caused by the negligence of the defendant company.

It appears that the plaintiff had on the morning of that day gone from Hardware, a station on the defendant's road west of Bremono, to Richmond, on an excursion train. That evening he, with many other persons boarded, as they supposed, the excursion train upon which they had gone to Richmond, to return home. After leaving Richmond, and before getting to Bremono, they were informed by the conductor that his train, being the regular accommodation from Richmond to that point, did not go beyond Bremono, and that they would have to get off his train there and wait at the station for the excursion train, which was following.

When the train upon which they were traveling reached Bremono, the engine was stopped at the usual place, but the train being longer than usual—consisting of the engine, a baggage car, and four passenger cars—the rear car and part of the next car in front of it did not reach the passenger platform, which was on the north side of the track. The passengers were directed to get off the train, so that it could be moved from the main track to a siding to make way for the excursion train.

The plaintiff, who was in the rear car, states that when the train stopped for Bremono it was very dark and raining; that he knew nothing about the place; that he started to get off the car, and some one said, "Do not do that. The depot is on the other side;" that he alighted on the depot side, and walked a few steps on the end of the ties, holding to a car that was standing on the track; that walking on the ties was so rough that he thought he would get off the ties, and onto a path which he expected to find on the side of the track, and, as he did so, or after making a few steps, he fell into a ditch, which was about 13 feet deep, and received the injuries complained of; that he saw neither conductor nor brakeman after the train reached Bremono; that no one directed or showed him which way to go; and that there was no light by which to be guided.

It is not denied that the night was dark, and that there was a heavy rain falling when the train reached Bremono. The statement of the plaintiff that the approaches to the depot and platform where he got off were without lights, and that no one rendered aid or assistance to persons getting off the rear of the train, is not only sustained by witnesses of the plaintiff, but also by the defendant's witness Thomas, who was with the plaintiff when he left the train, and near him when he was injured, and who states that when they got off the train there was no light to guide the passengers to the depot, nor was there any care taken by the trainmen to secure their safety, and that it was so dark they could not tell which way to go. The ditch into which the plaintiff fell was south of the depot siding, and not more than 15 or 18 feet from the passenger train.

The conductor of the passenger train states that he and his brakeman—he had only one—were on the passenger platform with their lanterns, assisting passengers to alight, and directing them to the depot, on the opposite side of the train from the platform, and that his baggage master, with his lantern, was on the depot side of the train, aiding passengers in getting off on that side, and directing them to the depot; that the destination of many of the passengers was Bremo, and that they did not want to go to the depot; that there were lights in the depot and in the train, and the signal lights were burning; and these statements of the conductor are sustained by the brakeman and the baggage master. No witness of the defendant testifies that there was sufficient light where the plaintiff left the train to guide him in his efforts to reach the depot, nor do they testify to such a state of facts as show that this was true. Conceding that the trainmen were where they state—aiding the passengers in getting off the train, and directing them where to go—their lanterns would furnish little, if any, light, except to those in their immediate vicinity.

The crowd was very large, the night dark, and it was raining hard. Two lanterns on one side of the train, and one on the other, and that not there until after the baggage master had put off the baggage for the station. The lights in the depot, from their character and location, could furnish little, if any, assistance to passengers on the rear part of the train, except to show the direction in which the depot was, and would not do that if the map put in evidence by the defendant is correct, as it shows that the two freight cars on the siding, and hereafter to be mentioned, were directly in the line of vision between the rear car and the depot.

The duties which a railway carrier of passengers owe to passengers going to and from its trains to the passenger station were considered by this court in the case of *C. & O. Ry. Co. v. Smith*, 49 S. E. 487, handed down at the last term of the court. It was said in the opinion of the court in that case that: "It is the duty of a railway company, for the protection of passengers carried or to be carried on its trains, to provide and maintain at its stations reasonably safe and adequate ways for approaching and leaving its trains, and at night to have such ways reasonably lighted a sufficient time before and after the arrival and departure of each train to enable passengers to avoid danger. * * * And where passengers are invited expressly or impliedly to get off a train at a place other than that at which they usually alight, and there is any special danger attending their approach to the station, it is the duty of the railway company to warn them of such danger, and to aid them in reaching the station in safety; and especially is this true in the nighttime."

Applying this rule to the facts and circum-

stances of this case, it is clear that the defendant did not exercise that degree of care for the protection of the plaintiff in going from its train to the station as the law imposed.

But it is insisted that the plaintiff was guilty of contributory negligence. One of the grounds relied on to show this is that, the defendant having provided a suitable and convenient platform for the purpose, it was the duty of the passenger to use it, in order to escape the imputation of negligence.

That proposition of law is, no doubt, correct, within certain limits. But the authorities relied on to sustain it show that it is based upon the fact that the passenger has knowledge of the existence of the platform, or its existence is so obvious that he must be held to have notice of it. *Shear. & Red. on Neg.* 521, in the same sentence quoted from by the defendant, say, that: "Passengers by rail should enter and leave cars by such methods as are, to their knowledge, provided for that purpose. * * * It is therefore generally, though not invariably, negligence for a passenger by rail to enter or leave on the opposite side from a landing platform. * * * But if the proper side or method of entry is not obvious, and the passenger is not proved to have had sufficient notice otherwise, he cannot be held in fault for selecting any method which is consistent with ordinary care."

The rule, as limited by the learned authors, can have no application to a case like this, where the passenger was not only without any knowledge whatever of the existence of the platform, but where the passengers on the train were getting off indiscriminately on both sides of the train, with the knowledge and assistance of the trainmen. The statement of the defendant's witness Thomas, if true—that he and the plaintiff first left the car on the platform side, and, after wandering around in the darkness and rain, got back on the car, and alighted from it on the other side—does not affect the question, for neither of them knew at that time or before the accident that there was a platform.

Upon his cross-examination the plaintiff stated that one reason why he did not get off on the other side of the train was "because there was such a rush, and that he never follows a crowd in such a rush as that." This, it is insisted, was evidence of contributory negligence.

Taken in the connection in which it was spoken, it does not show any want of due care on his part. He had just been told by some one that the depot was on the other side of the train. He had been directed to get off the train and go to the depot. People were getting off on both sides, and he had no reason to believe that the way to the depot from that side was any less safe than from the other. Ignorant as he was of his surroundings, he had the right to

presume that the defendant company had discharged its duty in rendering both approaches safe as far as practicable. Bishop's Noncontract Law, § 1086; Brassell, etc., v. N. Y., etc., R. Co., 84 N. Y. 241.

It is further contended that, "although the plaintiff says that when he got off the train he started towards the depot, his own evidence shows that he must have started in an opposite direction, because he says that after he 'let loose the passenger train' he touched the freight cars; showing that the freight cars were confronting him as he alighted. Had he turned up towards the depot, he could never have reached the trestle and ditch, which could only have been reached by him by turning down the track away from the depot, and then going around the cars and starting towards the depot, as detailed by witness Thomas. This action was nothing short of negligence."

This contention is based upon a mistake of fact. The front end of the rear car, where the plaintiff alighted, as appears not only from the map filed by the defendant, but from the measurements made and the defendant's evidence as to the point where the train stopped, was several feet east of the east end of the freight cars standing on the depot siding over the culvert, and opposite the ditch into which the plaintiff fell. All four of the passenger cars and a small part of the baggage car were east of the depot. The aggregate length of the passenger cars was 229½ feet. The distance from the depot to the ditch was 104 feet. Thus showing clearly that the front end of the rear car, which was 52½ feet long, was more than 70 feet east of the ditch, and several feet east of the end of the freight car, whose west end was opposite the ditch, as shown by the map. The plaintiff, having gotten off the train east of the freight car, could never have reached it, except by going toward the depot. He states that when he got off his car somebody told him the depot was up the track; that he started in that direction; that after he let loose the passenger train he touched the freight car, and, holding onto it, walked upon the ties until, finding that they were so rough, he thought he would get off and walk upon a path which he expected to find on the side of the track; and that when he stepped off, or after making a few steps, he went down into the ditch.

It is evident from the physical facts in the case, as well as from the plaintiff's evidence, that when he got off the train he did not go from the depot, but towards it.

The contention is made that "the plaintiff was also negligent in attempting to cross the trestle—a feat so difficult that it had to be accomplished by his holding onto a freight car in order to get along. He says, 'I held onto the train [i. e., the freight cars] as long as I could, and when I had to step off the

side of the track I went down into the ditch;' and again he stated that he walked on those ties and held onto the freight cars, and that he stepped off, thinking he would get in a path, and that when he released his hold on the freight cars he fell into the ditch. He knew, therefore, that he was in a dangerous and precarious situation, and the authorities cited above are sufficient to show that he should not have undertaken to cross the trestle, when there was a safe way which he could have discovered by the exercise of due care on his part. * * *

When the plaintiff's evidence is read as a whole, it does not show that the plaintiff, when walking on the end of the ties and holding onto the freight car, knew or had the least reason to believe that he was on a trestle, or that he was in a dangerous and precarious situation; and his conduct in letting go the car and stepping off the ties to get into a path, as he supposed, when or just before he fell into the ditch, shows how entirely ignorant he was of his danger. There is not only nothing in the case to show that he knew or had any reason to believe that in walking on the end of the ties by the freight car he was in peril, but he had the right to presume, as before stated, that the defendant had discharged its duty in making the approaches from its passenger cars to its station reasonably safe. Bishop's Noncontract Law, § —; Brassell v. N. Y., etc., R. Co., supra.

We are of opinion that the record does not show that the plaintiff was guilty of contributory negligence, and that, upon the whole case, no verdict other than one against the defendant company could have been rightly found. It is therefore unnecessary to consider the objections made to the instructions given and refused in the case, since a decision of those questions could not affect the result. Southern Ry. Co. v. Oliver, 102 Va. 710, 47 S. E. 862; Richmond P. & P. Co. v. Allen, 103 Va. —, 49 S. E. 656, and cases cited.

The remaining assignment of error is that the damages allowed by the jury are excessive.

They do seem pretty heavy, but are not so great, under all the facts and circumstances of the case, as to furnish ground for believing that the jury were actuated by partiality or prejudice; and, unless this is so, under the well-settled rule in this state in this class of cases, the court should not disturb the verdict. Farish v. Reigle, 11 Grat. 697, 62 Am. Dec. 666; Richmond Ry., etc., Co. v. Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; Southern Ry. Co. v. Oliver, supra.

We are of opinion, therefore, to affirm the judgment.

KEITH, P., absent.

(103 Va. 650)

DRIVER'S ADM'R v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. March 9, 1905.)

MASTER AND SERVANT—RAILROADS—COLLISION—WARNING SIGNALS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULES—EVIDENCE—PLEADING—BILL OF PARTICULARS.

1. Though a bill of exceptions is the usual mode of making the court's action on a motion and exceptions thereto a part of the record, an order of court showing that plaintiff moved the court to require defendant to file a statement of its grounds of defense, that the motion was overruled, and the plaintiff excepted, is sufficient.

2. Under Code 1887, § 3249 [Va. Code 1904, p. 1709], providing that the court in any action may require a statement of the particulars of the claim or ground of defense, whether or not such statement shall be required is within the trial court's discretion.

[Ed. Note.—For cases in point, see vol. 89, Cent. Dig. Pleading, § 951.]

3. Where, in an action against a railroad company for death of an employe, the grounds of defense actually relied on were defendant's want of negligence and negligence of decedent and his fellow servants, the court's refusal to require a statement of the ground of defense was not prejudicial to plaintiff.

4. Where a train properly made up at its starting point was changed by the conductor, evidence relating thereto, not tending to show authority to make the change, was properly rejected.

5. In an action against a railroad company for death resulting from collision, evidence showing a habitual disregard by employes of a rule requiring the placing of warning signals on the stoppage of trains on the track is properly excluded where it is not shown that the company had notice of the violations.

6. A railroad company is not chargeable with negligence in failing to maintain telegraph offices along its line not more than 10 miles apart, as required by Acts 1891-92, p. 969, c. 614, § 9 [Va. Code 1904, p. 672, § 1294d], where the accident occurred within less than 10 miles of a telegraph station, and before the train had reached another station where such an office was kept or required to be kept, and a strict compliance with the act would not have avoided the accident.

7. Where a train properly made up at the starting point was afterwards changed by the conductor, a fellow servant, without authority, and in violation of the company's rules, the company was not negligent because the train was improperly and dangerously made up.

8. Negligence in failing to give a train in advance special warning orders of a train following, which was dangerously made up, is not shown where it is not proven to have been the company's duty to notify such trains, and the dangerous make up was not known.

9. Where the proximate cause of a decedent's death by collision was his own failure to comply with the company's rules regarding the placing of danger signals, the company's negligence, if any, in using an engine in an imperfect condition, did not make it liable, as it was not a case of concurring negligence.

Error to Circuit Court, Prince William County.

Action by the administrator of Walter E. Driver against the Southern Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Roller & Martz, R. A. Hutchinson, Marshall McCormick, and Sipe & Harris, for plaintiff in error. R. Walton Moore, for defendant in error.

BUCHANAN, J. This action was brought by the personal representative of Walter E. Driver to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the Southern Railway Company prior to the constitutional and statutory changes made in the law of master and servant.

The deceased was the flagman (rear brakeman) on an extra freight train, No. 546, composed of 11 loaded and 4 empty cars, which left Manassas for Strasburg at 3:50 a. m., November 15, 1901, on a single-track, unblocked branch line of the defendant company, which is used day and night for the movement of scheduled and unscheduled trains. From some cause the engine did not steam well that morning, and made very poor speed. When the train reached Wellington, five miles from, and the first station west of, Manassas, it remained there some 25 minutes for the purpose of shifting cars and getting up steam. When the train got under way, it ran about half a mile, when it was stopped again for want of steam for about 10 minutes. After getting up steam, it started again, and, having gone a mile or a little more, and while running at the rate of 12 or 15 miles an hour, was run into by another extra train, No. 832, going in the same direction; and the plaintiff's intestate, who was in the caboose at the rear end of train No. 546, was killed. No. 832 was under orders to go to a station west of the point where the accident occurred, and left Manassas from three-quarters to one hour after No. 546 left there. No. 832 was properly made up at Alexandria, its starting point, but when it reached Manassas the conductor in charge of it turned the engine around, placed the caboose in front of the tender, and started the train towards its destination; and while running at the rate of 25 miles an hour ran into No. 546.

The grounds of negligence charged and relied on in the declaration, as stated in the petition for the writ of error, are that the defendant company disregarded the requirements of the statute (Acts 1891-92, p. 969, c. 614, § 9 [Va. Code 1904, p. 672, § 1294d]) as to maintaining and operating telegraph offices for the protection of its train service; in dispatching No. 832 improperly and dangerously made up; in failing to give special warning to No. 832 to proceed under control, and to look out for No. 546; and in failing to give No. 546 special orders that No. 832 was following in its dangerous make-up; and in failing to furnish an engine with sufficient power to move No. 546 in the usual way.

The first assignment of error is to the refusal of the court to require the defendant

company to file a statement of its ground of defense.

It is insisted by the defendant that this assignment of error cannot be considered, because the ruling of the court complained of was not made a part of the record by a bill of exceptions.

While a bill of exceptions is the usual and regular mode of making the court's action upon such a motion and exception thereto a part of the record, it is not the only mode. The order or judgment of the court may itself show all that would be necessary for a bill of exceptions to show in order to make the matter a part of the record, and if it does it is sufficient. *White v. Toucray*, 9 Leigh, 347; *Mitchell, etc., v. Baratta*, 17 Grat. 445; *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. 876.

The order of the court shows that the plaintiff moved the court to require the defendant to file a statement of its grounds of defense, that the court overruled his motion, and that the plaintiff excepted to the court's action. This is all that a bill of exceptions would have shown, and is sufficient.

Section 3249 of the Code of 1887 [Va. Code 1904, p. 1709] provides that "in any action or motion the court may order a statement to be filed of the particulars of the claim or of the ground of defense, and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party so plainly as to give the adverse party notice of its character."

There is no inflexible rule as to the classes of cases in which a statement of the particulars of the plaintiff's claim or of the defendant's ground of defense will be required, but it rests in the sound judicial discretion of the court. This is the construction which has been placed upon the statute by the Massachusetts courts, from whose Code it was taken. *Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Blake v. Everett*, 1 Allen, 248; *Commonwealth v. Giles*, 1 Gray, 466.

While the question of whether or not such statement shall be required to be filed is within the discretion of the trial court, to be soundly exercised under all the circumstances of the particular case, its action in granting or refusing such request will be supervised by the appellate court; but such action will not be reversed unless it is plainly erroneous. *Hites' Case*, 96 Va. 489, 31 S. E. 895; *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

The grounds of defense actually relied on by the defendant were those generally, if not invariably, relied on in such cases out of abundant caution on the part of counsel, viz., that the defendant was not negligent, or, if it was, the proximate cause of the accident was the negligence of the injured employé and his fellow servants. How the refusal of the court to require such a statement as that

could have prejudiced the plaintiff we are unable to see.

The second, third, and fourth assignments of error may be considered together. They are all based upon rulings of the court in reference to the improper make-up of No. 832 at Manassas.

There is no question that the conductor, McDonald, directed it to be made up in the condition it was when it left that point. The plaintiff sought to show that the defendant intrusted him with the duty of making up the train, which it is agreed was one of the nonassignable duties of the master. The defendant, on the other hand, claimed that the train was properly made up by the defendant company in Alexandria, the point from which the train started, and, having been made up properly there, the act of the conductor at Manassas in turning the engine around and running it backward with caboose ahead of the tender was without authority of the defendant, and in violation of its rules. The court held that, if the plaintiff could show "authority from the master to change the order of that train at Manassas, why then the master is liable. It was the duty of the master to have sent that train out in proper form at the point of origin. If it was changed without orders, or contrary to the rule of the company, afterwards, they are not liable."

This, we think, was a correct statement of the law. But the plaintiff did not avow that it could show that McDonald was authorized by the company to make the change, nor does the evidence which was rejected, as set out in bills of exceptions numbered 1 and 2, when considered in connection with what preceded and followed it, tend to show such authority. It was therefore properly rejected.

The evidence which was permitted to go to the jury over the objection of the plaintiff, as shown by bill of exceptions No. 3, if error at all, was harmless error. It seems to have been a concession all through the case that the change in the make-up of the train at Manassas was done by McDonald's orders. The point in controversy was not as to the fact that he ordered the change, but as to his authority to make it.

The next assignment of error is to the refusal of the court to permit the plaintiff to show that the employés of the defendant habitually disregarded rule No. 99, which provided that: "When a train is stopped at an unusual point or is delayed at a regular stopover three minutes, or when it fails to make its schedule time, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point one-half of a mile (or 18 telegraph poles) from the rear of his train he must put torpedo on the rail on engineman's side; he must then continue to go back at least three-fourths of a mile (or 27 telegraph poles) from the rear of his train and place two torpedoes on the rail ten yards apart from rail length,

when he may return to a point one-half of a mile (or 18 telegraph poles) from the rear of train, and he must remain there until recalled, but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedoes nearest the train, but the two torpedoes must be left on the rail as a caution to any following train. If the delay occurs upon single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the front brakeman must go forward and use the same precautions. If the front brakeman is unable to leave the train, the fireman must be sent in his place. In descending grades or during blinding storms or fog, the flagman must go as much farther than the distance named above as will insure absolute safety, placing the torpedoes at relatively greater distances from the obstruction."

The importance of this rule not only appears from the rule itself, but is referred to and emphasized by other rules of the company. The bill of exceptions sets out what the plaintiff expected to prove, but it does not state that he expected to prove that the defendant knew of such violation, or neglected to enforce the rule. On the contrary, the court certifies that certain rules of the defendant (of which No. 99 was one) were admitted and agreed by the parties to be the identical rules in force and effect prior to and at the time of the accident. One of the grounds upon which the court bases its refusal to admit the evidence rejected was that it was not shown that the defendant company had notice of the violation of rule 99.

This was a sufficient ground upon which to justify its action, under the facts disclosed, even if the other grounds were insufficient, as to which we express no opinion; for it is settled law that an employé will not be absolved from the imputation of contributory negligence for violating a rule of the master, made for his own as well as for the protection of others, because that rule is habitually disregarded, unless it appears (and the burden is upon the plaintiff to show this) that it was done with the knowledge of the master, or he had so neglected to enforce it as that his conduct amounted to a suspension of the rule. *Wright v. Southern Ry. Co.*, 101 Va. 36, 42 S. E. 913.

The remaining assignment of error is to the action of the court in sustaining the defendant's demurrer to the evidence.

The plaintiff insists that the defendant was guilty of negligence in failing to maintain and operate telegraph offices as required by statute.

By section 9, c. 614, p. 969, Acts 1891-92 [Va. Code 1904, p. 672, § 1294d], it is provided that: "Every railroad company doing business in this state shall establish and maintain along its line, at depots or stations, not more than ten miles apart, telegraphic offices, to be operated for the protection of

its train service by competent persons in the employ of such company: provided, however, that the railroad commissioner may grant such company, in special cases, permission to have its telegraphic offices at the distance from each other greater than ten but not more than fifteen miles. It shall be the duty of every such operator to telegraph the arrival and departure of every train, as soon as it shall leave the depot or station, to the train dispatcher or other person regulating the running of trains, and if there be no such persons, then to the nearest telegraph office in the direction in which such train is going. The person receiving the telegram shall forthwith give such order or notification by telegraph as may be necessary to prevent any collision of trains."

The accident occurred within less than 10 miles of Manassas, where there was a station with a telegraph office, and before the train had reached another station where there was such an office kept or required to be kept. If there had been a telegraph office in operation at the next station beyond where the accident occurred and within 10 miles of Manassas, a strict compliance with the provisions of the statute would not have avoided the accident, since the statute imposed no duty upon the defendant as to the train in question until it had reached such station.

Neither was there any negligence shown in dispatching No. 832 improperly and dangerously made up, since the train was properly made up at Alexandria, and was afterwards changed by the conductor, a fellow servant (*N. & W. Ry. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791), without authority, and in violation of the rules of the defendant.

Another ground relied on to show negligence on the part of the defendant, was its failure "to give special warning orders to No. 832 to proceed under control, and to keep a lookout for No. 546, and in failing to give No. 546 special warning orders that No. 832 was following in its dangerous make-up." The evidence was that No. 832 was notified that No. 546 was ahead, and to keep a lookout for it. It was not shown to be the duty of the defendant to notify No. 546 that No. 832 was following, and it could not have given any warning of the latter's dangerous make-up because it did not know it.

The remaining charge of negligence on the part of the defendant is "in failing to furnish an engine with sufficient power to move No. 546 in the usual way."

"It would," as was said by the Court of Appeals of New York in *Bajus v. Syracuse Co.*, 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723, "impose upon every railroad company very embarrassing, onerous, and unjust responsibilities, if in the case of accidents with moving trains it was to be the subject of inquiry before a jury whether the particular accident might not have been avoided with

an engine of greater or less power. If this engine, drawing a train upon a railroad, had, in consequence of its imperfect condition, become stalled, so that passengers and freight failed to reach their destination in time, or if, when placed at rest, it had run away in consequence of the leakage through its throttle valve, different questions would have been presented for our consideration. But, without violating any rules that have been laid down for the protection of the employes, we are constrained to hold in this case that this was not, as to the plaintiff, a dangerous engine; that it was reasonably safe and proper; and that there was no negligence on the part of the defendant in putting it to the service in which it was employed; and that, therefore, upon the facts as they now appear, the plaintiff has no cause of action against the defendant."

That seems to us to be a correct statement of the rule of law applicable to cases like this. But if the defendant had been guilty of negligence, as to the plaintiff's intestate, in using the engine as it did in its then condition, that negligence was not the proximate cause of the injury, and therefore it was not a case of concurring negligence. *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 792, 40 S. E. 54, and authorities cited. The proximate cause of the death of the plaintiff's unfortunate intestate, as clearly appears from the evidence, was his own failure to comply with rule 99 of the defendant, which made it his duty, when his train was delayed at Wellington more than three minutes, and when it was stopped west of that station at an unusual place, to go back with danger signals to warn any train moving in the same direction. If he had done this, the accident would have been avoided. It is insisted, however, that it is not clearly proved that he did not comply with that rule. We think it is; but, if he did comply with it, then the proximate cause of the accident was the negligence of his fellow servant, the conductor on No. 836, in turning his engine around at Manassas and running it backward, with the caboose ahead of it, so that the engineer did not and could not see No. 546 as he approached it. The evidence is uncontradicted that, but for this change in the make-up of the train by the conductor, No. 546 could have been seen, and the collision avoided.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

(57 W. Va. 57)

BANK OF UNION v. NICKELL et al.
(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

WITNESS — COMPETENCY — DEATH OF DEBTOR —
LIMITATIONS — NEW PROMISE — COMMISSIONER
IN CHANCERY — REPORT — EXCEPTIONS.

1. If a creditors' suit is brought to settle up a decedent's estate, and a creditor of the de-

cedent files a claim against the estate, before the commissioner to whom the case is referred, to convene the creditors and state an account therein, involving purely personal transactions between the creditor and deceased, the creditor, under section 23, c. 130, Code 1899, is incompetent to give evidence as to such claim.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 566-569.]

2. Where a debt is barred by the statute of limitations, and a new promise or acknowledgment is relied upon to remove the bar, there must be an express promise to pay, or an acknowledgment of the debt, unaccompanied by reservations or conditions, from which an implied promise will arise, and the writing ought to be such a one as, if declared upon, would support the action.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 585, 591-618.]

3. To take advantage of a report of a commissioner in chancery on the ground that the evidence taken before him is insufficient to support his findings, it is necessary that the report be excepted to; but where the report is erroneous upon its face, the error can be taken advantage of without such exception.

(Syllabus by the Court.)

Appeal from Circuit Court, Monroe County; J. M. McWhorter, Judge.

Bill by the Bank of Union against R. B. Nickell, administrator of O. P. Nickell and others. Decree for plaintiff, and defendants appeal. Modified.

Rowan & Boggess, for appellants. J. D. Logan and John Osborne, for appellee.

SANDERS, J. The Bank of Union brought a chancery suit in the circuit court of Monroe county against R. B. Nickell, administrator of C. Patton Nickell, deceased, for the purpose of settling up his estate. Upon the maturity of the bill the case was referred to M. J. Keister, commissioner in chancery, and thereafter the commissioner made and filed his report, as directed by the decree, and, among other things, reported a debt in favor of James B. Fisher for the sum of \$109.78; with interest from January 12, 1899, and another for the sum of \$251.62, in favor of J. D. Logan, special receiver in the case of *W. W. Brown v. Geo. Lemon's Heirs et al.* The report was excepted to by R. B. Nickell, administrator, in so far as it allowed any part of the debt claimed by Fisher, first, because there was no proof of the debt, and, second, because, if proven, it was barred by the statute of limitations. On the 23d day of October, 1903, a decree was entered sustaining said exception indorsed as to the Fisher debt, as to the sum of \$18, and overruling the exception as to the residue, and giving a recovery in favor of Fisher for \$91.78, with interest from January 12, 1899, and a recovery in favor of J. D. Logan, special receiver, for the sum of \$251.62. Thereafter R. B. Nickell, administrator, and others, filed a bill of review against the Bank of Union and others, asking that the final decree of October 23, 1903, adjudicating the said claims of Fisher and Logan, receiver, be reviewed and revers-

ed, and on the 18th day of March, 1904, the defendants demurred to the bill of review, which demurrer was sustained and said bill was dismissed, and the defendants filed their petition for an appeal from the final decrees entered at the October term, 1903, taking recoveries in favor of Fisher and Logan, receiver, and the March term, 1904, dismissing the bill of review.

The first question is, should the court have sustained the exception to the commissioner's report as to the Fisher debt? The commissioner certified with his report all the evidence that was taken before him, and among the witnesses who testified relative to this claim was Fisher, the creditor. Objection was made to his evidence upon the ground that his claim was based upon a personal transaction had with C. Patton Nickell, who was deceased at the time of the giving of his evidence, and under section 23, c. 130, of the Code of 1899, this objection is based, and is clearly sound. But it is claimed by Fisher that without his testimony there is sufficient evidence to support the finding of the commissioner as to his claim. But we find that there is no evidence that could, from any standpoint of view, be considered as sufficient to establish his debt, the only other witnesses being Miller and Cummings, neither of whom seem, from their evidence, to know anything about this transaction; and the letter of C. Patton Nickell, which was introduced before the commissioner and filed along with his report, and relied upon by Fisher to prove his claim, certainly does not do so. All that he says in the letter is: "I herewith enclose you check for \$15.00, it is the best I can do for you at present." Now, there is no statement here, except by implication, that he at that time owed him anything else, and, if so, there is nothing to show what the amount of it is. Therefore the commissioner could not have based any allowance to Fisher upon this letter. There should be evidence, before a recovery can be taken, to show that the decedent, Nickell, was indebted to Fisher, and, if so, in what sum, and there is no evidence from which this can be fairly inferred, to say nothing about that full proof which should be required to establish claims of this character.

Then, again, the exception on the ground that Fisher's claim is barred by the statute of limitations is well taken, the entire account being made in the year 1895 and the years preceding, and this suit being brought on the 28th of April, 1902, more than five years since the last item in the account appears to have been charged. Not one of these items appears to have been charged later than March 7, 1895. But it is contended for, on behalf of Fisher, that the letter of C. Patton Nickell, filed before the commissioner, constitutes a new promise or acknowledgment of the debt, such as to remove the bar of the statute of limitations, and that in computing the time it should date from the 12th

day of January, 1899, the date of the letter. This letter is as follows:

"Sinks Grove, W. Va., Jan. 12th, 1899.

"Mr. J. B. Fisher—Dear Sir: I enclose check for \$15.00, it is the best I can do for you at present. I just happened to get it yesterday. Hope this will be satisfactory. Love to all. With kind wishes to all the family I am your obedient servant,

"C. Patton Nickell.

"Please send me a receipt for the \$15.00 fifteen dollars."

There is nothing contained in this letter that even shows an acknowledgment upon the part of Nickell that he is indebted to Fisher, and, if it could be so construed, it certainly does not fix any specific sum, which would have to be done in order to remove the statute. In order to create such a promise under the law as to take the claim without the statute of limitations, there must be an express promise to pay, or an acknowledgment, unaccompanied by reservations or conditions, from which an implied promise will arise, and the promise ought to be such a one as, if declared upon, would support itself. All that Nickell did was to send Fisher the check for \$15, and say to him, "This is the best I can do for you at present." How could this be construed as a promise to pay or an acknowledgment of the debt? There is no sum named, and no reference to anything by which it could be ascertained, and nothing in the letter to show that he did not intend to rely upon the statute of limitations. "An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement." *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986. Where a party relies upon a new promise to remove the statute of limitations, the burden is upon him to show such promise. "The burden of removing the bar of the statute of limitations by a new promise rests upon the defendants, and an acknowledgment or admission, to have that effect, must not only be unqualified in itself, but there must be nothing in the attendant acts or declarations to modify or rebut the inference of willingness to pay, which naturally and prima facie arises from an unqualified admission." *Stansbury v. Stansbury's Adm'rs*, 20 W. Va. 23. "A new promise must not be uncertain. It must acknowledge a fixed sum, or a balance which admits of ready ascertainment." *Quarrier's Adm'r v. Quarrier's Heirs*, 36 W. Va. 310, 15 S. E. 154. Numerous authorities could be cited to support this view, but it is entirely unnecessary to do so, in view of the fact that it is such a well-established legal proposition.

The appellants did not except to the report of the commissioner as to the debt for which a recovery was taken in the decree of Octo

ber 23, 1903, of \$251.62, in favor of Logan, receiver, but claim that they have a right to take advantage of it in this court for the first time. A party has the right to take advantage of any error appearing upon the face of a commissioner's report without excepting thereto. This is the well-settled law of this state, having been decided time and again. *Windom v. Stewart*, 48 W. Va. 488, 37 S. E. 808; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933; *Bank v. Shirley*, 28 W. Va. 563. But unless the error appears upon the face of the report, it will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded. *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 528. "Where a commissioner's report is confirmed without exception, this court will not look into the evidence on which it is founded or by which it might be affected, but will accept the findings of such commissioner, as to all facts depending on extrinsic evidence, as final and conclusive." *Long v. Willis*, 50 W. Va. 341, 40 S. E. 340. And, also, see case of *McCarty v. Chalfant*, 14 W. Va. 531; *Ward v. Ward*, 21 W. Va. 262; *Thompson's Adm'r v. Catlett*, 24 W. Va. 525. We cannot look to the evidence, because that cannot be treated as the face of the report; but, in order to take advantage of the insufficiency of the testimony to establish a claim, exception should be indorsed to the report, pointing out specifically the reasons why the claim should not have been allowed. There is abundant authority to show that the evidence should not be considered in determining the question as to whether or not there is error upon the face of the report. Among them are the cases of *Bank v. Shirley*, supra; *Kester v. Lyon*, supra. The court holds in these cases that the only thing that can be treated as the face of the report is the face of the report proper and the pleadings in the cause. It does not include depositions and documentary evidence. Therefore the position taken, that the evidence does not sustain the Logan claim, cannot be considered, for the reason that no exception was taken to the report on that ground. Not being able to look to the evidence on the question of the Logan claim, it is proper to inquire, is there any error upon the face of the report? The appellants point out none, and we see from the report that the commissioner, upon the question of reporting the indebtedness against Nickell's estate, says: "Statement No. 3. Showing all the debts against the estate of C. Patton Nickell, dec'd, with their amounts, dignities and priorities;" and in this statement, under "Class 3," he refers to a decree of March 2, 1900, showing the appointment of J. D. Logan, special receiver, to collect from C. Patton Nickell and others the sum of \$185.11, with interest, making, as of October 20, 1903, the sum of \$251.62, the amount of the

recovery in favor of Logan, receiver. This reports the claim of Logan, receiver, against the estate of C. Patton Nickell, deceased, and in favor of Logan, receiver, the person the report shows was appointed to collect it, and therefore we find no error upon the face of the commissioner's report as to this debt.

The decree of the circuit court, entered on the 23d day of October, 1903, confirming the commissioner's report, is modified and corrected in so far as a recovery is taken in favor of James B. Fisher for the sum of \$91.73, with interest from January 12, 1899, and this recovery is stricken from said decree; and the decree in all other respects is affirmed.

(57 W. Va. 49)

COBB v. GLENN BOOM & LUMBER CO.
(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

DIRECTING VERDICT—VENDOR AND PURCHASER
— CONTRACT — STATUTE OF FRAUDS — TELE-
GRAMS—CORPORATIONS—AUTHORITY OF SEC-
RETARY—BEST AND SECONDARY EVIDENCE.

1. On a motion to exclude all the plaintiff's evidence and direct a verdict for the defendant, the court should be guided by what its action would be if the case were submitted to the jury, and they should find a verdict in favor of the plaintiff upon such evidence. If it would be the duty of the court to set aside the verdict of the jury because without sufficient evidence, then the court should sustain the motion to exclude, and instruct the jury to find for the defendant. But if, on the other hand, the evidence is such that, under the law, the court should refuse to set aside the verdict, the motion to exclude the evidence should be overruled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 383.]

2. A contract for the sale of real estate may be made by means of telegraphic communications, and if it can be collected from the telegrams referring to one another and directly related to one another, so that it may be fairly said to constitute one paper relating to the contract, and if the telegrams are signed by the parties or their agents, and it appears by them that the minds of the parties met, and that the terms of the contract, by referring to the telegrams, can be made to clearly appear, it is a sufficient compliance with the statute which requires contracts for the sale of real estate to be "in writing and signed by the party to be charged thereby, or his agent."

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 199.]

3. The secretary of a corporation has no power, merely as such secretary, to make contracts binding the corporation; and if the secretary, by virtue of his office, makes a contract selling the real estate belonging to the corporation, the contract is not enforceable against the corporation, unless it appears that the secretary had express authority to make such contract, or had been clothed with apparent authority by the corporation to do so, or that the corporation had acquiesced in or ratified the sale.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1613.]

4. Where a person deals with an agent, it is his duty to ascertain the extent of his agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power, and, if the agent exceeds his authority, the contract will not bind the principal, but

only the agent. *Rosendorf v. Poling*, 37 S. E. 555, 48 W. Va. 621.

5. The message sent to a telegraph office, to be transmitted in reply to one received, is the original, and not the message received at the place to which it is transmitted. The latter must be considered as a copy, and carries with it none of the qualities of primary evidence, and cannot be admitted until the foundation is laid for the admission of secondary evidence, and then can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents. But even where the original is produced, its authenticity must be established, and this either by proof of the handwriting, or by other proof establishing its genuineness.

(Syllabus by the Court.)

Error from Circuit Court, Tucker County; John Homer Holt, Judge.

Action by W. H. Cobb against the Glenn Boom & Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. B. Maxwell and J. P. Scott, for plaintiff in error. A. Jay Valentine and L. Hansford, for defendant in error.

SANDERS, J. This is an action of assumpsit brought in the circuit court of Tucker county, wherein the plaintiff claims that he entered into an executory contract with the defendant, by which he purchased from it 800 acres of land lying in Randolph county, at \$15 per acre, and that after the making of said contract the defendant sold the timber on said land to another person, thereby rendering it impossible for it to carry out its contract with him, and claiming damages in the sum of \$5,000. The defendant pleaded non assumpsit, and filed an affidavit denying that it signed or authorized the signing of the telegrams in the declaration mentioned, and upon this issue the case was tried. After the plaintiff introduced all his evidence, the court, upon motion of the defendant, excluded it from the jury, and instructed them to find a verdict in favor of the defendant. The jury returned a verdict as instructed, and the court rendered judgment thereon, and it is this judgment that we are now asked to review.

The right of the courts in this state to exclude the evidence from the jury, and to peremptorily instruct a verdict in favor of the defendant, has been for many years well settled; but it was not until the decision in the case of *Ketterman v. Dry Fork Railroad Co.*, 48 W. Va. 606, 37 S. E. 683, that a well-defined and proper test was made for the guidance of the courts, for the decisions previous thereto, while they all recognized the well-settled practice to be that the defendant had the right to make such motion, and the province and duty of the court to sustain it in any proper case, yet the difficulty has been when such a motion should prevail, and by what rule the court is to be guided. Judge Green holds, in the case of *Franklin v. Geho*, 30 W. Va. 34, 3 S. E. 168, that a motion to

exclude all the plaintiff's evidence and direct a verdict for the defendant is equivalent to a demurrer to the evidence; and Judge Holt, in the case of *Aqua Impt. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771, holds that a motion to exclude or strike out evidence is not in all cases the equivalent of a demurrer to the evidence, and that it should not, without modification, be permitted to supersede and replace such demurrer; and then, again, in the same book (the case of *Bridge Co. v. Bridge Co.*, 34 W. Va. 156, 11 S. E. 1009), Judge Lucas holds that a motion to exclude the plaintiff's evidence ought to be overruled where the court cannot grant the same without usurping the functions of the jury. And then, in *Carrico v. W. Va. Central & Pa. Ry. Co.*, 35 W. Va. 389, 14 S. E. 12, it is held that a motion to exclude the plaintiff's evidence on the ground that it is insufficient to warrant a verdict should not be granted if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case; and in the case of *Henry v. Ohio River R. Co.*, 40 W. Va. 235, 21 S. E. 863, it is laid down, in the ninth point of the syllabus, "Whenever the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out the evidence or direct a verdict for the defendant." Also in *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027, the rule is laid down to be that a motion to exclude plaintiff's evidence on the ground that it is insufficient to warrant a verdict will not be granted if there be any evidence which tends, in any degree, however slight, to prove his case. Therefore it will be seen, from these various decisions, that in some it is held that the motion to exclude should be treated as a demurrer to the plaintiff's evidence; and in the case of *Aqua Impt. Co. v. Standard Fire Ins. Co.*, supra, it is held that in all cases it is not the equivalent of a demurrer to the evidence, and then, in others, that if there be any evidence tending in any degree, however slight it may be, to make out the plaintiff's case, the motion should be overruled; and then, again, we find that in some it is said that, if there is any evidence tending in any appreciable degree to establish the plaintiff's contentions, the court should not exclude the evidence. The question as to when evidence tends in any appreciable degree to support the plaintiff's claim is very difficult to determine. What is meant by "appreciable degree," in passing upon questions of this kind, is hard to define; and then to say that a court should not exclude the evidence because there is some evidence, no matter how slight it may be, to make out the plaintiff's case, means that the court shall submit many cases to the jury for its decision, when, at the same time, it is perfectly apparent that if the jury should find a verdict for the plaintiff the court will be compelled to set it aside because contrary to the evidence. It seems contrary to good reason to say that

when the plaintiff has introduced all of his evidence, and from that evidence the court could not sustain a verdict in his favor, the court should overrule a motion to exclude the evidence, and continue the trial of a case without merit. The proper test is that when a motion is made to exclude the plaintiff's evidence the court should be guided by what its ruling would be, should that evidence be submitted to the jury, and upon it the jury find a verdict in favor of the plaintiff. If it would be the duty of the court to set aside the verdict because manifestly contrary to the evidence, then it is the duty of the court to exclude it from the consideration of the jury, and instruct them to find in favor of the defendant. This question was discussed by Judge Brannon in delivering the opinion of the court in the case of Ketterman v. R. R. Co., and, while he did not expressly lay this rule down to be the true test, yet he substantially held it to be so.

We look to the evidence to see whether or not the court did right in excluding the plaintiff's evidence. To establish his case, plaintiff relies upon certain letters and telegraphic communications, which, in order to get a more complete understanding of the case, are here given in extenso:

"Sunbury, Pa., Nov. 25, 1901. W. H. Cobb, Esqr., Elkins, W. Va.—Dear Sir: Your valued communication of 22nd inst. just at hand. We realize that the point you make regarding the difficulty of working our whole tract from one side, is probably well taken, and for that reason we have no objection to making sale of the land lying on the Otter Creek side & Shafers Fork side separately. But we do not think the price you offer (\$12.50) per acre for the land on Otter Creek side is sufficient for it. You know this tract is exceptionally well timbered and will not grow less with time. Besides the coal question should be taken into consideration to a certain extent. We feel positive there is coal in paying quantities on this tract, although we have not had it opened up. Yours truly, Glenn Boom & Lumber Co., per W. H. Sager, Sec'y."

"Elkins, W. Va., Nov. 27th, 1901. To W. H. Sager, c/o Glenn Boom & Lumber Co., Sunbury, Pa.: Wire best cash price on Otter Creek land. My offer about limit. W. H. Cobb."

"Sunbury, Pa., Nov. 27th, 1901. Fifteen dollars. W. H. Sager."

"Elkins, W. Va., Nov. 27th, 1901. To W. H. Sager, c/o Glenn Boom & Lumber Co., Sunbury, Pa.: Will take Otter Creek land at price named. W. H. Cobb."

"Sunbury, Pa., Nov. 28th, 1901. To W. H. Cobb, Elkins, W. Va.: Our Mr. Chester will reach Elkins Monday to consult with you. Letter to-day. W. H. Sager."

"Sunbury, Pa., Nov. 28th, 1901. W. H. Cobb, Elkins, W. Va.—Dear Sir: Your Teleg. of 27th rec'd. Our Mr. Chester will reach Elkins about Monday evening to ar-

range terms of sale with you and enter into agreement with you if satisfactory all around. Yours truly, W. H. Sager, Sec'y Glenn Boom & L. Co."

The court sustained the objection to the introduction of all the telegrams, except the first one mentioned, sent by the plaintiff to Sager, care of the defendant, inquiring the price of the land, and also sustained the objection to the introduction of the letter dated November 28, 1901. But we will first look to see if from these letters and telegrams the plaintiff has shown such an executory contract as he could specifically enforce, for this is the basis of his action, and without establishing such a contract as he could, in a court of equity, specifically enforce against the defendant for the sale of said land, he would not be entitled to recover in this action. Under chapter 98 of the Code of 1899, a contract relating to the sale of real estate, to be binding, must be in writing, and signed by the party to be charged thereby, or his agent. This brings us to the question, is the contract made by the letters and telegrams such a one as meets the requirements of the statute of frauds above referred to? It is not necessary that the whole agreement should be written upon one piece of paper, but if it can be fully collected from various papers referring to one another, or directly related to one another, such as letters and telegrams written and sent, and the replies thereto, so that they may be fairly said to constitute one paper relating to the contract, it is a sufficient agreement, if it appears that the minds of the parties met, and if the terms of the contract, by referring to the various writings, can be made to clearly appear. *Gaines v. McAdam*, 79 Ill. App. 201; *Elbert v. Gas Co.*, 97 Cal. 244, 32 Pac. 9; *Brewer v. Horst*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; 27 Am. & Eng. Ency. Law (2d Ed.) 1092; 5 L. R. C. C. P. 295; *Smith et al. v. Easton*, 54 Md. 188, 39 Am. Rep. 355; *Story on Contracts*, 1449.

While these letters and telegrams constitute a complete contract between the parties to them, yet, if they were written and sent by some person other than the one who is sought to be charged, it is necessary that the authority of the person writing and sending them should be shown. The defendant filed an affidavit with its plea, as provided by section 40, c. 125, of the Code of 1899, denying that it signed or authorized the signing of the telegrams which are claimed to have been received by the plaintiff. If not, under the general issue, without such affidavit, certainly under this plea, verified by affidavit, the burden of proof was upon the plaintiff to show that W. H. Sager, in signing these telegrams, was authorized by the defendant to do so on its behalf. There is no such authority shown or attempted to be shown, except that the evidence shows that Sager at the time was the secretary of the

defendant company, but does not show that he had any other connection with the defendant, or that he had authority to make the sale of the land in question. A secretary of a corporation, as such, has no authority to make contracts for it. "The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made." Cook on Corp. § 717. And then Thompson on Corporations, § 4697, says: "The law does not ordinarily imply, in the secretary of a business corporation, the power, ex officio, to bind the company by means of letters or documents signed officially." And also in Clark & Marshall on Corporations, § 704, we find: "Unless authority is expressly conferred, however, or he is clothed with apparent authority by being intrusted with the management of the business, or part of it, the secretary of the corporation has no authority to make any contracts on its behalf and in its name, or bind it by such acts. He has no such authority merely by virtue of his office." The secretary not having authority by virtue of his office to make such a contract as is relied upon by the plaintiff for the basis of this suit, the defendant cannot be held liable by reason of the letters and telegrams sent by Sager unless he had at the time express authority from the corporation to make sale of this land, or unless he was held out by the defendant in such a way as to make it apparent that he had such authority, or unless the contract was ratified by the defendant. Every one who deals with an agent is presumed to know the extent of his authority, and, if he exceeds his express or apparent authority, his acts do not bind the principal, but only bind the agent, unless they have been ratified by the principal. *Curry v. Hale*, 15 W. Va. 867; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Wells v. Michigan Life Ins. Co.*, 41 W. Va. 131, 23 S. E. 527; *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555.

It is claimed that the letter of the 25th day of November, 1901, addressed to the plaintiff, and signed by "Glenn Boom & Lumber Co., per W. H. Sager, Secty.," shows that negotiations were pending for the sale of this land, and that the telegrams sent by Sager to the plaintiff in reply to the plaintiff's telegrams, having come from the proper place and the proper officer of the defendant, raises the presumption that they were directed to be sent by the defendant. There is no such presumption arising from the facts in this case. While the letter shows that it was signed by the defendant, "per Sager, Secty.," yet that does not show that Sager had authority to sign it; taking it that the letter is material to this controversy, which

we think it is not, because, if a contract for the sale of this land was made, it was consummated by the three telegrams—the one asking the price of the land, the one in reply, quoting the price, and the one of the plaintiff accepting the proposition and agreeing to take the land—and, none of these papers being shown to have been signed by the defendant or its authorized agent, the circuit court committed no error when it sustained the motion of the defendant to exclude the evidence and direct a verdict for it.

But even if Sager had been shown to have authority to make this sale for the defendant, the telegrams sent by Sager were not proper to be admitted as evidence, because their genuineness had not been shown. There is nothing to show that they had in reality been written and signed by Sager. From the authorities, there is some difficulty in determining what are original telegrams, within the meaning of the rule that the best evidence must be produced. "By the decided weight of authority, the question whether the communication sent, or the one received, is to be deemed the original, depends upon which party is responsible for its transmission—in other words, for whom the telegraph company is agent. If there is but a single communication, the dispatch as delivered at the place of destination is the best evidence. * * * Of course, there must be competent proof that the alleged sender did actually send or authorize the sending of the message in question. * * * In proving a contract by telegrams, the best evidence is the telegram containing the offer as received at the point of destination, and the dispatch containing the acceptance as delivered for transmission." *Jones on Evidence*, § 209. Now, in this case the plaintiff adopted the telegraphic system as a means for making the contract here relied upon, and made inquiry of Sager as to what he would take for the land in question, to which Sager replied, giving him the price, which plaintiff accepted. Now, in accordance with the above authority, the best evidence is the telegrams of the plaintiff as received at their destination, and the telegram of Sager at the place at which it was delivered for its transmission. But then, again, there is no evidence, as we have noticed above, that Sager, in sending the telegrams, was acting as the agent of the defendant, and, of course, for that reason they were inadmissible. It is argued that the telegrams are without the jurisdiction of the court, and, even if this is true, it does not authorize the introduction of copies of them until their genuineness has been shown, and the authority of the person sending them to do so. If such a message as the plaintiff claims was sent to him, he could have shown the authenticity of it when delivered to be telegraphed to him, and then show that, as it was delivered to the telegraph company, it was transmitted and delivered at the place

of destination. But whether a copy is introduced, or the original, it is necessary that the genuineness of it should be shown, before it becomes competent evidence. "A dispatch or a copy of a dispatch purporting to have been sent by A. B., as cashier, to C. D., cannot be read in evidence without first proving that it was a genuine paper; that is, that it was written and sent by the party whose name it bears." *National Bank v. National Bank*, 7 W. Va. 544. And also see *Smith & Whiting v. Easton*, 54 Md. 128, 39 Am. Rep. 355; *Jones on Ev.* § 209. There being no evidence to show or tending to show that these telegrams which were claimed to have been sent by Sager were signed by him, and delivered to the telegraph company for transmission, the court committed no error in rejecting them.

For the foregoing reasons we find no error in the judgment of the circuit court, and it must therefore be affirmed.

(57 W. Va. 66)

HARMAN & CROCKETT v. MADDY BROS.
(Supreme Court of Appeals of West Virginia.
Jan. 31, 1905.)

ASSUMPSIT—WHEN LIES—SETTLEMENT—CONCLUSIVENESS—INSTRUCTIONS—WEIGHT OF EVIDENCE.

1. An item omitted, by mistake, accident, or fraud, from a settled account between individuals, growing out of an ordinary business transaction, such as a sale of cattle, may be recovered in an action of assumpsit.

2. If, upon the trial of the issue in such case, the court instruct the jury that they shall regard the settlement as prima facie correct, and that the plaintiff can recover only upon clear and satisfactory proof of the mistake, it is not prejudicial error to refuse to further instruct that the proof, in order to warrant a recovery, must be full.

3. The giving of an instruction which, by reason of its susceptibility of such interpretation as will make it express a proposition at variance with the law applicable to the evidence which forms its subject-matter, is erroneous and prejudicial, although another interpretation of it in harmony with the law is not precluded by its terms.

4. The weight to be accorded to evidence is matter for determination by the jury, and an instruction which wholly or partially withdraws it from their control by limiting or defining it is generally cause for reversal.

(Syllabus by the Court.)

Error to Circuit Court, Monroe County; J. M. McWhorter, Judge.

Action by Harman & Crockett against Maddy Bros. Judgment for plaintiffs, and defendants bring error. Reversed.

John Osborne and Rowan & Boggess, for plaintiffs in error. J. D. Logan and J. A. Meadows, for defendants in error.

POFFENBARGER, J. Reversal of a judgment for \$463.95 in an action of assumpsit is sought here upon the theory that the trial court erred in giving certain instructions, in refusing others, and in overruling a motion

to set aside the verdict, first, because of the misconduct of a juror; and, second, because it is against the weight and preponderance of the evidence.

The declaration contains only the common counts, but the object and purpose of the suit, as shown by the evidence, was to open a settled account and recover said sum, as the amount of an item inadvertently omitted in making the settlement. C. C. Harman and E. King Crockett, partners doing business as Harman & Crockett, and residing in Tazewell county, Va., sold to Maddy Bros., of Monroe county, W. Va., in the fall of 1902, 66 head of cattle, 25 of which were known as the J. D. Honaker cattle, weighing 27,060 pounds; 9 as the J. D. Honaker Thorne Place cattle, weighing 10,325 pounds; 9 as the J. B. Shannon cattle, weighing 8,970 pounds; 16 as the W. E. Harry cattle, weighing 16,794 pounds; 6 as the C. C. Harman cattle, weighing 6,505 pounds; and one as the heifer, weighing 820 pounds. On the day of the settlement Maddy Bros. gave to Harman & Crockett, as payment in full for the cattle, one check for \$2,400, and another for \$452. These were dated October 4, 1902. The settlement was made October 7, 1902, and a receipt was given for the \$2,852 "as payment in full for 66 cattle." On the 9th day of October, 1902, Harman wrote that he had discovered that the checks did not cover the price of the heifer. On the next day he wrote Maddy Bros. that he had discovered that the \$452 check had not been signed, and saying he had inclosed it for signature. On the 20th day of October, 1902, not having received the check, he made another inquiry about it, and again referred to the omission of the price of the heifer. On the 27th day of October he wrote another letter, containing a statement showing what the cattle amounted to according to the weights and prices, and that, after deducting the one \$2,400 check, there remained due \$856.10, and asking for a check in payment thereof. Later a sight draft was made on Maddy Bros., and then, on December 2, 1902, they wrote for an explanation, acknowledging the receipt of the letter, calling attention to the want of signature to the \$452 check, and requesting its return to them for signature. On December 8th Harman & Crockett replied to this letter, repeating their statement and showing the balance for which the draft had been made. The plaintiffs claim the contract prices of the cattle to have been \$4.75 per 100 for the Honaker cattle, \$4.50 for all the others, except the heifer, and \$3.50 for the heifer. And they claim that the error is the omission of the J. B. Shannon cattle. In support of this, they produce the papers on which they say the calculation of the amount due was made by them. There seems to be no disagreement about the weight of the cattle, but the defendants claim the price of the Honaker cattle to be \$4.10 per 100; part of the Harman cattle, \$3.95; and part of

them, \$4.50; the Shannon cattle, \$3.95; the W. E. Harry cattle, \$3.87; and the heifer, \$3.50. When the contract was made, on or about September 4, 1902, Harman & Crockett gave to Maddy Bros. a memorandum thereof, and Maddy Bros. gave to Harman & Crockett written evidence of the purchase on their part. These two papers were produced on the day of settlement. Maddy Bros. claim the one they had given was returned to them at the time of the settlement, and then and there destroyed. Harman & Crockett produced as evidence in this case what they assert to have been the memorandum given by them on September 4, 1902, to Maddy Bros.; it being claimed that it was returned to them at the time of the settlement. It specifies the prices contended for by the plaintiffs. The defendants say this paper is a fabrication. On the other hand, Maddy Bros. produce a checkbook which they say contains, on the backs of certain checks and the cover of the book, the calculations made by them at the time of the settlement. This the plaintiffs denounce as a fabrication of evidence on the part of defendants. They say the stub in that checkbook was not written with the same pen and ink that the check was written with, and the check was produced for the purpose of comparison.

After this and other evidence had been introduced, the defendants requested the court to instruct the jury that, if they should find a settlement had been made, checks given in full for the amount found due, and a receipt taken from the plaintiffs for the same, they should regard such settlement as prima facie correct, and hold it to be conclusive, unless the plaintiffs should show by full and clear proof that a mistake had in fact been made. The court struck out the words "full and," and made the concluding phrase say "unless the plaintiffs show by clear proof that a mistake was in fact made." This modification made no substantial alteration in the instruction. *Mahnke v. Neale*, 23 W. Va. 57, 80, is cited to sustain the assignment of error. That case does not use the word "full." It only says the mistake or fraud shall be clearly shown. *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731, is also cited. The language of the court there is that the settlement will not be disturbed unless the party furnish clear proof of a mutual mistake or a fraud. Neither word has any technical meaning or force, and if the instruction, by the use of the words "clear proof," sufficiently directed the minds of the jury to the requirement that there must be substantial and preponderating evidence of the mistake, such as to satisfy them of its existence, nothing more was required. In an instruction given at the instance of the plaintiffs, the court said the testimony must be clear and satisfactory proof, to warrant a recovery. The common-sense import of this is that the evidence must satisfy the minds of the jurors—convince them—of the existence of the mistake. If

the addition of anything to the word "clear" was necessary, it has been supplied in this last instruction. The legal effect of a mere statement of an account is to dispense with proof of the items of which it is composed, make the result prima facie correct, and cast upon the party denying its correctness the burden of proving a mistake or fraud, as ground for reopening it. *Lockwood v. Thorne*, 18 N. Y. 285; *Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860. To open a settled account, a higher degree of proof is necessary than in the case of a stated account, but the rule requires only clear and convincing evidence. In *Chubbuck v. Vernam*, 42 N. Y. 432, it is stated as follows: "A party who seeks to open a settlement of accounts on the ground of mistake assumes the burden of proving distinctly wherein the mistake consisted, and of furnishing the data by which it may be corrected." The common law does not recognize the Roman civil law division of proof into two classes, *plena probatio* and *semiplena probatio*. 1 Greenl. Ev. § 119, vol. 3, § 409. If it did, the proof in this case is not within the rule.

Instruction No. 1 given at the instance of the plaintiffs reads as follows: "The court instructs the jury that when an accusation is made by one party against another of the existence of a certain fact, and the party called upon for a reply, and, he failing to reply, when men similarly situated under like circumstances should do so, the fact of not so doing is considered by the law as an admission of the correctness of the accusation or existence of the fact." Of this the plaintiffs in error complain bitterly. They say it virtually tells the jury that the silence of Maddy Bros., after their attention had been called to the error, and pay for the alleged omitted item had been demanded, for a period of more than two months, amounts to a conclusive admission of their liability. In other words, they say the court, by giving said instruction, rather pressed upon the jury, as a presumption of law, the view that this conduct on the part of defendants is sufficient proof, without regard to any other circumstance, to warrant a verdict against them. On the other hand, for the defendants in error the instruction is regarded as only intended to fix in the minds of the jury that the circumstance of silence is an evidential fact for their consideration. Such is undoubtedly the character of that fact. It does not rise to the dignity of an estoppel, and cannot be regarded as conclusive evidence of liability on the theory of a mistake. In support of the instruction, section 197, Greenl. Ev., is cited. This only says that admissions may be implied by acquiescence, and instances a number of examples of it by way of probative force of such admissions. Consideration of that is postponed to section 212 of the same volume, where they are classed as nonjudicial admissions, and shown not to be conclusive. Among these are classed ac-

counts rendered, and of them it is said they are not conclusive, but are left at large, "to be weighed with other evidence by the jury." This instruction tells the jury that silence under circumstances calling for a response is considered by the law as an admission of the existence of a fact. Admissions other than judicial admissions and admissions by deed are seldom, if ever, conclusive, unless they have been acted upon by the opposite party to his prejudice, so that they must be made conclusive upon the party making them, to the end that injustice and injury may not result to the party who has acted upon them. "Verbal admissions which have not been acted upon, and which a party may controvert without any breach of good faith or evasion of public justice, though admissible in evidence, are not held conclusive against him." 1 Greenl. Ev. § 209. After giving some illustrations, the author further says in this section: "In these and the like cases no wrong is done to the other party by receiving any legal evidence showing that the admission was erroneous, and leaving the whole evidence, including the admission, to be weighed by the jury." Such being the character of the admission, the inquiry is as to what the instruction means, what effect it may have had upon the jury, and whether it was improper. As the court had admitted the evidence, there was no reason for suggesting to the jury its admissibility. Nor is it easy to conceive any reason for explaining that it was in the nature of an admission. Its nature as such is readily perceived without the aid of legal knowledge. Hence the jury probably assumed that there was some purpose in giving it. It was well calculated to impress upon their minds that, under some legal principle known to the court and unknown to them, it was evidence of a higher nature than other evidence in the case. The language is susceptible of a double meaning. It tells the jury that, tested by the law, the act is an admission. What sort of an admission—a conclusive admission or only a persuasive admission? How is the court to determine what construction the jury gave it? Strictly speaking, the law does not class it as an admission. The law says it is evidence, because reason and common sense teach that it is an admission. Therefore it is admissible as evidence for the consideration of the jury. As the instruction is susceptible of two meanings, and the jury might, and probably did, give it a wrong interpretation, it is such an instruction as was calculated to mislead and confuse them. The giving of such an instruction is erroneous. *Railroad Co. v. Lafferty*, 2 W. Va. 104; *Bantz v. Basnett*, 12 W. Va. 772. "Where an instruction asked for is so imperfectly expressed that its true import is not readily discernible, and would tend to mislead the jury, it should be refused." *Patton v. Navigation Co.*, 13 W. Va. 259. "It is error to give an instruction which is confused in its language and calculated to mis-

lead the jury." *State v. Sutfin*, 22 W. Va. 771; *State v. Cain*, 20 W. Va. 679; *Nicholas v. Kershner*, 20 W. Va. 251. Aside from the view that the jury may have regarded the instruction as virtually binding upon them to find for the plaintiffs, the instruction may be regarded as one upon the weight of the evidence. That is clearly a matter within the exclusive province of the jury, and with which the court cannot deal without doing violence to the principles of law governing jury trials. It is almost universally held that an instruction upon the weight of the evidence is erroneous. *Earp v. Edgington* (Tenn. Sup.) 64 S. W. 40; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Westbrook v. Howell*, 34 Ill. App. 571; *Ephland v. Railroad Co.*, 57 Mo. App. 147; *Blasf. Instr.* § 236.

A portion of the brief for plaintiffs in error is devoted to the contention that a settled account cannot be reopened for fraud or mistake in a court of law. The objection seems not to have been brought to the attention of the trial court, but it is said that, as it relates to the jurisdiction of the court, it may be made in the appellate court for the first time. Whether it is made in time need not be considered, for the reason that it is not tenable, even if properly made. Jurisdiction of such a case by an action of assumpsit was entertained in *Bank v. Als*, 5 W. Va. 50. To the same effect, see *Goodwin v. Life Ins. Co.*, 24 Conn. 591; *Railroad Co. v. Railroad Co.*, 157 Mass. 253, 31 N. E. 1067. Settled accounts are most usually impeached in equity, not because there is no jurisdiction at law, but because the equity forum is generally preferred on account of its better facilities for careful investigation of complicated accounts. The jurisdiction is concurrent, but it is only in cases of complicated accounts that equity will take jurisdiction for the purpose of settling an account. When an account has been settled, and there is an effort to reopen it, equity has concurrent jurisdiction with the law courts on the ground of mistake or fraud, because mistake and fraud are recognized heads of equity jurisdiction, but the jurisdiction in equity is not exclusive in such cases. It is concurrent. *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028.

The printed record fails to disclose the entry of any plea of any kind in the case, but it does say that a jury was impaneled to try the issues joined. Omitted portions of the record may show pleadings subsequent to the declaration, but, as there may be none, it is deemed proper to mention the matter, since failure to make up an issue has been held error in numerous cases in which parties went to trial without an issue having been made. *Stevens v. Friedman*, 53 W. Va. 79, 44 S. E. 163; *Ruffner v. Hill*, 21 W. Va. 152; *State v. Douglass*, 20 W. Va. 770; *State v. Conkle*, 16 W. Va. 736.

In view of the error in giving instruction No. 1 for the plaintiffs, for which the judgment must be reversed and a new trial granted, it is unnecessary to pass upon the ruling of the court on the motion to set aside the verdict for either of the causes assigned. Comment on the sufficiency of the evidence to sustain it would be manifestly improper. The rules and principles under which relief may be given on account of misconduct on the part of jurors are well settled. Hence the only inquiry here would be whether the facts in this case would, under those rules, necessitate the setting aside of the verdict. A decision of this question would be of no value as a precedent, and all the relief a decision favorable to the plaintiffs in error would result in is awarded them upon another ground.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(87 W. Va. 91)

FULTON v. CROSBY & BECKLEY CO.

(Supreme Court of Appeals of West Virginia.

Feb. 7, 1905.)

**INJURY TO EMPLOYÉ—DEFECTIVE APPLIANCES—
DUTY OF MASTER—NEW TRIAL.**

1. A lumber railroad, crudely and unscientifically constructed, the character of which is fully known to a servant who is engaged in operating a locomotive engine upon it, has, in the contemplation of the parties, and therefore of the law, certain elements and qualities upon which the servant may rely for his personal safety, and which the master, by the exercise of reasonable care, must maintain.

2. The measure of the duty of a master to his servant is reasonable care, in view of the situation of the parties, the relations they have established, the nature of the business in which the servant is employed, the character of the machinery and appliances used, the surrounding circumstances and conditions, and the exigencies which require vigilance and attention.

3. A new trial will not be allowed in a case in which only simple issues of fact were raised, dependent upon conflicting oral evidence, thus making the credibility of witnesses an important factor in the case, merely because the verdict is contrary to an excess in the quantum of such evidence, there being direct and positive evidence tending to sustain it, and no controlling physical, admitted, or established facts with which it is inconsistent.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County; Joseph M. Sanders, Judge.

Action by Fred H. Fulton, by his next friend, against the Crosby & Beckley Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rucker, Anderson & Hughes and Wyndham Stokes, for plaintiff in error. T. L. Henritze and E. O. Marshall, for defendant in error.

POFFENBARGER, J. Relying upon the action of the court in overruling a motion to exclude the plaintiff's evidence, and in refusing to set aside the verdict on the ground

that it is contrary to the law and the evidence, as grounds of error, the Crosby & Beckley Company complain of a judgment of the circuit court of McDowell county, in favor of Fred H. Fulton against it for the sum of \$1,500.

The action was for the recovery of damages for personal injuries sustained in consequence of the wreck of a wooden bridge or trestle in a logging railroad, on which, as an employé of the defendant, the plaintiff was running on a locomotive engine as fireman. The bridge was something over 20 feet long, and consisted of pens built of logs, with log stringers, supporting the ties and rails, resting on the pens. It had been in use for more than three years, in which time no previous accident had occurred.

Evidence was introduced to show defects in the bridge in two respects: First, that the stringers, reaching from pen to pen, and supporting the ties and rails, and to which the ties had been spiked, were defective in this: that the sap of the logs through which the spikes had been driven had become so rotten as to release the spikes; and, second, that the ties had not been sufficiently nailed to the stringers. That the ties had become detached from the stringers at the time of the wreck of the engine seems to be undisputed. They slipped off of the stringers, threw the engine off the bridge, and then remained fastened together by the rails, and swung loose on the stringers.

The witnesses substantially agree in saying that the stringers were sap-rotten, and that the rotten wood was from one-half inch to an inch and a half in thickness. They differ, however, on the question whether, when the bridge was originally constructed, the sap on the top of the stringers, at the points at which the ties rested on them, had been hewn off. The plaintiff himself, as a witness, says nothing on the subject. A. L. Denham, the second witness, is silent as to whether the stringers were surfaced for the ties. W. L. Akers, the third witness, says the spikes had pulled out on account of the stringers being rotten. Whether any part of the sap had been taken off, he does not say. The next witness for the plaintiff, Andrew Javens, said the sap was taken off. Plaintiff's next witness, Melvin Camper, thought the stringers had not been surfaced, but was not positive as to that. All of these witnesses, except the plaintiff, had inspected the ties and stringers.

The defendant introduced, first, Lee McChesney, its general manager, who said the stringers had been surfaced off, and, in so doing, "the bigger part of the sap had been taken off," but that the amount of sap left on the stringers was not enough to render them defective. R. K. Lowery, who was next introduced, testified that the stringers had been cut down to the depth of an inch or an inch and a half to the solid wood. The evidence for the defendant further shows that the same stringers were put back into the bridge

when it was repaired, with the exception of one, which had either been broken or was too short, and that no additional surfacing had been done on them. And as to this there is no contradiction in the evidence, except that some of the witnesses for the plaintiff say they think two new stringers were put in instead of one.

As to the nailing of the ties, Denham said they had not been properly nailed, as he had seen some which bore no evidence of having been nailed, but could not say whether they had been in the bridge or had been brought to the scene of the wreck for the construction of a temporary track for use in putting the engine back on the track. Witness Akers said he had gone on the grounds before any repair work had been done, and had seen but few spikes, and that not more than one-fourth of the ties had been nailed. Mr. Javens, witness for plaintiff, said all the ties had been well nailed down at each end, with one spike through the center, and one on each side "toe-nailed." Camper was positive that only part of the ties had been spiked down, and that it was customary to put only one spike in each end.

The three witnesses for the defendant, McChesney, Lowery, and Fitzgerald, all testified that all the ties had been well nailed down, and constantly inspected, and renailed from time to time. Fitzgerald said that, on either Saturday or Monday preceding the Tuesday on which the bridge broke, he had gone over it and nailed all the ties down, because he thought some of the spikes might have broken in two.

Any error there may have been in overruling the motion to exclude the evidence for the plaintiff was waived by the introduction of evidence for the defense. *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596; *Trump v. Coal Co.*, 46 W. Va. 238, 32 S. E. 1035.

The case is clearly ruled by the principles governing the relation of master and servant, not by those applicable to common carriers. The plaintiff was an employé, and in the line of duty at the time of the injury. As such, he must be held to have assumed all the ordinary risks which were incident to the dangerous employment in which he was engaged. *Reese v. Ry. Co.*, 42 W. Va. 333, 26 S. E. 204; *Oliver v. R. R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Seldomridge v. Railway Co.*, 46 W. Va. 569, 33 S. E. 293; *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Humphreys v. Newport, etc., Co.*, 33 W. Va. 135, 10 S. E. 39. If the negligence of the master was known to him, he is deemed to have assumed the risk of injury resulting from it also. *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841; *Berns v. Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304. An employer does not guaranty the safety of his employé. *Stewart v. Ry. Co.*, 40 W. Va. 188, 20 S. E. 922; *Reese v. Ry. Co.*, 42 W. Va. 333, 26 S.

E. 204; *Oliver v. R. R. Co.*, 42 W. Va. 704, 26 S. E. 444.

Nevertheless, the master owes certain duties to his servant. He must provide safe and suitable machinery and appliances for the business in which his servant is employed, keep the same in repair, and make proper inspections and tests as to their safety and suitability. He must exercise reasonable care in providing and retaining sufficient and suitable servants for the business. He must establish proper rules and regulations for the service, and conform to them. He must also provide for the safety of the place in which the servant is to work. *Jackson v. R. R. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Madden v. R. R. Co.*, 28 W. Va. 617, 57 Am. Rep. 695. These duties are absolute and nonassignable, and for injury resulting from a breach thereof the employer must answer, though the fault be that of his vice principal to whom the performance thereof had been delegated, unless the servant himself, before the injury, had knowledge of the breach of duty on the part of the master, or has by his own negligence contributed to the injury. *Jackson v. R. R. Co.*, cited.

As the employé assumes the risk of all known dangers, though attributable to failure of legal duty in the abstract on the part of the employer, the question of negligence in any given case depends upon the relation which the master and servant, by their conduct and agreement, have established between themselves with reference to the business in which the servant is employed. This waiver on the part of the servant releases the master from much of the burden which the law, but for it, would impose. Of this the case in hand affords a good illustration. The railroad, though running over a mountain, crossing ravines, winding around the sides of declivities, and, in general, located on ground such as, in the case of an ordinary railroad, would require the use of the best materials, most modern and improved appliances, and best construction, conforming in all respects to those rules and principles which experience has shown to be essential to safety in operation, is a crude affair, lacking in such materials, appliances, and construction. All this was necessarily known to the plaintiff, and he assumed the risk of all danger of injury incident to his employment on that road. But the engine and cars were no doubt light, run at a low rate of speed, and not heavily burdened, in view of which the track and roadbed were deemed sufficient and reasonably safe by both employer and employé, notwithstanding the use of inferior materials and crude construction. However, the employer is by no means relieved of all duty to the servant under such conditions. He is still bound to the exercise of care for the safety of the servant, and the measure of his duty is reasonable care,

in view of the situation of the parties, the nature of the business, character of the machinery and appliances used, all the surrounding circumstances and conditions, and the exigencies which require vigilance and attention. *Oliver v. Railroad Co.*, 42 W. Va. 703, 26 S. E. 444; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Labatt, Mas. & Serv.* § 16. Though a lumber railroad, with its wooden rails and other elements of primitive and obsolete construction, is crude and dangerous, as compared with roads scientifically constructed, it has, in the contemplation of the parties concerned, and therefore of the law, certain characteristics and qualities upon which the servant may rely, and which he is not deemed to have waived, and which the master must have given the structure in its erection and is under a duty to maintain. This duty of maintenance necessarily implies that of supervision, inspection, and repairing.

These principles, so far as the record discloses, were applied. As the evidence introduced by the plaintiff was adduced for the purpose of showing a dangerous condition of the stringers, due to age and decay, and defective nailing of the cross-ties, it clearly falls within the limits of the rules stated. As to these matters, the employer was undoubtedly bound to the exercise of reasonable care for the safety of the employes operating the train, and as to both issues of fact there is conflict in the evidence. Some witnesses say the ties were all sufficiently nailed to the stringers, and others that they were not. All agree that the stringers were sap-rotten to such an extent as to weaken the connection between the ties and stringers, provided the sap had not been hewn off under the ties. As to whether it had been hewn off, however, they are not agreed. On each of the two issues of fact, a determination of which, adverse to the defendant, would sustain the verdict, there is evidence tending to support the contentions of both parties. In dealing with this evidence, the jury, judged by the verdict, have not ignored any legal principles governing the evidence, unless it be the rule of preponderance, which will be noticed later on, nor any admitted or clearly established material facts inconsistent with the verdict, or the finding as to facts, directly dependent upon the conflicting evidence. The rule on this subject is most clearly and accurately stated in 3 Cyc. 352, as follows: "A verdict will not be set aside unless overwhelmingly against the weight of the evidence, or so palpably unsupported by sufficient evidence as to clearly indicate that it is wrong, though, in such contingency—as where all the reasonable probabilities and overwhelming weight of the evidence are against a verdict, or the testimony on one side is consistent and in harmony with known facts, and that on the other is inconsistent with itself and with such known facts, or where the verdict is against admissions, or where the preponderance is such as

to indicate a mistake, or that the verdict was rendered under a misapprehension of the legal effect of the evidence, or material facts are mistakenly disregarded—the verdict will be set aside. And, where the verdict is manifestly against the evidence, the judgment will be reversed, notwithstanding the trial court had refused to set aside the verdict. But, on the other hand, the verdict must be so clearly wrong, and so manifestly against the weight of the evidence, as to amount to a verdict upon failure of proof, or to raise a necessary inference that it was the result of passion or prejudice, and not of an intelligent or honest exercise by the jury of its proper and lawful functions. In such emergency, however, the verdict will be set aside." *Johnson v. Burns*, 39 W. Va. 638, 20 S. E. 686, and *Davidson v. P., C. & St. L. Ry. Co.*, 41 W. Va. 407, 23 S. E. 593. do not go beyond the limits of this rule. In the former, the evidence showed certain physical facts and well-known customs and usages which the parties clearly understood, in view of which the contract was made, and which were actually and necessarily comprehended in the manifest objects and purposes of the parties to the contract, so that failure of the jury to recognize them and harmonize the other evidence with them had resulted in a verdict palpably wrong and against the overwhelming weight of the evidence viewed as a whole. The other case is of much the same character, admitted circumstances and incontrovertible physical facts governing and controlling the weight and force of all the other evidence and facts, and irresistibly leading to a conclusion different from that embodied in the verdict, having been ignored by the jury. Hence those cases are clearly within the general proposition above quoted. They do not apply here, because the conditions calling for their application are not found in this case.

The evidence for the defendant may, and probably does, preponderate, in the sense that the evidence for the plaintiff is not entirely consistent, one witness having testified that all the cross-ties had been properly nailed down and all the sap removed from such parts of all the stringers as were directly under the cross-ties, so that the sap-rottenness could not have caused the injury; while the testimony of all the witnesses for the defendant agrees that the ties had been nailed and the sap so removed from the stringers. But the credibility of the witnesses is a large factor to be dealt with in determining these questions, and, as practically all of them were employes of the defendant at the time of the trial, this circumstance was an element bearing on the question of credibility. "Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court is of opinion that the preponderance of evidence required a different

verdict." *Black v. Thomas*, 21 W. Va. 709, 713; *Sheff v. City of Huntington*, 16 W. Va. 307; *Grayson's Case*, 6 Grat. 712. This is the rule for the guidance of the trial court. In the appellate court the verdict must be viewed as having been strengthened by the approval of the judge who tried the case, heard the evidence detailed, and observed the personal appearances and demeanor of the witnesses. *Black v. Thomas*, cited; *Brugh v. Shanks*, 5 Leigh, 598. In view of these rules, the extent to which the credibility of the witnesses enters into the verdict, and the simplicity of the issues presented, it is clear that mere excess in the quantum of the evidence adduced by the defendant does not justify the granting of a new trial by this court.

No error in the judgment being perceived, it will be affirmed.

(57 W. Va. 146)

STATE v. MOORE et al.

(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)

CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED—SWEARING JURY.

1. Where a person is convicted of a felony, it must affirmatively appear from the record that the prisoner was present in court, and entered his plea in person to the indictment against him; and it is reversible error if the record fails to show this.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1466; vol. 15, Cent. Dig. Criminal Law, § 2766.]

2. There can be no legal conviction of a person for a felony unless the record shows that the jury which tried the case were duly sworn according to law.

(Syllabus by the Court.)

Error to Circuit Court, Lewis County; W. G. Bennett, Judge.

Oley Moore and others were convicted of murder, and bring error. Reversed.

E. A. Brannon, E. H. Morton, W. T. Talbott, and W. B. McGary, for plaintiffs in error. Romeo H. Freer, Atty. Gen., E. K. Reedy, and J. M. Hoover, for defendant in error.

SANDERS, J. This is a writ of error to the judgment of the circuit court of Lewis county, sentencing the defendants to the penitentiary of this state. The prisoners were indicted for the murder of Benjamin H. Edgar, and on the 29th day of May, 1904, were jointly tried, and Oley Moore and Hanson Moore were found guilty of murder in the first degree, with recommendation that they be punished by confinement in the penitentiary. Robert Moore was found guilty of murder in the second degree. The defendants moved the court to set aside the verdict of the jury and to grant them a new trial, which motion was overruled, and the defendants were sentenced to confinement in the penitentiary of this state.

The defendants make several assignments of error, one of which is that the plea of not guilty was entered by their attorneys, and not by them in person. The order making up the issue in the case shows: "This day came the state by the prosecuting attorney, and the defendants in their proper persons and by attorneys, and the defendants, by attorneys, demurred to said indictment, and the said demurrer, being considered by the court, is overruled, and the defendants, by their attorneys, for plea," etc. Before a person can be legally convicted of a felony, it is necessary that he be present in court, and plead to the indictment against him in person, and the record must affirmatively show this; and where the record shows that the plea was entered by attorney, and not by the prisoner in person, it is error, for which this court will reverse the judgment. The record in this case clearly shows that the plea was entered by the attorneys for the defendants. But it is argued by the attorneys for the state that inasmuch as the prisoners were present in court at the time their pleas were entered, and all that was done was done by their attorneys in their presence, this satisfies the law which requires that their pleas shall be entered by them in person, and that while it is, literally speaking, a plea by their attorneys, yet, within the spirit and true meaning of the law, it should be regarded as being done by them in person, because what was done by their attorneys in their presence and at their direction is, in law, the doing of that particular act in person. This argument is not without reason, and comes with considerable force, but is made in the face of numerous decisions of this state and Virginia holding that the record must show the presence of the prisoner, and that he pleaded in person. This question has been before the court so often, and has been so clearly decided, and the rule so firmly settled, that it is a waste of time to discuss it further. *Sperry v. Commonwealth*, 9 Leigh, 623, 33 Am. Dec. 261; *Younger's Case*, 2 W. Va. 579, 98 Am. Dec. 791; *State v. Conkle*, 16 W. Va. 736; *State v. Sutphin*, 22 W. Va. 771; *State v. Allen*, 45 W. Va. 65, 30 S. E. 209; 2 Ency. Pl. & Pr. 792; 12 Cyc. 373.

It is also assigned as error that the record fails to show that the jury which tried the defendants were sworn. Upon an examination, we find in the order impaneling the jury, and after giving their names, this language: "Who were elected according to law to well and truly try and true deliverance make between the state of West Virginia," etc. The order shows an attempt to swear the jury, and in all probability they were properly sworn, but, through the inadvertence of the clerk, the record fails to so show. The absolutely essential word, "sworn," was omitted, and the omission of

which is, of course, fatal to the verdict. We must take the proceedings of the trial as they appear on the face of the record, and be guided absolutely thereby; and, if it discloses error, we must reverse the judgment. It is hardly necessary to cite authorities to show that a person cannot be legally convicted unless the record shows that the jury which tried the case were sworn according to law. It is not necessary that the oath should be copied into the order, but the record must affirmatively show somewhere and in some way that the jury were sworn in the manner prescribed by law, before there can be a legal conviction. It will not suffice to say that the jury were "elected" according to law. It must show that the jury were sworn according to law. Code 1899, c. 159, § 6; 12 Ency. Pl. & Pr. 515, 521; *Younger's Case*, 2 W. Va. 579, 98 Am. Dec. 791; *Lawrence v. Commonwealth*, 80 Grat. 845; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Kellison*, 55 W. Va. —, 47 S. E. 166; 12 Cyc. 712.

For the foregoing reasons, the judgment of the circuit court sentencing the prisoners to the penitentiary is reversed, the verdict of the jury set aside, and a new trial awarded to each of the defendants.

BRANNON, P. I concur, but I am not clear that the plea is to be regarded as made by the attorney. When arraignment was a necessary part of trial, the prisoner was asked for his answer to the indictment after its reading, and he must make plea with his own lips; but, the arraignment having been abolished by the Code, I do not see why a plea in his presence, though by the mouth of his attorney, is not his plea. The Code puts the plea in for him, though he utter not a word. But the want of the oath to the jury inevitably calls for a new trial.

(57 W. Va. 149)

RISHER v. WHEELING ROOFING & CORNICE CO.

(Supreme Court of Appeals of West Virginia. Feb. 14, 1905.)

ACTION—DISCONTINUANCE—DOCKETING—CONTINUANCE—ABATEMENT—ANOTHER ACTION PENDING—PLEA.

1. In an action of assumpsit plaintiff filed his declaration at October rules, 1903, and the common order was entered thereon by the clerk. At November rules following, the defendant filed a plea of payment, answering part of the plaintiff's claim, and by an addition to the plea acknowledged itself indebted for the residue of the plaintiff's claim, and offered to confess judgment therefor; and the clerk made an entry of a plea of the general issue by the defendant, and of the common order confirmed, which entry at the ensuing term was stricken out by the court, and the plaintiff did not appear at rules after the filing of the plea of payment, and either demur or reply thereto, or "sign judgment" by entering a nolle prosequi for the part of the plaintiff's claim not answered by the plea of payment. Held, these proceedings at rules did not operate as a discontinuance of the action,

and the clerk properly placed the case on the docket for the ensuing term of court.

2. Under the circumstances of this case the defendant was not entitled to a continuance as a matter of right at the ensuing term of court.

3. The pendency of a suit in equity is not ground of defense to an action at law for the same cause of action, pending at the same time, either under the general issue or plea in abatement.

4. In an action at law a plea in abatement of a former suit pending, which does not aver whether such former suit is pending at law or in equity, is bad for uncertainty.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by H. A. Risher against the Wheeling Roofing & Cornice Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Handlan & Reyman and Hubbard & Hubbard, for plaintiff in error. Caldwell & Caldwell, for defendant in error.

COX, J. On the 16th day of September, 1903, H. A. Risher instituted an action of assumpsit against the Wheeling Roofing & Cornice Company in the circuit court of Ohio county, and filed his declaration and bill of particulars therein at October rules, 1903, and the clerk entered the common order. At November rules the defendant appeared, and filed a plea of payment, concluding to the country, as to the sum of \$776.93 part of the sums in the declaration mentioned, and by an addition to the plea acknowledged itself indebted to the plaintiff in the sum of \$10, the residue of plaintiff's claim as shown by his bill of particulars, and confessed or offered to confess judgment therefor, and the clerk made the following entries on the rule docket: "Common order confirmed, and writ of inquiry, plea of payment, and general issue filed by the defendant. Plea of payment and confession of judgment." Without any other proceedings at rules, the action was placed on the docket for the November term of the circuit court, which began on the 16th of November, 1903. On the first day of the term the defendant moved the court to remand the action to rules, and the arguments on the motion were set down for November 19, 1903. On the 19th of December, 1903, an order was entered whereby it appears substantially as follows: The defendant having at a former day of the term moved the court to strike this action from the docket and remand it to rules on the ground that it was improperly on the docket, the plaintiff, having at the same time moved the court to strike from the file the plea in writing filed by the defendant at November rules on the ground that it was a sham plea, tendered with the motion two affidavits. The evidence of the deputy clerk was heard. The defendant tendered an affidavit in opposition to the plaintiff's motion. The questions arising upon such motions were heard together. Objec-

tions were made to the filing of the affidavits. The court rejected the affidavits, and overruled the motion of the plaintiff and the motion of the defendant. Thereupon the plaintiff moved that the case be set for trial upon a given day of that term. The defendant moved for a continuance to the next term. Both motions were continued until the 26th of December. By an order entered on the 2d day of January, 1904, it appears substantially as follows: The defendant assigned as grounds for its motion to continue that the plea of the general issue as well as the confirmation of the common order had been inadvertently and improperly entered at rules by the clerk, and filed an affidavit in support of the motion. Upon consideration of such motion the plea of the general issue and the confirmation of the common order were stricken out by the court. After such correction the court held that the action was properly on the docket, and overruled the motion to continue. Thereupon the defendant offered to file its second special plea in writing, averring the pendency of a former suit, to which the plaintiff objected, and the defendant asked time to file affidavits in support of the plea, and time was granted until January 4th to file such affidavits. By an order entered on the 23d day of January it appears substantially as follows: The defendant having at a former day of the term offered to file an affidavit in writing with exhibits in support of its second plea in writing then tendered, the plaintiff objected to the filing of the plea and affidavit, and moved to reject the same, which motion the court sustained, and rejected the plea and affidavit. Thereupon the defendant moved the court for leave to file its third plea in writing, tendering with the motion the third plea, averring the pendency of a former suit, and moved the court to consider in support of the third plea the same affidavit and exhibits tendered in support of its second plea. The plaintiff objected to the filing of the third plea, and moved to reject it. Upon consideration by the court the third plea and affidavit with exhibits were rejected. The plaintiff joined issue on the plea of payment and on his motion the action was set for trial for February 1st. By an order entered on the 3d day of February it appears substantially as follows: The defendant waived a jury, and, the plaintiff desiring none, the action was put upon trial to the court, and the court, having heard the plaintiff's evidence and the defendant having offered no evidence, entered judgment in favor of the plaintiff for the sum of \$786.93, the full amount of plaintiff's claim as shown by the bill of particulars. The defendant moved the court to set aside the judgment and award it a new trial, which was overruled, and defendant excepted, and was granted leave to file its bill of exceptions in vacation. The bill of exceptions, which included the evidence, was afterwards signed, and

made part of the record. The several rulings of the court were excepted to by the opposite party. The case comes here by writ of error and supersedeas allowed the defendant.

The defenses in this action are said to be technical. They may be technical, but are important, and, if legal, are binding on the court. In order that the proceedings may appear in their proper sequence, the detailed statement above is given. The principal questions arising upon the record are: First. Did the proceedings at rules or in court operate as a discontinuance of the action? Second. Should the defendant have been granted a continuance as a matter of right? Third. Should the court have admitted the second and third pleas of a former suit pending? These are not the only questions arising, but, in our judgment, are the most material. In determining the question as to a discontinuance, we must consider what was the legal effect of the addition to the plea of payment, acknowledging indebtedness and confessing or offering to confess judgment for that part of the plaintiff's claim not answered by the plea. We think this addition to the plea cannot be treated as more than an offer to confess judgment for that part not answered by the plea, and an acknowledgment of the plaintiff's claim to that extent. We do not consider it a confession of judgment under the statute (Code 1899, c. 125, § 43), because such confession must be assented to by the plaintiff. The sum must be such as the plaintiff is willing to accept. We think the addition to the plea must, for the purpose of a discontinuance, be treated in the same manner as a failure to plead to the part of plaintiff's claim not answered by the plea of payment. In support of the view that there was a technical discontinuance, the defendant invokes a rule of pleading to the effect that, where a defendant files a proper plea, which is an answer to a part of the plaintiff's declaration, and does not in that or any other plea notice the remainder of the declaration, the plaintiff must take judgment for the part unanswered as by *nisi* dict. If he demurs or pleads over without taking such judgment, the whole action is discontinued; for in such case the plaintiff, by omitting to enforce such claim in respect of the unanswered portion of his claim by taking judgment, or to re-sign it by entering a *nolle prosequi* thereto, causes a chasm or hiatus in the proceedings. 1 Chitty on Pldg. p. 549 (16th Am. Ed.). This rule is stated in the same or different language by different courts and text-writers; but the substance of it is that, if a plaintiff demurs or replies over to a proper plea answering a part only of the plaintiff's cause of action, without "signing judgment," an hiatus and consequent discontinuance takes place. The reason given is that the plaintiff thus fails to prosecute or follow up his action. This rule has not been looked upon with much

favor by some authorities, especially in modern practice (Enc. Pldg. & Prac. vol. 6, p. 924-926); but we are inclined to consider the rule as still existing (4 Minor, Inst. 784; St. Pldg. 216 [Tyler's Ed.]; Hunt v. Martin, 8 Grat. 578; Southall v. Exchange Bank, 12 Grat. 812). Under the rule, was there a discontinuance of this action at rules? There was an entry by the clerk at rules of the general issue by defendant, which was at the ensuing term stricken out by the court as unauthorized. The general issue goes to the whole of plaintiff's claim, and, although entered without authority, could only be stricken out by the court in term. The plaintiff did not appear at rules after the plea of payment was filed and demur or reply to the plea, or "sign judgment" for the part of his claim not answered by the plea. He did nothing until the ensuing term. These facts, we think, prevented a discontinuance. Under the circumstances here presented the plaintiff cannot be said to have failed to prosecute or follow up his action, and thus to have caused a chasm or hiatus in the proceedings until he demurred or replied over without signing or taking judgment for the part of his claim unanswered by the plea. We are clearly of the opinion that there was not a discontinuance of this action at rules, and that the clerk properly placed it on the docket for the ensuing term. When the case came before the court, the court, having complete control over the proceedings in the office of the clerk during the previous vacation, made an order striking out the entry of the common order confirmed, and of the plea of the general issue by the defendant. At that term the general issue was joined by the plaintiff, and the case was tried by the court in lieu of a jury, and judgment rendered for the whole amount of plaintiff's claim, including the part unanswered by the plea of payment. In determining whether or not a discontinuance of the action occurred in court, we must consider the term as an entirety. All the proceedings therein were subject to the control of the court until the term adjourned. The action being properly in court, all the proceedings at that term must be considered together upon the question as to a discontinuance. The term "session," when applied to courts, means the whole term; and in legal construction the whole term is construed as but one day. Dunn's Ex'rs v. Renick, 40 W. Va. 349, 22 S. E. 66; Dew v. Judges (Va.) 8 Hen. & M. 27, 3 Am. Dec. 639. If the plaintiff at that term "signed judgment," or, which is to the same effect, took judgment for that part of his claim not answered by the plea of payment, it was sufficient to prevent a discontinuance. The plaintiff did take judgment at that term for the part of his claim not answered by the plea of payment; not separately, it is true, but it was included in the judgment upon the trial of the action, and prevented a discontinuance.

There being no discontinuance either at rules or in court, was the defendant, as a matter of right, entitled to a continuance under the circumstances of this case? We are cited to the case of Southall v. Exchange Bank, supra, as sustaining the right of the defendant to a continuance. Defendant claims that because of the entry by the clerk of the plea of the general issue and of the common order confirmed as to the whole of the plaintiff's claim, which entry was afterwards stricken out by the court, he was entitled as a matter of right to a continuance on the ground that the plaintiff only placed himself rectus in curia at that term. The practice formerly was different from what it is in this state as to the plea of payment. The plea of payment was not formerly an issuable plea. It concluded with a verification, and not to the country. It is now an issuable plea, and concludes to the country. Douglass v. Central Land Co., 12 W. Va. 502; Kinsley v. County Court, 31 W. Va. 464, 7 S. E. 445. A proper plea of payment in this state presents an issue which the plaintiff must accept. Upon it a similliter may be added by the plaintiff, or, if he does not do so, he may proceed to trial as if there were a similliter. Code 1899, § 25, c. 125. The rule as to a continuance as a matter of right upon a plea of payment is thus changed in our practice. We do not understand it to be the law that a party filing an issuable plea at rules may have a continuance as a matter of right solely on the ground that the plaintiff or the law has added a similliter, in term. When the plea of payment concluded with a verification, it was different in this: that the replication did not make the issue; and, if the replication be filed properly for the first time in term it might reasonably be said to operate to give the defendant a continuance as a matter of right, if demanded. In the Southall Case the plaintiff had filed a replication to the plea at rules, which was afterwards in term withdrawn, and refiled in term. In the case at bar it was the entry of the defendant's plea of the general issue, and not the plaintiff's replication, which was stricken out by the court. The entry of the common order confirmed at rules by the clerk as to the whole of the plaintiff's claim, which entry was afterwards stricken out by the court, was erroneous only as to the part of the plaintiff's claim answered by the plea of payment. After filing the issuable plea of payment at rules, with the addition before mentioned, no further attendance at rules was necessary on the part of the defendant. The striking out of the entry of the common order confirmed by the court could not operate as a surprise to the defendant, and, as was said in the opinion in the Southall Case, no injustice could be done by this to the defendant, as it only placed the case where it would have been but for the irregularity which occurred at rules. We think that under the circumstances of the case at bar the defendant was not entitled, as a matter of

light, to a continuance at that term of court.

We will now consider the question as to the admission of the two pleas in abatement. These pleas tendered by the defendant are designated in the record as the second and third pleas of the defendant. Each averred a former suit pending by the defendant and others against the plaintiff and others upon and directly involving the very same promises in the declaration in this case mentioned. The third plea differs from the second only in this: that it also averred a reason for not filing the plea before pleading in bar. In support of these pleas the defendant tendered an affidavit. Neither of the pleas averred whether the former suit was pending at law or in equity. Without considering the question as to the time of the filing of the pleas, or as to the filing of an affidavit in support of them, were they sufficient if they had been filed in time? If the former suit was in equity, its pendency could not be pleaded in abatement of the action at law. Since the jurisdiction of equity is limited to cases in which the law does not afford a complete and adequate remedy, it has been held by cases both at law and in equity that two causes, one at law and one in equity, are ex necessitate so dissimilar that the pendency of one cannot be pleaded in abatement of the other. Cyc. of Law & Proc. vol. 1, p. 40; and cases cited in note. In *Williamson v. Paxton*, 18 Grat. 475, it was held that, where a suit in equity and an action at law, for the same cause of action, are pending at the same time, it is not ground of defense at law either under the general issue or plea in abatement. We hold this to be the law in this state. Applying the law to the two pleas in abatement mentioned, they are fatally defective in not averring whether the former suit was at law or in equity. A plea which avers facts which, if true, may or may not constitute a legal defense, depending entirely upon an ulterior fact not averred, is bad for uncertainty. A plea in abatement must be certain to every intent. 1 Chitty, Pldg. 473. All the particularity of the common law is required in a plea in abatement. *Quarrier v. Ins. Co.*, 10 W. Va. 507. These pleas were insufficient in law, and, upon objection, were properly rejected.

It is assigned as error that the court entered judgment on the 3d day of February, 1904, for \$788.93, with interest from the 26th day of July, 1903. If allowing interest from a previous day, instead of computing it up to the day of judgment and including it therein, is error, it is not to the prejudice of the defendant, and it cannot complain.

It is also assigned as error that the judgment is not sustained by the proper evidence heard at the trial. We must presume that the court excluded from its mind all improper testimony, if the proper testimony is sufficient to sustain the judgment. *Mer. Co. v. Truax*, 44 W. Va. 531, 29 S. E. 1006; *State v. Denoon*, 34 W. Va. 139, 11 S. E. 1003. The

defendant offered no testimony, and we think the proper evidence offered at the trial by the plaintiff fully sustains the judgment of the lower court.

For the reasons stated above, the judgment entered by the circuit court of Ohio county on the 3d day of February, 1904, in favor of the plaintiff, H. A. Risher, against the defendant, the Wheeling Roofing & Cor-nice Company, is affirmed.

(57 W. Va. 137)

YOCK v. MANN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)

DEED—AFTER-ACQUIRED TITLE—IMPROVEMENTS
—NOTICE OF SUPERIOR TITLE—MARRIED
WOMAN—ESTOPPEL—ADMISSIONS.

1. If one conveys land with general warranty, his title to which is defective, and he afterwards acquires good title to the same, such acquisition inures to the benefit of his grantee.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 99.]

2. One making permanent improvements on land as if his own, if when making them he has notice, actual or constructive, of the superior rights of another, cannot be allowed for such improvements.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Improvements, §§ 2, 14, 15.]

3. "One having notice of facts rendering his title inferior to another's, who by mistake of law regards his title good, cannot claim for permanent improvements." *Williamson v. Jones*, 27 S. E. 411, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891.

4. A married woman cannot lose her land, separate or not separate estate, by estoppel by conduct (in pais) without actual fraud, if even by it. *Waldron v. Harvey*, 46 S. E. 603, 54 W. Va. 608.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 234.]

5. "One cannot lose vested title to land by oral admission that it is the property of another." *Waldron v. Harvey*, 46 S. E. 603, 54 W. Va. 608.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 236.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by Florence Yock against John O. Mann and others. Decree for defendants, and plaintiff appeals. Reversed.

J. Hop Woods and W. T. George, for appellant. Ice & Ice and F. O. Blue, for appellees.

McWHORTER, J. By deed dated the 16th day of December, 1893, James A. Williamson and wife, and John C. Mann and wife, in consideration of \$350, of which \$125 was paid in cash, and the residue, \$225, to be paid in three equal annual payments of \$75 each, conveyed to Florence Yock a lot, containing 28 rods of land, in the town of Belington, in Barbour county, with general warranty, reserving their vendor's lien to secure the payment of the deferred installments of pur-

chase money. The same lot had been previously conveyed to said Mann and Williamson by W. P. Scott and Henry C. Jones, in which a vendor's lien was likewise retained to secure the payment of unpaid purchase money. Still prior to that, the same lot was conveyed to Scott and Jones by James R. Payne and Julia C. Payne, his wife, who had also reserved a vendor's lien for a part of the purchase money. In January, 1898, H. A. Monahan brought his suit, as assignee of some of the notes secured by the former vendor's liens, and on the 4th day of June, 1898, a decree was rendered to sell the said lot to satisfy said prior vendors' liens, which was duly sold by a special commissioner and purchased by the defendant John C. Mann, and the sale duly confirmed, and Special Commissioner W. T. George, appointed for that purpose, was directed to collect the deferred installments and disburse the purchase money, and when all the purchase money should be paid that he should execute a deed to the purchaser for said lot, and after the purchase money was collected, at the request of John C. Mann, who had made sale of the lot to F. P. Rease, Special Commissioner W. T. George joined in a deed with John C. Mann and his wife, dated the 9th day of May, 1899, and conveyed the same to Frank P. Rease, in consideration of \$350 paid by said Rease to Mann. At the April rules, 1902, Florence Yock filed her bill in the circuit court of Barbour county against John C. Mann, J. O. Williamson, administrator of James A. Williamson deceased, F. P. Rease, and W. T. George, special commissioner, defendants, alleging the payment of the sum of \$84.30 as of the 30th day of April, 1894, and \$69 paid about the 30th of June or July, 1894, on account of said deferred payments of purchase money due from her to Mann and Williamson, and claimed that there was only then due from her on account of the purchase money not exceeding the sum of \$114.53, and alleging that she was entitled, upon payment of the residue of the purchase money due from her, to have the conveyance by the special commissioner and said Mann and wife to F. P. Rease set aside as in fraud of her rights and as a cloud upon her title, and to be placed in possession of said lot as her own, and brings into court and tenders to said defendants, Mann and the administrator of J. A. Williamson, said sum of \$114.53 as all that was due upon the purchase money from her under her conveyance, and prays that said deed to Rease from Mann and wife and the special commissioner be set aside as a cloud upon her title, and an order be made releasing the vendor's lien retained in the deed from Mann and wife and Williamson and wife to her, and that she be given the possession of the said lot, and for general relief. Plaintiff exhibited with her bill copies of the deeds to herself from Mann and Williamson, and from J. R. Payne and wife to Scott and Jones, and from Scott and Jones

to Mann, all of which deeds appear to have been duly recorded; and plaintiff also exhibited a copy of Monahan's bill, and decree of sale, and decree confirming the sale of the lot in said cause to Mann. The defendants John C. Mann and F. P. Rease severally answered the bill, to which general replications were entered.

Defendant John C. Mann denied the subsequent payments of \$84 and \$69, alleged by plaintiff, on account of the purchase money, after the cash payment of \$125; admitted the former vendors' liens, and the proceeding by H. A. Monahan against him and others to enforce the collection thereof, and the purchase by himself of the lot under the decree of sale made in the Monahan case, and the confirmation of the sale to himself at the price of \$215.43, and the sale of the same by himself and wife, and deed to Rease, joined in by the special commissioner, George, who was appointed to make a deed to said Mann when he should pay the residue of the purchase money; denied that he had ever called upon plaintiff to have her pay the purchase money due him from her before the said prior liens on said lot were fully discharged; that he frequently urged plaintiff and requested her to take up the liens of the said Monahan and Crim, and he would allow her full credit for the same upon the purchase money due to him, and thus perfect her title to said lot and remove all incumbrances thereon, which she expressly refused to do; denied that he had anything to do with the institution of the suit of Monahan against plaintiff and others, and that respondent repeatedly, at and after the sale, urged and requested plaintiff, through her agent and attorney, to take said lot and pay him and Williamson what was due to them after they had paid off the liens thereon, and have the sale made by Commissioner George confirmed to the plaintiff instead of respondent, and for several days the confirmation of said sale was held back for the express purpose of giving plaintiff an opportunity to take the house and lot, and she informed him by her agent and attorney that she could not do so. Respondent denied that he, in fraud of the rights of plaintiff, joined in said conveyance with Commissioner George in the deed to defendant Rease; that, while he did join in the conveyance, he did not do so with any fraudulent intent or purpose, but because he had in good faith sold said lot to the defendant Rease, and that the sale was not made to Rease until long after the respondent had been informed by plaintiff's attorney that she could not and would not take the property and pay respondent and Williamson what she owed them upon it; alleging that the sale to Rease by respondent was made with the full knowledge of plaintiff, and that no kind of opposition or protest was ever interposed by her to the execution of the deed to defendant Rease or to the making of said sale to him, and that plain-

tiff, prior to the sale or conveyance of said lot to Rease, delivered possession thereof to respondent; that respondent was unable to say whether defendant Rease had notice of the rights now claimed by plaintiff in said property or not, but was certain that he never informed said defendant Rease of it, because he knew of no just right or claim that plaintiff had to or in said property; and denied that plaintiff was entitled to have the deed to Rease set aside, or that she had any right or interest whatever in said property, and alleged that the conveyance from himself and Commissioner George to Rease conferred complete legal and equitable title upon the defendant Rease, and that the same was not in fraud of the rights of plaintiff, or otherwise invalid; and denied that the purchase of said lot by him from said Commissioner George at the sale thereof inured to the benefit of the plaintiff.

The defendant Rease filed his demurrer and answer to the plaintiff's bill, admitting that it was true that he purchased the property from defendant Mann for \$350, which he paid to Mann, and received a deed therefor from Mann and his wife and Commissioner George, dated the 19th day of May, 1899; denied that he had any knowledge of plaintiff's rights in the matter, but that he bought the same in good faith; that plaintiff was a party defendant to the chancery suit of Monahan against her and others; that she permitted the sale of said lot to be made to Mann, and by decree duly entered confirmed to him, in which decree said special commissioner was authorized and directed to execute a deed conveying the lot to said Mann; that plaintiff had full knowledge of the purchase by Mann, and that Mann was willing to have said sale reported and confirmed to plaintiff, but she declined to have the same done, and entered into an agreement with Mann that the same was to be confirmed to him, and that he was to release her from any further payment by reason of her purchase from him and Williamson, and that under this agreement said Mann had said sale confirmed to him, and released said plaintiff of payment of the unpaid purchase money to him and Williamson; that respondent after his purchase took possession of the lot, plaintiff giving him possession and making no claim thereto, and thereupon respondent rebuilt the dwelling house on said lot, fenced it, built new pavements around it, and made other improvements, at an expense to him of \$362, all of which was known to plaintiff, who stood by and permitted same to be done without making any claim to said lot whatsoever, and in his answer sets up her said acts as an estoppel against her making claim to said lot, and praying that, if the court should hold that she was entitled to the same, respondent be allowed the value of his improvements, and that the amount paid by him to John C. Mann be refunded to him, and denied

every charge of fraud or intimation of fraud alleged against him in plaintiff's bill.

Depositions were taken and filed in the cause, and the cause was heard on the 31st day of May, 1904, upon the bill and exhibits, the answers of Mann and Rease, and general replications thereto, and upon exceptions to depositions, which exceptions were overruled, and the court held that upon the pleadings and proofs the cause was for the defendants, and decreed the dismissal of the bill, and costs to the defendants Mann and Rease; from which decree the plaintiff appealed.

The decree in favor of appellee Mann in this case seems to be defended by counsel upon the theory that there existed between Mann and Williamson on the one side, and plaintiff, Yock, on the other, an executory contract for the sale to Yock of the land, and that upon the failure of the purchaser, Yock, to pay the purchase money, they could rescind the contract, and cite many authorities to that effect, as in *Ketchum v. Everton*, 13 John. (N. Y.) 359, 7 Am. Dec. 384: "Where a purchaser who advances money as part performance of a contract for the purchase of land refused to pay the remainder, the vendor may rescind the contract and convey the land to another." And to the same effect is the case of *Chabot v. Winter Park Company*, 34 Fla. 258, 15 South. 756, 43 Am. St. Rep. 192; besides several Virginia cases and some West Virginia cases. They seem to forget that the legal title had passed from Mann and Williamson to the plaintiff, Yock; that, while she owed purchase money which she failed or refused to pay, she still had the legal title, and they could make no conveyance thereof to any other purchaser. In section 216, Maupin on Mark. Tit. to Real Estate, it is said: "A covenant of warranty will, in every case in which the grantor undertakes to convey an indefeasible estate, and not merely such interest as he may have, estop him from afterwards holding an after-acquired estate in the premises as against the grantee." And cases there cited. So, in section 24, 1 Greenl. on Evidence: "A covenant of warranty also estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant." In *Raines v. Walker*, 77 Va. 92, it is held: "If one conveys land with general warranty, which at the time he does not own, but afterwards acquires the same, such acquisition inures to the benefit of the grantee." *Clark v. Lambert*, 55 W. Va. —, 47 S. E. 312 (Syl., pt. 2): "If one conveys land with general warranty, which at the time he does not own, or his title to which is defective, but he afterwards acquires good title to the same, such acquisition inures to the benefit of his grantee." *Flanary v. Kane* (Va.) 46 S. E. 681. Defendant Rease in his answer states that plaintiff, Yock, gave him possession, and thereupon he rebuilt the dwelling house on the lot, and made the other improvements

set up in his answer. To this answer there is a general replication by plaintiff, and plaintiff denies the fact in her testimony, and states that Mann got possession by getting one of her keys from her renter, Mr. Gainer, claiming he had bought it; that the possession of both Mann and Rease was without her consent or authority. Rease fails to prove, even by his own testimony, that the possession was delivered to him by the plaintiff. There is nothing in his testimony showing any act on the part of plaintiff that could in any way estop her in the assertion of her rights. He claims in his testimony that he thought he had good title. That he did not know that he had examined the records. That Mr. Ware was looking after that line of business for him, and he didn't remember that Ware reported to him as to the title of this property. He stated that he did not know that Mann owed the purchase money for it to commissioner George, and was asked, "Did you buy it of Mann without knowing anything about the title, and whether he had paid for it or not?" A. "I did. I considered him perfectly good for any purchase." That Mann did not tell him he owed the commissioner for the property, and stated that the first he learned that Mrs. Yock claimed any interest in the property was about the time she brought suit.

An attempt is made to prove by Melville Peck, who was attorney for Mrs. Yock, that she had failed in her efforts to raise the money to pay the purchase money, and that she had given up hope of saving it, and was therefore estopped from insisting that her claim should be enforced. Exceptions were taken to the deposition of Mr. Peck, for the reason that it detailed and disclosed communications of plaintiff to him when and while he was counsel for plaintiff in respect to the subject-matter of this controversy, and was therefore privileged. The exception was overruled. The action of the court in overruling the exception is immaterial, as the evidence of Peck failed to prove an estoppel. There is nothing to show he was authorized to make the statements he did, and, admitting the fact, they are not sufficient to estop her from asserting her claim. He simply stated that "she seemed to fall in her efforts to get the money; said that Mr. Surpell at last refused to furnish the money, and, as I understood her, she gave the matter up. I then told Mr. Mann that Mrs. Yock had failed to get the money to pay for the property, and I thought the matter was ended." The deed from Special Commissioner George and John C. Mann and Sallie Mann, his wife, of the 19th of May, 1899, recites the chancery cause of Monahan against Mann and others, to which the plaintiff, Florence Yock, was a party, and wherein it appears that said Mann and Williamson had conveyed the said property to the said Yock, and that she then had the legal title to said land. Of this

fact the said Rease was bound to take notice, as it was a recital in the deed then executed to him. In *Clark v. Lambert*, supra (Syl., pt. 3), it is held: "Where a subsequent purchaser had actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all of the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance, or other circumstances affecting the property, of which he had notice." Rease claims that, in case the plaintiff is entitled to have his deed set aside, he would be entitled to be paid the amount he had expended on said lot in the way of improvements. *Williamson v. Jones*, 43 W. Va. 562 (Syl., pt. 16) 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891: "One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them." And point 17: "One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, cannot claim for permanent improvements." This question is discussed at page 588 of 43 W. Va., page 421 of 27 S. E. (38 L. R. A. 694, 64 Am. St. Rep. 891), in said case. In *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603 (Syl., pt. 10): "A married woman cannot lose her land, separate or not separate estate, by estoppel by conduct (in pais) without actual fraud, if even by it." And point 11: "One cannot lose vested title to land by oral admission that it is the property of another." When the purchase was made by Mann under the decree in the Monahan case, the purchase inured to the benefit of his grantee, Florence Yock, and his sale of the property to Rease, and the purchase by Rease of the same, were in fraud of the rights of plaintiff Yock.

For the reasons herein stated, there is error in the decree of the circuit court of Barbour county, and the same is reversed, set aside, and annulled, and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the deed of May 19, 1899, from John C. Mann and Sallie Mann, his wife, and W. T. George, special commissioner, to Rease be, and the same is, set aside, annulled, and held for naught, and the plaintiff is awarded a writ of possession for the lot in controversy, with costs to the plaintiff, as well in the circuit court as her costs of this appeal. But this decree is without prejudice to the defendants Mann and Williamson to take such proceedings as they may be advised to enforce their vendor's lien against said property, if any, which may remain due and unpaid from the said Florence Yock.

(57 W. Va. 196)

STOVER v. DAVIS.(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)**UNLAWFUL DETAINER—PROOF OF TITLE—DIS-
CLAIMER BY TENANT.**

1. In an action of unlawful detainer brought by a landlord, no proof of title is required, since, if a tenant has once recognized the title of the plaintiff, and treated him as his landlord, by accepting a lease from him, he will not be permitted to dispute his landlord's title.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 1243.]

2. Where the lease is by parol, it is not necessary for the landlord to give any evidence of his title anterior to the lease. An acknowledgment by the defendant that he went into possession under the plaintiff is sufficient to entitle plaintiff to recover the possession.

3. A tenant in possession cannot disclaim his landlord's title without surrendering possession to him. He cannot collude with and attorn to another, claiming a hostile title, to the prejudice of his landlord.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 208, 210–214.]

4. The rule is well settled in this state that a tenant is not allowed to dispute his landlord's title after having accepted possession under him.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 151–214.]

(Syllabus by the Court.)

Error to Circuit Court, Raleigh County;
J. M. Sanders, Judge.

Action by A. L. Stover against Lewis Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Ashby and Price, Smith & Spillman, for plaintiff in error. Brown, Jackson & Knight, J. W. McCreary, and Angus W. McDonald, for defendant in error.

McWHORTER, J. This was an action of unlawful detainer brought by A. L. Stover against Lewis Davis to recover the possession of a tract of 50 acres of land in Raleigh county. About the last of May or the first of June, 1902, defendant, Davis, was placed in possession of the house and premises to hold possession for and under Stover until about the 1st of March, 1903. When possession was demanded of him by Stover, Davis replied, "Whenever you can show a better title than Mr. Crawford, that I have leased it from, I will give you possession, but not before." Stover then brought his action of unlawful detainer before a justice of the peace. Defendant, Davis, filed his verified answer to the complaint of plaintiff, stating that the title would come in question. The plaintiff filed an affidavit denying the fact stated in the answer of defendant—that the title of said real estate would come in question. The justice heard the evidence, and rendered judgment for plaintiff for the possession of the premises and for plaintiff's costs. The defendant appealed to the circuit court. At the June term, 1903, the parties, waiving a jury, submitted all matters of law

and fact to the judgment and determination of the court. The court, having heard the evidence, took time to consider of its judgment, and on the 28th of July rendered judgment for plaintiff for the recovery of the possession of the premises, and awarded a writ of possession therefor, and rendered judgment for costs of the suit against the defendant and his sureties on his appeal bond; and the defendant moved the court to set aside the judgment and grant him a new trial because of errors committed in the trial of the action to his prejudice, as shown in the record, and, further, because said judgment was contrary to the law and the evidence, which motion was overruled, and the defendant excepted. On the trial of the case the defendant took a bill of exceptions to the several rulings of the court excepted to, which was made a part of the record, which bill of exceptions included all the evidence introduced in the case at the trial. Plaintiff proved upon the trial that he had had actual possession of the premises in question, and had paid taxes thereon, ever since the 28th of August, 1890, at which time he received from Asel Ford and wife a general warranty deed for the premises, which was duly recorded October 9, 1890, and under which he had held possession ever since. Upon the trial it was admitted by the defendant that he was then in possession of the property described in the summons as amended, and was so in possession at the time of the institution of the suit.

There are exceptions taken to the ruling of the court in overruling objections to the introduction of the deeds on either side, and to the motion to quash the summons, which was permitted to be amended in the court; but none of these exceptions are relied upon, and, as stated by counsel for defendant in their brief, "the only question is, could Davis, under the circumstances above set out, defend this action?" And they say: "First, that in this case actual notice was given to the landlord of the adverse holding; second, while, as a general rule, when the relation of landlord and tenant is once established, the tenant cannot dispute his landlord's title, yet this rule is subject to many qualifications and exceptions as well and firmly fixed as the rule itself." And they cite *Voss v. King*, 33 W. Va. 240, 10 S. E. 402; *Emerick v. Tavener*, 9 Grat. 220, 58 Am. Dec. 217; *Campbell v. Fetterman's Heirs*, 20 W. Va. 398; *Willison v. Watkins*, 3 Pet. 43, 7 L. Ed. 596; *Alderson v. Miller*, 15 Grat. 279. In the case of *Voss v. King* the defendant was in possession at the time he accepted the lease from Voss, and therefore did not acquire his possession from the landlord. Judge Snyder, in rendering the opinion of the court, at page 245 of 33 W. Va., and page 405 of 10 S. E., says (this being the case): "Whether we apply the rule that a tenant who acquires his possession from the landlord must surrender his possession before he

can assert an adverse claim, or the other rule, that without an actual surrender of the possession the tenant may, after a positive disclaimer and notice to the landlord, set up an adverse title either in himself or a third person, the defendant in this case was entitled to prove that he had given notice to Voss, and that he was holding adversely to his title"—and in the latter event he ought to be permitted to show to the satisfaction of the jury that more than three years before the action was commenced he had disclaimed to hold under Voss' title, and that Voss, or those claiming under him, had notice of such disclaimer; clearly holding, by implication, that the possessory action could be brought within the three-years limitation, even under the last rule mentioned, where the possession was not acquired directly from the landlord. In *Emerick v. Tavenor*, 9 Grat. 220, 58 Am. Dec. 217, decided in 1852, Judge Lee thoroughly discusses the relation of landlord and tenant. In that case *Emerick*, in possession claiming under a patent of 1839, accepted for a year a lease from *Tavenor*, an adverse claimant out of possession. In 1847, *Tavenor* having to that date made no further claim, *Emerick* conveyed the land to *Alton*. *Tavenor* then demanded rent of *Emerick*, who refused to pay, and possession, being demanded, was also refused, when *Tavenor* brought his action of unlawful detainer. At page 223 of 9 Grat. (58 Am. Dec. 217) the opinion says: "The doctrine is well settled that, if a privy of estate have existed between parties to an action, proof of title is ordinarily unnecessary for a party is not permitted to dispute the original title of him by whom he has been let into possession. A tenant cannot be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession, or done what would be regarded as equivalent; nor can he be permitted to deny that the possession so received was the possession of his landlord. And the rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease; and it applies whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action. *Wood v. Day*, 7 Taunt. R. 646; *Fleming v. Gooding*, 10 Bing. R. 549; *Taylor v. Needham*, 2 Taunt. R. 278; *Cooke v. Loxley*, 5 T. R. 4; *Codman v. Jenkins*, 14 Mass. 95; *Inhab. of Watertown v. White*, 13 Mass. 477; *Galloway's Lessee v. Ogle*, 2 Bin. 468; *Graham v. Moore*, 4 Serg. & R. 467; *Willison v. Watkins*, 3 Pet. 43, 7 L. Ed. 596; *Marley v. Rodgers*, 5 Yerg. 217; *Wilson v. Smith*, Id. 379; *Jackson v. Dobbin*, 3 Johns. 223; *Crabbe on Real Property*, 327; *Archbold on Landlord & Tenant* 219. Nor is the rule varied where the tenant is in actual possession of the premises at the time he accepts a lease. He thereby as effectually recog-

nizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself. *McConnell v. Bowdry's Heirs*, 4 T. B. Mon. 392. The same rule is recognized in equity. *Wilson v. Lord Townsend*, 2 Ves. Jr. R. 693; *Attorney General v. Lord Hotham*, 3 Russ. R. 415. When once this relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely; the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own. *Doe v. Mills*, 2 Adolph. & Ell. 17; *Doe v. Austin*, 2 Moore & Scott, 107; *Doe v. Burton*, 9 Carr. & Payne, 254; *Doe v. Lady Smythe*, 4 Maule & Selw. 367; *Jackson ex dem. Vandusen v. Scissam*, 3 Johns. 499. It has been suggested, however, that although a party succeeding a tenant in the possession is to be presumed to have taken as tenant, also, yet that he may repel that presumption, and escape being concluded by the acts and admissions of his predecessor, by showing that he did not take in that character, as by producing a deed from the tenant purporting (as in this case) to convey the premises in fee. But the contrary has been expressly decided, and it has been held that, though the party purchase and enter upon the premises under an absolute conveyance, he still, in judgment of law, is deemed to have entered as the tenant of the landlord, and to hold the possession subject to all the duties and responsibilities appertaining to that character." Much more might be quoted from this very able opinion which would be applicable to case at bar.

In 2 *Taylor's Landlord & Tenant*, § 629: "The rule is well settled that a tenant is not allowed to dispute his landlord's title after having accepted possession under him." Section 705, Id.: "No proof of title is required in this action when it is brought by a landlord, since, if a tenant has once recognized the title of the plaintiff, and treated him as his landlord, by accepting a lease from him, or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted, and that whether the action be debt, assumpsit, covenant or ejectment, for it is a general rule that a tenant shall never be permitted to controvert his landlord's title, or set up against him a title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise. And this rule extends to tenant holding over, as well as to an undertenant, assignee, or other person claiming under the lessee, and is applicable to every species of tenancy—whether for years, or from year to year, at will, or by sufferance. As a tenant is not permitted to resist the recovery of his landlord by virtue of an adverse title acquired during the tenancy, if he takes a lease from a third person

it is void, and cannot work an adverse possession against his landlord, for the possession of a tenant is the possession of his landlord." And cases there cited. Also section 706, Id.: "Where the lease is by parol it will not be necessary for the landlord to give any evidence of his title anterior to the lease, for a holding under a plaintiff and the expiration of the tenancy are the only things to be proved in ordinary cases. Even an acknowledgment by the defendant that he went into possession under the plaintiff is sufficient to entitle him to recover, it being a simple matter of fact for the jury to determine whether the defendant held under the plaintiff or not." In 1 McAdam on Landlord & Tenant, § 82, it is said: "When the tenant remains in possession after the expiration of the original term by permission of the landlord, the implication is that he continues in possession under the conditions of the former demise." See *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713; *Kendall v. Moore*, 80 Me. 327; *Commissioners v. Clark*, 88 N. Y. 251. In *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609, it is held "that, a tenant for one or more years holding over after the expiration of his term, the landlord has the option to treat him as a trespasser, or as a tenant for another year upon the terms of the prior lease, so far as applicable; and the right of the landlord to elect to continue the tenancy is not affected by the fact that the tenant has refused to renew the lease, and has given notice that he has hired other premises. It is not in the power of the tenant alone to throw off the character thus imposed upon him." And it is held to the same effect in *Bacon v. Brown*, 9 Conn. 334. In McAdam on Landlord & Tenant, § 174: "Where a lease is made for a certain definite term, the tenancy will expire with the term. In such cases, notice to quit will not be necessary to dissolve the relation of landlord and tenant. * * * Where the term is definitely fixed, the tenancy expires *ex vi termini*, and notice to quit is unnecessary. * * * Unless he renews the tenancy, he knows it is his plain duty to give up possession by returning the keys to the landlord at the end of the agreed term. The law imposes this duty upon him, as the natural, contemplated result of the contract under which he originally obtained his possession." In *Simmons v. Robertson*, 27 Ark. 50, it is held: "A tenant in possession is not at liberty to question the title of the person under whom he holds, or attorn to a third person." And again: "A tenant, while the relation of landlord and tenant exists, cannot rent from one who has acquired title hostile to that of his landlord, though it be a better title." And in *Bryan v. Winburn*, 43 Ark. 23, it is held: "A tenant, in possession cannot disclaim his landlord's title without surrendering possession to him. He cannot collude with and attorn to another to the prejudice

of his landlord." *Wilson v. James*, 79 N. C. 349; *Hawes v. Shaw*, 100 Mass. 187; *Oakes v. Munroe*, 8 Cush. (Mass.) 282. Judge Snyder, in treating of this doctrine in *Voss v. King*, supra, at page 240 of 33 W. Va., and page 403 of 10 S. E., says: "This doctrine was unknown at the common law, and is an estoppel in pais. The only tenant's estoppel known when Lord Coke wrote was that strictly by the indenture. But the tenant's estoppel is now no longer restricted, as it is founded on the possession, and not on the instrument of demise, and is as operative after the conclusion of the lease as before, and until that possession is ended. It is only when there is fraud or mistake, in consequence of which one takes a lease of land, that he will not be estopped by the lease. *Taylor on Land. & Ten.* §§ 89, 707; *Big. on Estop.* 350; *Camarillo v. Fenlon*, 49 Cal. 202; *Alderson v. Miller*, 15 Grat. 279; *Locke v. Frasher's Adm'r*, 79 Va. 409; *Dobson v. Culpepper*, 23 Grat. 352." In *Voss v. King*, Judge Snyder, in considering the question as to whether a tenant in possession could, by mere disclaimer and notice to his landlord, without an actual surrender of the premises, terminate his tenancy, after referring to the case of *Weathersby v. Willson*, 1 Nott & McC. 373, note, as to the holding in that case on the question, says: "The general rule seems to be that when the tenant disclaims to hold under his lease, and notice of this fact is brought home to the landlord, then the relation of landlord and tenant ceases, and the tenant becomes a trespasser, and his possession is adverse, and the landlord may by action dispossess him without notice to quit. If the tenant, with notice to the landlord, disclaims the tenure, and claims the fee adversely in right of himself or a third person, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation from that time. *Willison v. Watkins*, 3 Pet. 43, 7 L. Ed. 596; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Tyler, Ej.* 311; *Wild's Lessee v. Serpell*, 10 Grat. 405; *Miller v. Williams*, 15 Grat. 213, 219; *Cooley v. Potter*, 22 W. Va. 120." In *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154 (syl., point 3), it is held: "Where a person claiming title takes a lease of the same land under a different title, in the absence of fraud or mistake, he is estopped to deny his landlord's title or possession." And in *Church v. Arkle*, 49 W. Va. 92, 38 S. E. 486 (syl., point 2): "In an action of unlawful detainer by a landlord against a tenant, the tenant cannot deny the landlord's title."

Counsel for defendant rely particularly upon said case of *Willison v. Watkins*, and ask the especial attention of this court to that case, in support of their position. In this case, Justice Baldwin, after stating the

rule of estoppel precluding the tenant from controverting the landlord's title, and creating, because of the hardship of that case, the exception relied upon by plaintiff in error, at page 53 of 3 Pet. (7 L. Ed. 596), says: "In the case in 1 Nott & McC. 374, the court decide that, where a defendant enters under a plaintiff, he shall not dispute his title while he remains in possession, and that he must first give up his possession, and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing, in terms, tenants in common, trustees, mortgagees, and lessees, but disallowing none of the exceptions or limitations which qualify it, and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay, leaving the rule in full force wherever the suit is brought within the time prescribed by law." In that case the statute of limitations was five years, and, as stated in the syllabus, the act of limitations had run out four times before the landlord had done any act to assert his right to the land, and as the court said at page 49 of 3 Pet. (7 L. Ed. 596): "No injury can be done the landlord, unless by his own laches. If he sues within the period of the act of limitations, he must recover. If he suffer the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time." There was no time lost in the case at bar. The suit was brought within the same month in which the lease of the defendant expired, and the acceptance of a lease by the defendant Davis under the adverse title of Ashby et al. At the next succeeding term of the United States Supreme Court, after the decision of the case of Willison v. Watkins, Justice Baldwin, delivering the opinion of the court in Peyton v. Stith, 5 Pet. 485, 8 L. Ed. 200, referring to his former opinion, says: "In the case of Willison v. Watkins, 3 Pet. 44 [7 L. Ed. 596], decided at the last term, this court considered and declared the law to be settled that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term; that his possession became so far adverse that the act of limitations could begin to run in his favor from the time of such forfeiture, and the landlord could sustain ejectment against him, without notice to quit, at any time before the period prescribed by the statute had expired, by the mere force of the tenure, without any other evidence than the proof of the tenancy; but that the tenant could in no case contest the right of his landlord to pos-

session, or defend himself by any claim or title adverse to him, during the time which the statute has to run. If the landlord suffers it to run out without making an entry or bringing a suit, each party may stand upon their right, but until then the possession of the tenant is the possession of the landlord. Tested by these principles, the purchase from Phillips in 1814 can have no effect on the merits of this case. Though the possession of Stith became from that time adverse for these specified purposes, it remained fiduciary for all others. He could not assert an adversary title without surrendering possession. The law recognizes him as having no rights of property in the lands, unless such as grow out of his tenure. His title must remain dormant while he retains possession for a less term than prescribed by law. It may become active whenever he abandons the possession or it is protected by the limitation." *Wild's Lessee v. Serpell*, 10 Grat. 405.

The overwhelming weight of authorities sustains the proposition that a tenant taking possession of land under any person is not at liberty to question the title of the person under whom he holds, or to attorn to a third person. The action of unlawful detainer is a purely possessory action, and does not go to the title. It matters not to the tenant how the landlord came in possession. After accepting the possession under him he cannot question his title, and has no right to collude with persons out of possession in order to defeat the possession of his landlord. As is well said in *Simmons v. Robertson*, supra, at page 54, "If such sharp practice was tolerated by courts of justice, this important possessory action would be worthless." The facts in the case show—indeed, it appears in the petition for writ of error in this case—that "the plaintiff claimed title to a tract of land in said county, and in May, 1902, rented a portion of said land to the petitioner from that date until the 1st day of March, 1903. After this rental, W. L. Ashby, E. T. Crawford, and D. G. Courtney acquired title to a tract of land, the lines of which latter tract covered the lands rented by your petitioner from said Stover"; and it states that after the expiration of petitioner's lease with Stover he took a lease from said parties, and notified Stover of the fact that he was occupying said land as an agent of the other parties; claiming that at the termination of his lease with Stover he could thus turn over the possession to the claimants of the hostile title. As has been shown, the relation of landlord and tenant did not cease to exist at the end of the time for which he had leased. If he remained in possession after that time, it was the province of the plaintiff to treat him as a tenant or as a trespasser, at his option, in case he claimed to be holding adversely and under a hostile title. Section 211, c. 50, Code 1899, provides: "If any forcible or unlawful entry

be made upon land, or if, when the entry was lawful, the tenant detain possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of the possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may commence suit to obtain possession of the land and damages for its detention, within two years after the cause of action accrues, before any justice of the county in which such land or the greater part thereof is situated." This section is too plain to be misunderstood—that the action is simply for the possession to which the plaintiff is entitled, and is entirely independent of the title to the land. And section 217 specifically provides that the judgment in such suit "shall not bar any subsequent action of ejectment brought by either party." In a long line of decisions it has become a settled rule in this state that after the termination of a lease the landlord, at his election, may treat the tenancy as one at sufferance, or the holding over as a trespass, and in either case the tenant in an action for possession is estopped to dispute the title of his landlord within the period of the statute of limitations.

There is no error in the judgment of the circuit court, and the same is affirmed.

(57 W. Va. 157)

ROBINSON et al. v. EDGELL et al.

(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)

INJUNCTIONS—RESTRICTIONS IN DEED—ENFORCEMENT.

1. Courts of equity will enforce by injunction negative covenants and clauses in deeds, restricting the use of real estate, though they do not, in law, constitute easements or covenants running with the land; but the jurisdiction is discretionary, and is governed by the principles applicable to the enforcement of specific performance of contracts.

2. Equity will not enforce such a covenant if it appears that, since the conveyance was made, the general conditions and surroundings of the property, continuation of which was contemplated by the parties, have been so changed, otherwise than by the act of the covenantor, as to render the enforcement of the covenant inequitable and burdensome to him, and defeat the purpose of the restriction. But conditions existing at the time of the conveyance will not, in the absence of fraud or other vitiating element, constitute ground of defense to such suit.

3. Permanent restrictions upon the use of real estate being contrary to the policy of the law, courts of equity, in enforcing compliance with restrictive covenants, limit the decree by the duration of the conditions and relations which form the basis of the equity calling for such enforcement.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Bill by L. G. Robinson and others against C. W. Edgell and others. From a judgment dismissing the bill, plaintiffs appeal. Reversed.

E. L. Robinson, J. H. Strickling, Hunt & Staples, and Henry M. Russell, for appellants. Sperry & Sperry and John Bassell, for appellees.

POFFENBARGER, J. The circuit court of Wetzel county having dissolved the injunction and dismissed the bill, upon a full hearing, in a suit brought to enforce by injunction a negative covenant in a deed, restricting the use of the property thereby conveyed, the plaintiffs, grantors in the deed, have appealed.

The property involved is a lot about 30 by 80 feet, at a point in an oil region of Wetzel county, on the West Virginia Short Line Railroad, at a station called Robinson. It was conveyed on the 28th day of May, 1903, by L. G. Robinson and J. S. Robinson to C. W. Edgell for and in consideration of \$300. The restrictive clause involved reads as follows: "This writing prohibits the sale of intoxicating liquors in any manner whatever on the premises hereby conveyed, and this is a part of the consideration." The lot was a part of an estate, containing about 70 acres, which had been purchased by the Robinsons from the heirs of one Talkington. Talkington had left a widow and some children. Under a purchase, lease, or license from the widow, a man by the name of Ice, at the time of the purchase by the Robinsons, had a building on part of the land, in which he was conducting a retail liquor business. On the same day on which the conveyance was made to Edgell, the house in which Ice was doing business and the lot of ground on which it stood were conveyed to Emma M. Ice, A. B. Ice, and James Ice, by a deed which contains no clause restricting the use of the property, and the business then being conducted on the premises was continued. This lot and the lot conveyed to Edgell adjoined each other. The Robinsons still retained the larger portion of the land purchased from the Talkington heirs, and sold some additional lots out of it, both before and after the conveyance to Edgell; and in all the deeds, except the one executed to Ice, there are clauses prohibiting the sale of liquors on the lots. They justify the exception in that instance on the ground that the grantees in that deed had an interest in the land, as assignees of the dower interest, in consequence of which there was a compromise or adjustment under which the Ices obtained their lot without any restriction upon its use. Edgell erected a building on the lot, and in November, 1903, leased the third-story room of the building for the period of 12 months to P. P. Higgins, who, together with H. Behrman and P. Crim, contemplated using the same for saloon purposes, and prepared to open a retail liquor business therein. Thereupon the Robinsons brought this suit. Edgell filed an answer to the bill, setting up as matters of defense that the clause in question had been fraudu-

lently inserted in his deed after the execution and delivery thereof, and that Robinson had waived the benefit of the clause by omitting such clause from the deed made to Ice and from other deeds. The allegation of fraudulent insertion of the clause in Edgell's deed is not sustained by the evidence. As to whether it had been omitted from certain deeds, other than the Ice deed, is not entirely certain. If it was, it was afterwards inserted—in one instance by consent of the grantee, and in the other without the grantee's knowledge. The theory of the defense is that, after the contract to sell to Edgell was made, the Robinsons and Ices conceived the idea of creating for themselves a monopoly of the liquor traffic in that village, and procured the alteration of the deeds so as to restrict from such use all of the lots sold by the Robinsons, except the one sold to the Ices. P. A. Ice, by his own admission and the testimony of other witnesses, appears to have been active in procuring the insertion of these restrictive clauses in the deeds made to one P. B. Robinson and a firm known as Smith & Parrish. He also admits having paid to one Morgan, the owner of a tract of land near the village, the sum of \$500, in consideration of his agreement not to allow any of his property to be used for saloon purposes. Having the unrestricted use of his own property, the insertion of the covenant against sales of liquor in the deed made to P. B. Robinson was beneficial to him, and, in making inquiry about it, he was, no doubt, actuated by his own interest; but the acceptance, on the part of J. S. Robinson and L. G. Robinson, of any proper service rendered by him, is not inconsistent with the object which they say induced them to place restrictions upon the use of the other property. As to the Smith & Parrish deed, it can only be said the clause is in it, and no steps have been taken to eliminate it, and it has not been clearly shown to have been fraudulently inserted.

The jurisdiction in equity to enforce negative covenants restricting the use of real property is not denied. On the contrary, it is frankly admitted. Such jurisdiction is upheld by the courts everywhere. "Covenants restraining the use of real property afford an instance of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement, nor runs with the land. The jurisdiction is not confined to cases in which an action at law can be maintained, and such covenants, although not binding at law, will be enforced in equity, provided the person into whose hands the land passes has taken it with notice of the covenants." 11 Cyc. 1078. Pomeroy's Eq. Jur. § 1342, says such covenants will be specifically enforced in equity, by means of an injunction, not only

between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land. The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. To the same effect, see Beach on Inj. § 474. This proposition is sustained by numerous decisions cited in support of the text above quoted and referred to.

The most frequent illustrations of the application of the principle are found in cases involving the rights of parties holding by conveyance town lots, as subdivisions of a tract of land, the use of which had been limited by like or similar clauses inserted in all the deeds for the purpose of impressing upon all the property a certain character or quality, such as residence property. To the end that such property may be the more readily and advantageously sold, the use of each lot for trade, manufacturing, commercial, or business purposes is prohibited. Although the clause is not a covenant to do a beneficial act upon the property of the grantor, so as to directly annex to that property a benefit, but, on the contrary, binds the grantee to abstain from the doing upon his own lot of a certain act, a court of equity looks to the whole scheme as one intended to confer a benefit upon the property remaining in the hands of the grantor after the sale of each lot, and passing by subsequent conveyances to the grantees of other lots, as beneficial interests or rights attached to their lots, and therefore enforces observance of the provisions and restrictions as readily as a court of law would award damages for the breach of a covenant annexed to real property in such a manner as to make it a covenant running with the land. Beach on Inj. § 474; Whitney v. Union Ry. Co., 11 Gray, 359, 71 Am. Dec. 715; Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; Peck v. Conway, 119 Mass. 546; Smith v. Barrie, 56 Mich. 314, 22 N. W. 816, 56 Am. Rep. 391; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

The right to invoke relief by injunction in such cases is not absolute, however. To a certain extent, the jurisdiction is discretionary. It is governed by the same general principles which control the jurisdiction to compel specific performance of contracts. Where a proper case for its exercise is shown, relief is granted as a matter of course, but if, under the conditions and circumstances obtaining, the granting of the relief sought would work injustice or be ineffectual of any meritorious result, it will be refused. If, therefore, the restrictive covenants in deeds conveying lots were made with reference to the continuance of existing general

conditions of the property and surroundings, but in the lapse of time there has been a change in the character and surroundings, so as to defeat the purposes of the covenants, and to render their enforcement an inequitable, unjust, and useless burden upon the owner of the lot, equity will refuse its aid and leave the plaintiff to his remedy at law. *Trustees v. Thacher*, 87 N. Y. 811, 41 Am. Rep. 365; *Page v. Murray*, 46 N. J. Eq. 331, 19 Atl. 11. When such change in conditions is due to the act of the grantor or is assented to by him, equity will not interfere at his instance. *Page v. Murray*, cited.

Defense to this suit is made under this exception to the rule, founded upon the discretionary character of the jurisdiction. The argument is that as by the conveyance to Ice without any restriction upon the use of the lot the grantors by their own act subjected their adjacent land, as well as the lot conveyed to the defendant Edgell, to the very influence which they ostensibly sought to avert by the insertion of the restrictive clause in the Edgell deed, the enforcement of the clause in the Edgell deed would be inequitable and unproductive of any beneficial result. Moreover, at the time of the purchase of the lands from the Talkington heirs they were already subjected to the objectionable influence, and had in no sense any special character or quality impressed upon them. Though all the precedents on this subject, cited or found, have presented cases in which the circumstance or the act of the grantor which made it inequitable to enforce the restriction was subsequent to the date of the conveyance in which the restrictive covenant had been inserted, it is insisted that the relation in time between the conveyance and the matter relied upon to defeat enforcement of the covenant is immaterial. The defect in this contention is the failure to allow the conditions existing at the time of the conveyance and the intent and purpose of the grantor, all of which were known to the grantee and assented to by him, any weight or effect. It asserts as ground for relief from the restrictive clause not conditions which have arisen since the contract was made, but those which were in full view of the parties at the time it was made, and are deemed to have been included in it. Nothing has occurred since the conveyance which has wrought a change in conditions. The lot was taken subject to known existing conditions, and a stipulation in the deed prohibiting a particular use of it. To permit the grantee to prevent the operation of the restrictive clause by setting up prior or contemporaneous conditions would enable him to take advantage of his own acts, rather than those of the grantor. Unlike most instances of the subjection of property to limitation upon its use for a certain trade or business, the lot involved here has not the benefit of a like restriction upon all adjacent property. It is not

protected from the business or influence, the prevention of which is the ostensible purpose of the burden which has been placed upon it. The equitable easement or servitude, if any, which the grantor has annexed to his remaining property by imposing the burden of restriction of use upon the lot conveyed to Edgell, is partially defeated by the liberty of full and unrestricted use of the lot he conveyed to Ice, and the failure to limit the use of that lot almost wholly deprives Edgell of any reciprocal benefit from the limitation to which he has consented. This results, however, from the close proximity of his lot to the one on which the saloon is. He has the benefit of the implied limitation upon the use of the grantor's remaining lands, and there may have been a reduction in the price of the lot, as a further consideration. The deed recites that the restriction is a part of the consideration, and there is testimony tending to show such reduction. This view of the contract, conditions, and relations of the parties, therefore, could only raise a question of adequacy of consideration, and courts will not refuse specific performance on the ground of inadequacy unless it is so great as to shock the conscience and raise a presumption of fraud. This the evidence does not disclose. Had the conveyance to Ice followed that made to Edgell, instead of accompanying or preceding it, the latter might well set up against the plaintiffs their own breach of the mutual arrangement made for the benefit of the grantee, as well as that of the grantors. This subsequent act would be in the nature of a failure of consideration, a waiver of the easement, or a wrongful act, precluding relief, under the rule that he who invokes the aid of a court of equity must come with clean hands, and under the operation of the maxim that he who seeks equity must do equity. These principles cannot be applied to prior or contemporaneous acts and conditions unless it be shown that the grantor, by suppressing knowledge and information or some other fraudulent conduct, has overreached the grantee, and taken an unconscionable advantage, from which equity would grant relief, or because of which it would withhold its aid. Nothing of that kind appears here. The saloon on the adjoining lot was open and in full blast when the purchase was made. This was sufficient to put the grantee on inquiry. It was a patent condition, to which he made no objection. He took the deed subject to it, and is alone responsible for the situation of which he complains.

That the lot conveyed to Edgell is subject to the effect of the liquor traffic conducted on the adjoining lot, and its value is thereby made less than it would be if its use were not restricted, does not preclude an honest and proper motive for the insertion of the restrictive clause. Why may a landowner not exclude a certain class of business from

one portion of his land, without forbidding it on another? If he does so, does it not necessarily result that portions lying next to the division line may be in the exact situation in which Edgell's lot is? Might not the same result occur, in excluding such business or trade from the whole of a tract of land, as to so much of it as adjoins the lands of others over which the owner of the tract has no control? These are inevitable and unavoidable incidents to the exercise of this power of exclusion. Hence they afford no ground for the claim that the effort to exclude is futile, and the enforcement of the covenant in this instance would not effectuate its ostensible purpose. By limiting the use of the Ice lot, that purpose would have had broader scope, and the exclusion would have been practically complete, but by their contract the parties have defined and fixed the scope and determined the extent of exclusion, and no change has occurred by which it has been wholly or partially defeated, and the grantor has done nothing which justifies refusal of the aid of the court.

As to the other ground of defense, namely, that the suit is only a step in the execution of an arrangement to restrain the trade in liquors and create a monopoly in the hands of Ice, it is not necessary to say more than that the evidence does not sustain it. A. P. Ice was active in procuring the insertion of the restrictive clauses in the deeds. He paid Morgan \$500 as consideration for his agreement not to allow the business conducted on his premises. Clendemming, his lessee, and Morgan, his confederate, executed the \$3,000 injunction bond in this suit, as principal and surety, respectively; and J. S. Robinson almost admits that some of these people have indemnified the plaintiffs against costs and damages in the suit, but he does not say so, and there is no other evidence of it. The burden of proof as to this defense is on the defendants. They must prove their affirmative matter of defense, and we deem the evidence adduced insufficient.

Our conclusion is that the circuit court erred in dissolving the injunction. Hence the decree complained of must be reversed, and the injunction will be perpetuated, subject to the right, in the defendants and their assigns, to have the same hereafter dissolved for any sufficient cause that may be shown. As has been stated, the jurisdiction invoked is purely equitable and discretionary, and its exercise will extend no further than equity, conscience, and justice demand. Therefore the condition is put in the decree so that in the event of such changes in the future, or such conduct on the part of the grantor, and those claiming under him, as would make the burden of the restriction inequitable and oppressive, the coercive power of the court may be withdrawn, and the parties left to the pursuit of such legal remedies as they may have. *Winnepesaukee Association v. Gordon*, 63 N. H. 505, 3 Atl. 426.

(57 W. Va. 132)

NORMILE et al. v. WHEELING TRACTION CO.

(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)

ACTION BY WIFE—PERSONAL INJURIES—DAMAGES—EVIDENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—STREET RAILROAD—INJURY TO PASSENGER—VERDICT—EXCESSIVE DAMAGES.

1. In an action by the wife for the recovery of damages for personal injuries sustained by her, she may or may not, at her election, join her husband as coplaintiff.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 767, 768, 770.]

2. When the wife sustains personal injuries, and brings an action to recover damages therefor, she may recover for being prevented from performing and transacting her necessary affairs and business by her to be performed and transacted, if such prevention is the result of the injuries for which she sues.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 768.]

3. In an action for personal injuries, where, as a result of such injuries, a surgical operation is necessary to be performed, evidence which shows or tends to show that such operation was attended with great difficulty and dangers, and that comparatively few physicians perform such operation, is admissible.

4. A plaintiff, in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual, under similar circumstances, among careful persons of the class to which said plaintiff belongs.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 92.]

5. When an action is brought to recover damages for personal injuries sustained by the plaintiff on account of the defendant's negligence, it is not error to omit to instruct the jury as to the law of contributory negligence in an instruction given for the plaintiff, when the court, in giving the defendant's instructions, instructs the jury fully and fairly on that point.

6. It is not error to instruct the jury that the loss of childbearing power is an element of damage to be considered by them in an action for personal injuries sustained through the negligence of the defendant, when such loss is the reasonable and probable result of such negligent act.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 235.]

7. Where a street car company stops its cars for the purpose of receiving passengers, it is charged with the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1159.]

8. A case which was proper to be submitted to the jury on the question as to whether or not the plaintiff was guilty of contributory negligence.

9. In an action to recover damages for personal injuries, the court will not interfere with the verdict of a jury, on the ground that the damages found are excessive, unless the finding is so manifestly unjust as to show partiality, prejudice, or misapprehension on the part of the jury.

(Syllabus by the Court.)

Error from Circuit Court, Ohio County; Thayer Melvin, Judge.

Action by Annie Normile and husband

against the Wheeling Traction Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. M. Russell and Erskine & Allison, for plaintiff in error. Caldwell & Caldwell, for defendants in error.

SANDERS, J. This is an action brought by Annie Normile and Thomas Normile, her husband, against the Wheeling Traction Company, in the circuit court of Ohio county, for personal injuries sustained by the female plaintiff, which, it is alleged, were caused by the negligence of the defendant company. There was a verdict and judgment against the company of \$9,150, to which a writ of error and supersedeas was awarded.

The first error complained of is that the court improperly overruled the demurrer to the amended declaration. Counsel for the defendant contend that the declaration is bad, because the female plaintiff and her husband are joined therein as coplaintiffs, and that it unites two causes of action, in this: that in each of the three counts of the declaration it is alleged that Annie Normile was hurt in her person, and that she has suffered pain and had become sick, "and by means of which she was prevented from performing and transacting her necessary affairs and business by her to be performed and transacted." There is an endeavor to assimilate the declaration in this case with the one which was before the court in the case of *City of Wheeling v. Trowbridge*, 5 W. Va. 353, but, upon a comparison of these declarations, it will be found that there is a vast difference between them. In the *Trowbridge* Case, one count in the declaration alleged a case in which the wife was the meritorious cause of action, and in the other count "the husband claimed special damages for the loss of the society, comfort, assistance, etc., of his wife, and for money laid out and expended by him in and about the endeavoring to heal and cure her." Where the action is brought by the husband and wife for a wrong to the wife, there can be no recovery for what is special damage to the husband. The court, in its opinion in the *Trowbridge* Case, says: "The wife may join with the husband when she is the meritorious cause of action, and when the right of action would survive to her if the husband died before the amount of damages was received. But where the husband alone is entitled to the damages, and in case of his death they would go to the personal representative, then the husband should sue alone." The loss of the society, comfort, and assistance of the wife, and money expended by the husband in endeavoring to heal her, could alone be sued for by the husband; but very different is the declaration in the case before us. There is no claim made by the husband for damages, and the allegation therein contained, "and by means of which she was prevented from performing

and transacting her necessary affairs and business by her to be performed and transacted," is not an element of damage for which the husband alone could sue; but if so at the time of the decision of the *Trowbridge* Case, certainly not so now, because, at common law, and when that case was decided, and until the act of the Legislature of 1891, p. 328, c. 109, § 14, the earnings of the wife during coverture were the property of her husband, but by the said act of 1891 the common-law rule was abrogated, so that now the earnings of the wife, and any and all property purchased by her with the proceeds of said earnings, are her sole and separate property, so that her business affairs and transactions, and whatever might result from them, does not belong to her husband, and if she is interfered with in her business transactions, and for that reason unable to earn what she otherwise would have earned, the damage is personal to her, and such damages can be recovered by her in an action alone, or jointly with her husband.

The other reason assigned why the demurrer should have been sustained is that it was improper to join the husband and wife as coplaintiffs. At common law the action to recover damages for personal injuries to the wife must be brought in the names of the husband and wife jointly, the cause of action being in the wife, and surviving to her in case of the death of the husband; but this common-law rule has in a large measure been abrogated by the various married woman's acts. A married woman is allowed to sue in her own name to recover damages for personal injuries to herself, where the ground of the action is her injury and suffering; and also the same rule applies in actions concerning her separate property; but in a few of the states the common-law rule in this respect has not been altered, and the wife is still required to join her husband as coplaintiff. And, in most of the states where the common-law rule has been abrogated by permitting the wife to sue alone for personal injuries, it is held to be imperative, depriving the husband of any interest in the suit and forbidding his joining therein, but in many of the states the statute is deemed permissive, and merely allows the wife to either sue alone or join her husband, at her election. *Palmer v. Davis*, 28 N. Y. 242; *Draper v. Stouvenel*, 35 N. Y. 507; *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172; *Corcoran v. Doll*, 32 Cal. 82; *Reinheimer v. Carter*, 31 Ohio St. 579; *Kennedy v. Williams*, 11 Minn. 314 (Gil. 219); *Gee v. Lewis*, 20 Ind. 149; *Kramer v. Conger*, 16 Iowa, 434; *Norval v. Rice*, 2 Wis. 22; *Barr v. White*, 22 Md. 259. But it is the well-settled practice in this state, and has been since the question was first presented to our courts, that the wife may or may not, at her election, join her husband with her in an action concerning her separate estate. *City of Wheeling v. Trowbridge*, *supra*; *Wyatt v.*

Simpson, 8 W. Va. 394; Dimmey v. R. R. Co., 27 W. Va. 32, 55 Am. Rep. 292; Fox v. Insurance Co., 31 W. Va. 374, 6 S. E. 929; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. 602; Mathews v. Greer, 21 W. Va. 694; McKenzie v. R. R. Co., 27 W. Va. 306.

But it is contended that the rulings in this state permitting the joining of husband and wife were made prior to the revision of the married woman's act (chapter 66, Code; Acts 1893, p. 6, c. 3). This is true as to the cases above cited, but the case of Clay et ux. v. City of Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883, was decided since said act of 1893, but, as counsel says, no reference was made in that case to said act, and for the very reason, likely, that the court did not regard it as making any change in the rule. There is nothing in this statute that changes the rule that the wife may or may not, at her election, join with her husband in an action for personal injuries sustained by her, and, even if it should be doubtful as to what construction ought to be given to it now, the court would give it that construction which makes it permissive rather than imperative, and thereby leave unchanged the practice which is so well settled, especially when, by doing so, no injury therefrom can result to the defendant. The declaration being good, the court committed no error in overruling the demurrer.

In order to deal properly with the other assignments of error, it will be necessary to give a statement of the facts as they appear from the record. The female plaintiff, Annie Normile, who lived at 57 Thirty-Third street, in the city of Wheeling, on the 27th day of December, 1902, started from the home of her mother, at 2310 Market street, where she had been visiting that day, to return home. She had with her a bundle containing a loaf of bread, which she carried in her left arm, and a basket containing a few bottles, canned goods, etc., which she carried on the other arm. She stopped at the corner of Twenty-Third and Main streets to take passage on one of the cars of the defendant company. At that point she met Lloyd Kyle and his wife, with a baby which Kyle was carrying in his arms, who were waiting at the same place for the car. Shortly after she reached that point the car came, and stopped for the purpose of receiving passengers, the conductor not being on the platform, at the rear end of the car, where passengers are supposed to enter, but remained in the car, about the middle thereof. Kyle helped his wife on the car, and she opened the door and went in. Kyle, with his baby in his arms, got upon the platform himself; Mrs. Normile attempted to follow him; and when she stepped with one foot upon the step of the car, and after having raised the other from the ground in an attempt to step upon the car, the conductor rang the bell to give the signal for the car to start. At the sound of the bell, Annie

Normile dropped her basket on the platform and caught the handle of the car with her right hand. When the car started it did so with a jerk, and threw her so that her right side struck the end of the car. Kyle caught hold of her, but, still having the baby in his arms, his hold gave way, and, after being dragged about 30 feet, with the speed of the car constantly increasing, Annie Normile fell to the ground. As Kyle caught hold of Mrs. Normile, he called twice to the conductor to stop the car, and after she fell he opened the door and told the conductor to pull the bell for the car to stop. When the car was stopped the conductor went back, met Mrs. Normile, and assisted her into the car. The accident occurred on Saturday night, and shortly after Mrs. Normile boarded the car she began to feel sick, and continued to grow worse until on the following Monday morning she went to Dr. Haskins, a physician, who prescribed for her, and the treatment of the physician not having relieved her suffering, and continuing to suffer, in about a week she went to see him the second time. He made some external examinations and made some applications of plasters, and she, not improving from this treatment, shortly afterwards returned, and on the third visit the physician decided that an internal examination was necessary, but, for some reason, at that time Mrs. Normile was not willing to be examined, and the physician says that he thought it was because she was menstruating, but in a few days she returned and the examination was made, which showed that an operation would be necessary, and Mrs. Normile afterwards went to the hospital of Dr. Haskins, where, on the 24th of February, there was performed upon her the operation called "laparotomy." She remained in the hospital for a period of five weeks after the operation was performed, at the end of which time she returned home; this operation being a very severe and dangerous one, and one which comparatively few physicians will perform. At the time of the accident, Mrs. Normile was 23 years old, and up to that time had always been a strong, healthy woman; had always helped to do the housework at home, and, at the time of the accident, was doing her own work, as well as washing for herself and husband. After the accident, and before the operation, she was not able to do any work, and since the operation she has not been able to do any work of any consequence, and, as a result of the operation, she has lost the power of bearing offspring. Dr. Haskins, in his evidence, states that he could not state positively that the operation was made necessary as a result of the accident, but he stated that such injuries as she received would in all probability result in such an operation being necessary.

The next assignment of error is that the court erred in overruling the objection of the defendant to certain testimony of the witness Dr. Haskins. Upon the subject of the oper-

ation of laparotomy which was performed upon the female plaintiff, her counsel, in endeavoring to show the dangers incident to such an operation, and the gravity of it, and the skill required to perform it, asked the witness certain questions, which, together with the answers, are as follows: "Q. Is laparotomy a specific branch of surgery? A. Well, yes; yes, it is. Of course, you do that and do general surgery too, but at the same time it is a special branch of surgery. A man might be able to amputate a leg very well, and do what we speak of as 'gross surgery,' such as amputations, and not be capable of performing laparotomy for lack of experience and attention to that particular branch of surgery. Q. State whether or not all physicians who have studied surgery perform that operation, or refuse to perform it. A. Oh, there are comparatively few men that perform these operations; comparatively few. Q. Why? A. Perhaps they don't have a taste for it; perhaps they haven't the backbone to tackle it in the first place—I don't know." In the first place, the record shows no objection to the questions, but, after all of the questions were propounded and the answers given, the defendant's counsel entered an objection, but it does not appear what questions were objected to. While we can infer that the objection was intended to refer to the evidence complained of, yet, in order to get the benefit of the ruling of the court, it must affirmatively appear what evidence was objected to. But if there had been an objection to the evidence, it should not have been sustained, because the evidence shows that the operation which was performed upon the female plaintiff was attended with great difficulty and dangers, and that comparatively few physicians perform such operation, which would thereby increase the expense of securing a physician to do the work, and, this being an element of damages which the plaintiff would be entitled to recover, it alone makes the evidence admissible. Then, again, to show that it was such an operation that but very few physicians would perform goes to show the difficulties which attend its performance, and the gravity of it, which would also make the evidence admissible.

At the request of the plaintiff, and over the objection of the defendant, the court gave to the jury two instructions, which constitute the next assignment of error.

"Instruction No. 1. The court instructs the jury that to escape the responsibility of contributory negligence, a plaintiff, in an action for damages for an alleged negligence of another, is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which such plaintiff belongs."

There is no objection pointed out to this instruction, and it seems to have been taken from the case of *Dimmey v. Railway Co.*, 27 W. Va. 32, 55 Am. Rep. 292, in which the

court gave to the jury an instruction in substantially the same language, and also the court laid down the law in that case to be: "To escape the responsibility of contributory negligence, the plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs." We think this instruction correctly propounds the law applicable to this case. All persons are not chargeable with the same degree of care, and the jury, in passing upon the care that the plaintiff should exercise at the time of the accident, had the right to consider the class to which she belonged, and had a right to take into consideration all the circumstances surrounding the accident, as they would appear to a person of her class.

"Instruction No. 2. The court instructs the jury that if under the evidence they find the defendant guilty as in the amended declaration alleged, then, in estimating the damage of the plaintiffs, they have the right to take into consideration the personal injuries inflicted upon the plaintiff Annie Normile, in consequence of the defendant's wrongful acts, if any such injuries are proved, and the pain and suffering, both mental and physical, undergone by her in consequence of such injuries, if such pain and suffering have been proved; and if they further believe from the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts."

The defendant urges two reasons why it was error to give this instruction. One is that it wholly eliminates the question of contributory negligence, and the other is that it instructed the jury that they might consider a feature of the injury which should not have been included in the jury's finding. Taking it that counsel for the defendant is right in saying that the question of contributory negligence is eliminated by giving this instruction, and that it should have presented that question to the jury, still, under the repeated decisions of this court, it is not error when the jury was fully and fairly instructed upon the question of contributory negligence in other instructions. In the instructions given for the defendant the question of contributory negligence was clearly presented to the jury, and it was the duty of the jury, in deciding the case, to take the instructions as given, both for the plaintiff and defendant, and if the instructions, taken and read together, instruct the jury correctly as to the law of the case, there is no error.

Did the court, in this instruction, tell the jury that they might consider a feature of the injury which should not have been included in their finding? This contention is based upon the part of the instruction which tells the jury, "if they further believe from

the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts," and in support of this position the case of *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909, is cited, and in which the rule was definitely stated that the damages which may be recovered are such, and only such, as are the reasonable and probable consequence of the defendant's act. The loss of the power of childbearing is certainly an element of damage to be taken into consideration by the jury, as much so as an injury to any other part of the human body, and the question as to whether or not the injury is the reasonable and probable consequence of the negligent act is a question of fact for the jury. It was for them to say whether or not the operation of laparotomy was made necessary by reason of the accident, and, if so, was the loss of childbearing the reasonable and probable consequence of such negligent act. In the case of *Denver & Rio Grande R. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, it is held: "Thus, when one of the direct consequences of a wound was the loss of the power to have offspring, evidence of that fact was admissible, though the declaration did not directly designate that consequence." Complaint is made that the jury should have been told in the instruction that such damages could not be properly included in their estimate unless the evidence showed that the injury in question was the reasonable and probable consequence of the defendant's negligence. While this instruction does not, in express terms, so instruct the jury, yet the language used in the instruction is sufficient to guide the jury to a proper conclusion in this respect. They are told that they can consider this feature of the injury if it resulted from the wrongful act of the defendant—not that if it is a reasonable and probable consequence of the negligent act, but, as a matter of fact, if the loss of childbearing was the result of the defendant's wrongful act, the jury were told that they could consider this in estimating the damages. For the reasons given, we find no fault with this instruction.

The remaining question to be determined is whether or not the verdict of the jury is supported by the evidence. The negligent act complained of is that the defendant company did not exercise due and proper care in the management of its car at the time the plaintiff Annie Normile attempted to take passage thereon. It will be observed from the facts that at the time the plaintiff, Annie Normile, attempted to board the car, and after she had stepped upon one of the steps with her right foot, and while in the act of stepping up with her left foot, and

after she had raised it off of the ground, the conductor gave a signal for the car to start; that Mrs. Normile thereupon became excited, dropped her basket upon the platform, and the sudden movement of the car threw her against the rear rail of the landing. At that time Kyle, who had preceded her, and who had stepped up onto the platform, endeavored to assist her, but not being able to render her sufficient assistance, and the speed of the car constantly increasing, his hold upon her loosened, and, after being dragged a considerable distance, she was thrown from the car into the street. It is the duty of a street railway company, when stopping its cars for the purpose of the reception of passengers, to use the highest degree of care to see that those who are intending to take passage thereon have safely boarded the cars before giving the signal to start. If the conductor in this case had been at the proper place and exercised the proper care, this injury would have been avoided; but, on the other hand, instead of being at a place where his duty called him, and where he could see that all intending passengers were safely on board the car before giving the signal to start, he remained in the car, and, before the female plaintiff had an opportunity to embark, the car was, under his order, started. It is no excuse for the conductor that he did not see that Mrs. Normile had not safely boarded the car, because the law imposes upon him the duty to see, and his failure to see does not excuse the company. The authorities are abundant to sustain the view that it is the duty of a street railroad company, when it stops its cars at a regular stopping place to receive passengers, to see that they are safely aboard before starting the car. In the case of *Terminal Co. v. Morris' Adm'r*, 44 S. E. 719, decided by the Supreme Court of Appeals of Virginia, the court says: "It is the duty of a street car company, when its cars are standing at a stopping place for the reception of passengers, to use the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting its cars." In *Nellis on Street Surface Railroads*, page 458, etc., it is said: "It cannot be said, however, that it is inconsistent with ordinary care and caution for a person to board a street car while it is in motion. Whether one has or has not exercised reasonable care or caution in so doing, is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury. * * * If the passenger be in good physical condition and unincumbered, he may without negligence attempt to board a slowly moving car under all ordinary circumstances, and it will be even a question for the jury if in boarding he was negligent in not holding fast to the hand rail provided for the purpose of aiding him to board. * * * But one with packages in

both hands, as an umbrella in one hand and a handkerchief in the other, may attempt to board a slowly-moving electric car without being negligent as matter of law." In the case we have here, the car had been stopped, as it was the duty of the company to do, and, while the female plaintiff was somewhat incumbered with the basket on one arm and the package on the other, yet the car was standing still at the time she attempted to take passage, and, if it had been permitted to remain so until she could have boarded the car, there would have been no injury sustained by her. She had the right to rely upon the company, that it would exercise due and proper care, and that it would not, while she was endeavoring to board the car, start, or give a signal to start, the car. Much stronger is her case than are the cases referred to in the authority just cited. There it will be observed that the passengers were attempting to board a moving car, and even there the court held that it was a question of fact for the jury. "It is the duty of a conductor, before giving the signal to the employé controlling the power to start, after the car has stopped to take on passengers, to look around and see that all passengers to take passage at that place are safely on board, and failure so to do is not excused by the fact that he does not see an intending passenger. The car must wait a reasonable time, and a passenger, diligent in attempting to get upon it while it is stopped to receive passengers, though lacking in dexterity, may recover for injuries sustained from the starting of the car while he is attempting to board it. If the car be started when the employés knew, or by the exercise of ordinary care could have known, that the passenger was attempting to board, the company may be made liable for injuries sustained by the intending passenger. He has the right to rely on the due care of the company, and is not bound to anticipate that the car will start suddenly and throw him upon the ground, or against poles or other obstructions in close proximity to the track." *Nellis, Street Surface Railroads*, p. 161, etc. "And the fact that a person's movements are somewhat incumbered by packages in hands may reasonably require more delay and care in starting the train, in order to assure his safety, as in the case of aged or infirm persons." *Clark's Accident Law*, 27. And it is held, in the case of *Cohen v. West Chicago Street Railway Co.*, 60 Fed. 698, 9 C. C. A. 223, that "a conductor of street cars, having the safety and even the lives of the passengers in his keeping, has not discharged his whole duty to the public when he has stopped his train and waited what may appear, according to his schedule, a reasonable time for passengers to embark. * * * He is bound to know, when he starts suddenly and with full force, that no person attempting to embark is at that moment with one foot on the platform

and the other on the ground, and with his hand upon the rail, in the act of getting on board." There seems to be no question, from the facts in this case, applying the rules of law to them, but what the defendant company failed to exercise that due and proper care that it should have exercised at the time that Annie Normile attempted to take passage on its car.

But the defendant urges that, even if it was negligent, the plaintiff, Annie Normile, was likewise negligent, and, if the injury complained of was the result of the mutual fault of the defendant and Mrs. Normile, that then she is not entitled to recover, and that there was no material conflict of evidence in this case, and that the question as to whether she was guilty of contributory negligence was a question of law for the court, and that the court should not have submitted the question to the jury. We cannot say that Mrs. Normile was guilty of contributory negligence. At the time she attempted to board the car it was standing still, and she had the right to rely upon its so remaining until she had time to embark and reach a place of safety. She had a basket upon one arm and a bundle in the other, it is true, and was thereby unable to take hold of the railing; but this cannot be attributed to her as a negligent act. She had the right to attempt to enter the car without taking hold of the railing, and could have done so with all ease, and without a particle of danger, if the conductor had discharged his duty towards her by permitting the car to remain standing until he knew she was in a place of safety. But it is said she heard the signal for the car to start, and knew what it meant, and that she should then have stepped off. It may be that she could have stepped off without danger to herself, or it may be that she could not have done so; as to this, we cannot say from the evidence. She had to determine this question for herself, and she is not chargeable with doing wrong if she did not do the wisest and best thing under the circumstances. If she acted as a reasonable and prudent person would have acted under like circumstances, she cannot be held guilty of negligence. After the car started suddenly and struck her on the right side, she was probably in a very poor frame of mind to decide, upon a moment's reflection, what course she ought to take. *Barker v. Ohio River R. R. Co.*, 51 W. Va. 423, 41 S. E. 148; *Tuttle v. Atlantic City R. R. Co.* (N. J.) 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491. "A railroad company cannot be excused from gross negligence on its part, although the act of the injured contributed thereto, unless it be shown in evidence that such person was guilty of legal negligence; that is, some act of negligence that an ordinarily prudent person would not have been guilty of under the same circumstances." *Meeks v. O. R. Ry. Co.*, 52 W. Va. 102, 43 S. E. 120.

"When one, by the negligence of another, is so placed that he must choose on the instant, in the face of grave and impending peril, between two hazards, and he makes such choice as a person of ordinary prudence might make, his choice cannot constitute contributory negligence." *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 25 Am. Rep. 162. Also, see, *Dimmey v. R. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Hoffman v. Dickinson*, 31 W. Va. 154, 6 S. E. 53. There are cases in which the question of contributory negligence is a question for the court, but, in order to make it such a case, the evidence to establish the contributory negligence must be so clear that the minds of reasonable men, free from bias and prejudice, could not come to but the one conclusion. In this case the evidence does not warrant such a position, but the case is one which was proper to be submitted to a jury, and, the jury having found upon this evidence in favor of the plaintiffs, its finding must be accepted as correct.

It is claimed that the damages are excessive. The question of the assessment of damages in cases of this kind is peculiarly within the province of the jury; and when the jury takes into consideration the injury that the plaintiff, Annie Normile, sustained, the continued pain and suffering which the evidence shows that she underwent, and the painful and dangerous operation that was necessary to be performed upon her, and the fact that it has left her in a delicate condition and unable to bear children, are all facts upon which the jury had the right to base its finding; and we cannot say that the amount found by its verdict is excessive. And, for the foregoing reasons, the judgment of the circuit court is affirmed.

(57 W. Va. 206)

HORNAGE et al. v. IMBODEN et al.
(Supreme Court of Appeals of West Virginia.
Feb. 14, 1905.)

**TAX SALE—DEED—VALIDITY—IRREGULARITIES—
PROCEDURE—SPECIAL TERM.**

1. Failure to make out and swear to a list of lands delinquent for taxes by the first Monday in June, as required by Code 1887, c. 30, § 18, will not invalidate a deed under a tax sale.
2. Failure to post a list of lands delinquent for taxes as required by section 20, c. 30, Code 1887, will not invalidate a tax deed.
3. Failure to present a list of lands delinquent for taxes to the county court at the levy term as required by Code 1887, c. 30, § 21, and presenting it at a later term, will not invalidate a tax deed.
4. The fact that a list of lands delinquent for taxes was acted on at a special term of a county court, in the call for which no reference was made to action on such list, will not invalidate a tax deed.
5. A report of sales of delinquent lands was not required by Code 1887, c. 31, §§ 10, 12, to have a column for the day of sale, or to state the particular day of a sale.
6. The fact that an affidavit to a list of sales of delinquent land contains no venue, and does

not show of what county the notary is a notary, will not invalidate a tax deed.

(Syllabus by the Court.)

Appeal from Circuit Court, Fayette County; J. M. McWhorter, Judge.

Bill by George Hornage and others against G. W. Imboden and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Dillon & Nuckolls, for appellants. A. N. Campbell and E. M. McPeak, for appellees.

BRANNON, P. Six tracts of land, in all 636 acres, were sold in 1897 for taxes for 1895 and 1896 in Fayette county, in the name of Gersham Bulkley, and purchased by G. W. Imboden and J. R. Koontz; and George Hornage and H. V. J. Swain, claiming as owners of the land under Bulkley, brought a chancery suit to set aside the tax deed made under said tax sale, and, the court having dismissed the bill, Hornage and Swain appeal.

One ground for assaflt upon the tax deed is that the sheriff did not make out and swear to the delinquent lists before the first Monday in June, as required by section 18, c. 30, Code 1887, but delayed so doing until August. From this it is argued that there were legally no delinquent lists and no delinquency. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650, holds that this defect is cured by Code 1899, c. 31, § 25, and close of opinion in *Starr v. Sampselle* (W. Va.) 47 S. E. 258.

Another ground of assault on the tax deed is that the delinquent list was not posted as required by Code 1887, § 20, c. 30. The only evidence of such failure is that the affidavits to the lists are dated 6th and 23d of August, the same date of their presentation to the county court; and it is thence inferred that the lists had not been posted before those dates. It may be, and likely is, the case that they were posted before being sworn to. I hardly think this would matter, as they would be notice. By section 14, c. 55, p. 123, Acts 1875, it is provided that the list should be posted "after being verified as aforesaid," thus requiring a sworn list to be posted; but section 20, c. 30, Code 1887, providing for posting, has no such provision. Chapter 13, p. 144, Acts 1881, left that clause out, and it has ever since been out. The change means something. It does not seem probable that the Legislature would require the sheriff to swear to the list until he presented it to the court. He can collect up to that time. What if he should swear long before court and collect afterwards? He would not be guilty of perjury. The Codes of 1887 and 1899 say that "the sheriff or collector returning such list" shall make the affidavit. What is "returning"? I think it is the delivery of the delinquent list to the court. As to the list of lands improperly charged, it says the sheriff "on returning" it

shall make its affidavit. Both provisions mean the same. Besides this, failure to post will not overthrow the deed. Section 25, c. 31, Code 1887, has the broad provision that no irregularity in the proceedings under which the sale is made shall affect it, unless it appear on the face of the proceedings in the clerk's office. The law does not require the posting to so appear. The omission does not so appear.

Another ground of assault on the deed is that the sheriff did not return the delinquent lists to the July term of the county court, that being the levy term, as required by Code 1887, c. 30, § 21. I think that as this relates to the time of return, it is an irregularity in the "return" of the delinquent list cured by the letter of section 25, as held in *State v. McEldowney*. It says that "no irregularity, error or mistake in the delinquent list, or the return thereof, or the affidavit," shall invalidate or affect the deed. We may surely say that the act of delivery of the list to the court is a part of the act of the "return" of the list, and the omission to make the delivery to a particular term of court is covered by the words "irregularity, error or mistake." Those words signify an assiduous intent to cure such a defect. It could not be plainer, unless the law should say in words that failure to return at a particular term should not harm the deed.

Another ground for assault upon the deed is that the delinquent lists were presented to the county court at a special term in August, and that the call for it did not embrace action upon such lists. It is contended that the delinquent lists were never approved by the county court, and therefore there were never any legal delinquent lists, because the court which acted upon them was without jurisdiction to act upon them. It is true that it has been held that a special session of a county court can act only on the subjects specified in the call for the session, and this is jurisdictional; that is, action upon other matters is action without jurisdiction. *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 8. But we must not here forget the broad curative provisions of section 25, c. 31, Code 1887. It says that an irregularity shall not invalidate a sale, unless it be such "as materially to prejudice and mislead the owner of the real estate so sold as to what portion of his real estate was so sold, and when, and for what year or years, it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case that, but for such irregularity, the former owner would have redeemed the land." I have said that, so far as concerns the time or term of return a defect is cured, and therefore we have now the single question whether this special term feature will kill the sale. Does the fact that the return was to a special

term, not called to act on such lists, materially prejudice and mislead the owner in the respects specified in the statute? And, further, does it appear that, but for the return of lists to such a term, the owner would have redeemed? It has not been shown by oral evidence that but for this defect he would have redeemed; but granting that under *McCallister v. Cottrille*, 24 W. Va. 173, such evidence cannot be demanded of the owner, we must see that the defect is such as misled the owner and prevented redemption. We cannot see that the defect is such. Can we realize that the mere fact that the lists went before a special term, rather than a regular term, misled the owner, and prevented redemption? And is not this irregularity cured also by the words of section 25, above given, that "no irregularity, error or mistake in the delinquent list or the return thereof" shall invalidate the tax deed? This defect relates to the return of the list. The court action is a part of it. The return is not complete without it.

Another ground of assault upon the deed is that the sale report does not show the date of sale. Code 1887, c. 31, § 49, does not require the list of sales to show the day of sale. The sheriff seems to have used a form formerly used, giving a column headed "Date of Each Sale," the law formerly requiring that column; but the form given in the statute as it was at the date of this sale did not contain that column. The caption says that the sale was in the month of December, 1897, complying with the then statute. The omission to put the day of sale in the useless column does not affect the sale. Besides, section 25 says no irregularity in the sale list shall impair the deed. And again, the omission to state the day in that column cannot be held to have misled the owner and prevented redemption.

Another ground of assault on the deed is that the sheriff failed to append an affidavit to the sale list. This is predicated on the sole ground that the notary's certificate does not show of what county he is a notary, has no venue of county, and does not show that the oath was administered in his county. Why this objection? The letter of section 25 says that no defect in the affidavit will avail. But, without regard to the statute, it is doubtful whether the affidavit is bad. Want of venue does not destroy an affidavit, if it appear of what county the notary is an officer. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289. The list is a sale list for Fayette county, and the affidavit recites that McVey is sheriff of that county, and we can look to other parts of the paper than the jurat to collect of what county Tansill was notary. *Carpenter v. Dexter*, 8 Wall. 513, 529, 19 L. Ed. 426. But very plainly this error is cured by the statute.

We will affirm the decree.

MEMORANDUM DECISIONS.

AMMONS v. SOUTHERN RY. CO. (Supreme Court of North Carolina. Dec. 17, 1904.) Action by one Ammons against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Motion to dismiss denied.

PER CURIAM. This is a motion to dismiss on same grounds as in *Curtis' Case* (at this term) 49 S. E. 213, and is denied on the same grounds as stated in that case and in *Benedict v. Jones*, 131 N. C. 474, 42 S. E. 909. Motion denied.

MCNEILL v. DURHAM & C. R. CO. (Supreme Court of North Carolina.) Action by W. H. McNeill against the Durham & Charlotte Railroad Company. For former opinion, see 47 S. E. 765. See, also, 44 S. E. 34.

PER CURIAM. No new principle being presented, the petition to rehear is dismissed, on the authority of *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312.

TURNER v. WILSON. (Supreme Court of North Carolina. Dec. 17, 1904.) Appeal from Superior Court, Orange County; Bryan, Judge. Action by C. D. Turner against Thomas Wilson. From a judgment for defendant, plaintiff appeals. Reversed. C. D. Turner, in pro. per. *Graham & Graham* and S. M. Gattis, for appellee.

PER CURIAM. Reversed, on the authority of *Turner v. McKee* (at this term) 49 S. E. 330.

EQUITABLE FIRE INS. CO. v. FISHBURNE. (Supreme Court of South Carolina. Dec. 3, 1904.) Action by the Equitable Fire Insurance Company against Sophia H. M. Fishburne. Judgment for plaintiff. Defendant appeals. Motion to require appellant to amend return. Granted. *Smythe, Lee & Frost*, for the motion. *Julian Fishburne*, opposed.

PER CURIAM. The respondent on due notice moved this court to require the defendant to amend her return by inserting certain papers named in the notice. After consideration, this court orders that the defendant, appellant, do

forthwith add to her return already on file a copy of the decree of Judge Gage in this cause, also a copy of the defendant's notice of appeal from said decree, and also the defendant's ground of appeal or exceptions. This court reserves its right to further order any other papers added to defendant's return that may appear necessary for the proper consideration of the appeal herein.

CRALL v. COMMONWEALTH. (Supreme Court of Appeals of Virginia. Jan. 28, 1905.) Error to Circuit Court, Chesterfield County. One Crall was convicted of peddling, and brings error. Affirmed.

WHITTLE, J. In this case, as in another under the same style, in which an opinion has been handed down at the present term (49 S. E. 638), the plaintiff in error was convicted and fined in a prosecution under section 50 of an act approved May 13, 1903 (Acts 1902-04 [Va. Code 1904, p. 2223]), for peddling goods, wares, and merchandise without a license. It appears in this, as in the former, case that the actual sale of the goods was made through one Joseph Freeman, an agent of the L. B. Price Mercantile Company, a corporation domiciled at Kansas City, in the state of Missouri; that the company had two depositories, or storehouses, in this state, the one located in the city of Norfolk, and the other in the city of Richmond. Crall was the vice president of the company, and its general manager for the state of Virginia, with headquarters at Norfolk. Ostrander, under Crall's supervision, was in charge of the branch storehouse in the city of Richmond. Freeman, who was employed by Ostrander for the L. B. Price Company, was equipped with a wagon, goods, and printed contracts of sale, and conducted a regular peddling business on behalf of the company. He was sent out to peddle goods, and reported his sales to Ostrander, who made his reports to Norfolk. Upon the foregoing facts Crall was convicted of peddling, and a fine of \$100 imposed upon him, by the circuit court of Chesterfield county, to which court the case was carried by appeal from the judgment of a justice of that county. For reasons stated in the opinion in the former case, the judgment complained of is without error, and must be affirmed.

